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**LAWYERS'
REPORTS,
ANNOTATED.
BOOK XXII.**

**ALL CURRENT CASES
OF
GENERAL VALUE AND IMPORTANCE
DECIDED IN
THE UNITED STATES, STATE AND TERRITORIAL COURTS,
WITH FULL ANNOTATION
BY
BURDETT A. RICH, EDITOR,
AND
HENRY P. FARNHAM, ASSISTANT EDITOR.**

**AIDED BY THE PUBLISHERS' EDITORIAL STAFF AND, PARTICULARLY IN
SELECTION, BY THE REPORTERS AND JUDGES OF EACH COURT.**

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LAWYERS' REPORTS,

ANNOTATED.

MICHIGAN SUPREME COURT.

Elizabeth VAN AUKEN

v.

CHICAGO & WEST MICHIGAN R. CO.,

Pif. in Err.

(96 Mich. 307.)

1. A traveler is not guilty of contributory negligence as matter of law at least in failing to anticipate and guard against the running of a train in a dark night without any headlight, so as to defeat a recovery for injuries in being struck by an engine running backward at a railroad crossing, although there was a failure to stop and listen before endeavoring to cross the track.

2. It is not error to direct the jury as to an answer to a special interrogatory, where the evidence is all one way; and a party cannot complain of such direction because he wants to know whether the jury are making their findings from the facts in accordance with the evidence.

3. Riding home from a railroad station in a peaceable and quiet manner on Sabbath evening is not such a violation of the statute against labor, sport, games, etc., on that day as will defeat a right to recover for injuries received from a train at a railway crossing.

(Long and Grant, JJ., dissent from proposition 1.)

(June 30, 1898.)

ERROR to the Circuit Court for Van Buren County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinions.
Messrs. Smiley, Smith & Stevens, for plaintiff in error:

If several of plaintiff's witnesses with no better opportunities for hearing, and less motive, than plaintiff, all heard the train passing over the bridges, and if the plaintiff and her

three companions all had good hearing, and if they were looking and listening for an approaching train, as the law requires, is not the conclusion inevitable, that plaintiff would have heard the rumbling of the train as it passed over the bridges less than two minutes before the accident?

See *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616; *Matta v. Chicago & W. M. R. Co.*, 69 Mich. 109; *Haas v. Grand Rapids & L. R. Co.*, 47 Mich. 406; *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich. 100.

There are several objects in submitting special questions of fact to the jury.

Suppose the jury in this case had been permitted to answer this fourth question and had answered it in the negative, or suppose they had answered the first question in the negative, would it not have been clear that the jury were not regarding the evidence at all? And had the court any right to deprive the defendant of this test?

8 How. Stat. § 7606; *Beecher v. Galvin*, 71 Mich. 896; *International Wrecking & Transp. Co. v. McMorran*, 78 Mich. 472; *Zucker v. Karpales*, 88 Mich. 426; *Sherwood v. Chicago & W. M. R. Co.*, 82 Mich. 377; *Harrison v. Detroit, L. & N. R. Co.*, 7 L. R. A. 628, 79 Mich. 409.

Cavanaugh went to plaintiff's house on business at the time of the accident. The others seem to have been bent on pleasure only, and the statutes of the state and the authorities upon the subject are to the effect that one who is engaging in matters that are not allowed by statute on Sunday cannot recover for injuries that they may suffer while so engaged.

How. Stat. § 2015; *Johnson v. Irasburgh*, 47 Vt. 28, 19 Am. Rep. 111; *Jones v. Andover*, 10 Allen, 18; *Com. v. Sampson*, 97 Mass. 407; *McGrath v. Mervin*, 112 Mass. 467, 17 Am. Rep. 119; *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Way v. Foster*, 1 Allen, 409.

In *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 374, and in numerous other cases decided

NOTE.—The above case brings out a new application of the right to rely upon the performance of duty by a railroad company in giving warning of the approach of trains to a crossing, as affecting contributory negligence of a person at the crossing. For somewhat similar applications of this rule, see *Lyman v. Boston & M. R. (N. H.)*, 11 L. R. A. 364; *Hendrickson v. Great Northern R. Co. (Minn.)*, 16 L. R. A. 361; somewhat in conflict with which is *Cincinnati, L. St. L. & C. R. Co. v. Howard (Ind.)*, 8 L. R. A. 598.

As to reliance of traveler upon watchman at 22 L. R. A.

crossing, see *Louisville & N. R. Co. v. Webb (Ala.)*, 11 L. R. A. 674.

As to reliance upon open gates, see *Evans v. Lake Shore & M. S. R. Co. (Mich.)*, 14 L. R. A. 223; *Feeney v. Long Island R. Co. (N. Y.)*, 5 L. R. A. 544; *Lake Shore & M. S. R. Co. v. Franz (Pa.)*, 4 L. R. A. 389; *Greenwood v. Philadelphia, W. & R. R. Co. (Pa.)*, 3 L. R. A. 44.

As to violation of Sunday law as a defense, see also *Louisville, N. A. & C. R. Co. v. Buck (Ind.)*, 2 L. R. A. 520 and note; *Delaware, L. & W. R. Co. v. Trautwein (N. J.)*, 7 L. R. A. 435.

by this court, it has been held that a railroad track is itself a warning of danger to those about to go upon it, and that persons about to cross it are bound to recognize the danger, and to make use of the sense of hearing as well as of sight, and if either cannot be rendered available, the obligation to use the other is the stronger.

See *Brady v. Toledo, A. A. & N. M. R. Co.* and *Mynning v. Detroit, L. & N. R. Co. supra*.

Although a person who seeks damages in this class of cases swears that he looked and listened and did not see or hear a train that was actually approaching and which caused him injury, yet where the facts and circumstances completely negative the truth of what he says in that regard, this court will not say that it was a question of fact for the jury, merely because he swore to it, but will pronounce his statements false and direct a verdict accordingly.

Mahlen v. Lake Shore & M. S. R. Co. 49 Mich. 589; *French v. Detroit, G. H. & M. R. Co.* 89 Mich. 537; *Marion County Comrs. v. Clark*, 94 U. S. 284, 24 L. ed. 62; *Randall v. Baltimore & O. R. Co.* 109 U. S. 482, 27 L. ed. 1006; *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 198.

Had the plaintiff's driver stopped his team when he was fifty feet away from the track, he could not have failed to have seen or heard the approaching train.

Freeman v. Duluth, S. S. & A. R. Co. 3 L. R. A. 594, 74 Mich. 95.

On petition for rehearing.

The court should hold, and it is the only sensible thing to hold, that every person who crosses a railroad track should be held to great care and caution; and if this rule is firmly held and applied, there will be, upon the whole, a great saving of life by the adjudication.

Stubley v. London & N. W. R. Co. L. R. 1 Exch. 17.

Defendant's negligence cannot excuse the plaintiff's negligence.

Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274.

The only testimony which shows the slightest care on the part of the plaintiff, was that of one of her companions, who says that she looked and "apparently listened." Is this such care as the law requires? Or sufficient to shift the burden of responsibility upon the defendant in this case?

Horn v. Baltimore & O. R. Co. 54 Fed. Rep. 801.

A railroad is a place of danger and warning in itself; the duty to stop and listen, which plaintiff did not do, is supported by the following cases:

Lake Shore & M. S. R. Co. v. Miller, supra; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 93; *Brady v. Toledo, A. A. & N. M. R. Co.* 81 Mich. 616; *Grostick v. Detroit, L. & N. R. Co.* 90 Mich. 594; *Apsey v. Detroit, L. & N. R. Co.* 83 Mich. 432; *Pzolla v. Michigan Cent. R. Co.* 54 Mich. 278; *Matta v. Chicago & W. M. R. Co.* 69 Mich. 109; *Haas v. Grand Rapids & I. R. Co.* 47 Mich. 406; *Guta v. Lake Shore & M. S. R. Co.* 81 Mich. 294; *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 85; *Pennsylvania* 22 L. R. A.

R. Co. v. Beale, 78 Pa. 504, 18 Am. Rep. 753; *Chase v. Maine Cent. R. Co.* 78 Me. 353; *Flemming v. Western Pac. R. Co.* 49 Cal. 253; *Henes v. St. Louis, K. O. & N. R. Co.* 71 Mo. 636; *Pence v. Chicago, R. I. & P. R. Co.* 63 Iowa, 746; *Merkle v. New York, L. E. & W. R. Co.* 49 N. J. L. 473; *Grispen v. New York Cent. R. Co.* 40 N. Y. 50; *Horn v. Baltimore & O. R. Co. supra*.

Messrs. George W. Merriman and Boudeman & Adams, for defendant in error:

The object of the blowing of the whistle and the ringing of the bell is to warn people who cross the railroad track that a train is approaching, and for this reason the signal should be made at such a reasonable distance as would fairly notify people who are about to cross the track of the approach of a train.

Guggenheim v. Lake Shore & M. S. R. Co. 60 Mich. 150; *Cooper v. Lake Shore & M. S. R. Co.* Id. 281; *Staal v. Grand Rapids & I. R. Co.* 57 Mich. 239; *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532; *Guggenheim v. Lake Shore & M. S. R. Co.* 57 Mich. 488; *Palmer v. Detroit, L. & L. M. R. Co.* 56 Mich. 1; *Evans v. Lake Shore & M. S. R. Co.* 14 L. R. A. 228, 88 Mich. 442; *Breckenfelder v. Lake Shore & M. S. R. Co.* 79 Mich. 580; *Carver v. Detroit & S. Pl. Road Co.* 61 Mich. 585; *Detroit & M. R. Co. v. VanSteinburg*, 17 Mich. 99; *Mynning v. Detroit, L. & N. R. Co.* 67 Mich. 677; *Teipel v. Hilsendegen*, 44 Mich. 462; *Billings v. Breinig*, 45 Mich. 65; *Harrie v. Clinton Twp.* 64 Mich. 452; *Marcott v. Marquette, H. & O. R. Co.* 47 Mich. 1; *Breeze v. Powers*, 80 Mich. 172; *Rouz v. Blodgett & Davis Lumber Co.* 18 L. R. A. 728, 85 Mich. 519; *Suoboda v. Ward*, 40 Mich. 420; *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615; *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Luke v. Wheat Min. Co.* 71 Mich. 384; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 374; *Hellig v. Michigan Cent. R. Co.* 85 Mich. 359; *McWilliams v. Detroit Cent. Mills Co.* 31 Mich. 275; *Dickinson v. Port Huron & N. W. R. Co.* 58 Mich. 47; *Little v. Street R. Co. of Grand Rapids*, 78 Mich. 205; *Kinney v. Folkerts*, 84 Mich. 619; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247; *Butler v. Milwaukee & St. P. R. Co.* 28 Wis. 487; *Bower v. Chicago, M. & St. P. R. Co.* 61 Wis. 457; *Ferguson v. Wisconsin Cent. R. Co.* 63 Mich. 152; *Winstanley v. Chicago, M. & St. P. R. Co.* 72 Wis. 875; *Duane v. Chicago & N. W. R. Co.* Id. 523; *Kellogg v. New York Cent. & H. R. R. Co.* 79 N. Y. 72; *Wheelock v. Boston & A. R. Co.* 105 Mass. 203; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Chaffee v. Boston & L. R. Corp.* 104 Mass. 108; *French v. Taunton Branch Railroad*, 116 Mass. 537.

The judge was entirely correct in declining to put questions to the jury which related to points not in dispute, or to facts which were in no way conclusive.

Fowler v. Hoffman, 31 Mich. 215; *Pigott v. Engle*, 60 Mich. 221; *Orane v. Reeder*, 28 Mich. 527, 15 Am. Rep. 228; *Sheahan v. Barry*, 27 Mich. 218; *Frankenberg v. First Nat. Bank of Decatur*, 33 Mich. 46; *Michigan Paneling Mach. & Mfg. Co. v. Parsell*, 38 Mich. 475; *Johnson v. Continental Ins. Co. of New York City*, 39 Mich. 83; *Swift v. Plessner*, Id. 178; *Pettibone v. Maclem*, 45 Mich. 382; *Toulman v.*

Seain, 47 Mich. 82; *Banner Tobacco Co. v. Jensen*, 48 Mich. 460.

A party traveling upon the highway upon the Sabbath, either for exercise or pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the railroad company for its negligence from the fact the accident occurred on Sunday.

Philadelphia, W. & B. R. Co. v. Philadelphia & H. De G. Steam Tow Boat Co. 64 U. S. 23 How. 209, 16 L. ed. 433; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534; *McArthur v. Green Bay & M. Canal Co.* 84 Wis. 189; *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278; *Mohney v. Cook*, 26 Pa. 842, 67 Am. Dec. 419; *Woodman v. Hubbard*, 25 N. H. 67, 7 Am. Dec. 810; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Corey v. Bath*, 35 N. H. 530; *Sewell v. Webster*, 59 N. H. 586; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *Carroll v. Staten Island R. Co.* 58 N. Y. 134, 17 Am. Rep. 221; *Wood v. Erie R. Co.* 72 N. Y. 196, 23 Am. Rep. 125; *Platz v. Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Landers v. Staten Island R. Co.* 13 Abb. Pr. N. S. 838; *Carroll v. Staten Island R. Co.* 65 Barb. 82; *Johnson v. Missouri Pac. R. Co.* 18 Neb. 690; *Jacobs v. St. Paul & C. R. Co.* 20 Minn. 130, 18 Am. Rep. 360; *Morton v. Gloster*, 46 Me. 520; *Bigelow v. Reed*, 51 Me. 325; *Hamilton v. Goding*, 55 Me. 428; *Baker v. Portland*, 58 Me. 199, 4 Am. Rep. 274; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18; *Louisville, N. A. & C. R. Co. v. Buck*, 2 L. R. A. 520, 116 Ind. 566; *Baldwin v. Barn-ey*, 12 R. I. 392, 34 Am. Rep. 670; *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415; *Smith v. New York, S. & W. R. Co.* 46 N. J. L. 7; *Delaware, L. & W. R. Co. v. Trautwein*, 7 L. R. A. 435, 52 N. J. L. 169; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 516; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 134; *Kernshacker v. Cleveland, C. & O. R. Co.* 8 Ohio St. 172, 62 Am. Dec. 246; *Nodine v. Doherty*, 46 Barb. 59, 5 Am. L. Reg. N. S. 346; *Schmid v. Humphrey*, 48 Iowa, 652, 30 Am. Rep. 414; *Bird v. Holbrook*, 4 Bing. 628; *Sawyer v. Oakman*, 7 Blatchf. 290; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 81 L. ed. 795; *Barnes v. Ward*, 9 C. B. 420; *Bateman v. Bluck*, 18 Q. B. 870; *Sharp v. Evergreen Twp.* 67 Mich. 443.

The trial court is justified in taking the case from the jury because of plaintiff's contributory negligence only when the proof is so clear against the plaintiff as to warrant no other inference, and where the whole evidence is susceptible of but one opinion.

Detroit & M. R. Co. v. VanSteinburg, Teipel v. Hilsendegen, and Mynning v. Detroit, L. & N. R. Co. supra.

The question of whether a person is in the exercise of ordinary care need not to be made out by direct evidence; if the occurrence itself and the surrounding circumstances, after due allowance for conflicting considerations, were capable of breeding an inference of it, and a jury might draw it in the proper exercise of their function, it was sufficient.

Billings v. Breinig, supra.

It is not the province of the court to pass upon the weight of the evidence.

Carver v. Detroit & S. Pl. Road Co. 61 Mich. 593.

22 L. R. A.

The taking of the case from the jury can only be authorized upon the strongest case made by any of the witnesses.

Marcott v. Marquette, H. & O. R. Co. 47 Mich. 7; *Harris v. Clinton Twp.* 64 Mich. 452; *Little v. Street R. Co. of Grand Rapids*, 78 Mich. 207; *Breckenfelder v. Lake Shore & M. S. R. Co.* 79 Mich. 563.

Negligence cannot be conclusively established by a state of facts upon which fair-minded men may differ.

Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; *Swoboda v. Ward*, 40 Mich. 424; *Luke v. Wheat Min. Co.* 71 Mich. 364; *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Breeze v. Powers*, 80 Mich. 182; *Roux v. Bloodgett & Davis Lumber Co.* 13 L. R. A. 728, 85 Mich. 519; *Hagan v. Chicago, D. & C. G. T. Junction R. Co.* 86 Mich. 615.

What is required in these cases is reasonable prudence, and a person is only required to take such precautions as a reasonably prudent man would under all the circumstances take.

Cooper v. Lake Shore & M. S. R. Co. 66 Mich. 266; *Breckenfelder v. Lake Shore & M. S. R. Co.* 79 Mich. 563; *Helbig v. Michigan Cent. R. Co.* 85 Mich. 359; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 380.

Where a railroad company omits its duty and a person is injured thereby, although the injured person may by his own acts or omissions induced by the negligence of the company, have been guilty of some fault which contributed to the injury complained of, such fault ought not to be permitted to avail the company in making defense against the wrongful act unless it was willful or so gross as to make it equally inexcusable.

Klanowski v. Grand Trunk R. Co. 57 Mich. 529; *Chicago & N. E. R. Co. v. Miller*, 46 Mich. 532; *Dickinson v. Port Huron & N. W. R. Co.* 53 Mich. 47; *Richmond v. Chicago & W. M. R. Co. supra*; *Sanborn v. Detroit, B. O. & A. R. Co.* 16 L. R. A. 119, 91 Mich. 539; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 445, 32 L. ed. 480; *Continental Improv. Co. v. Stead*, 95 U. S. 167, 24 L. ed. 407; *Weber v. New York Cent. & H. R. R. Co.* 58 N. Y. 451; *Voak v. Northern Cent. R. Co.* 75 N. Y. 820; *French v. Taunton Branch Railroad*, 116 Mass. 537.

It is not simply the statutory signals which are at all times necessarily sufficient. Although the statute does not require head-light or other sufficient light to be placed in front of an approaching train at night, yet we know that it is the custom of all well-regulated railroad companies to have such a light upon their trains; and a person traveling at night has a right to expect that this customary regulation will be observed.

Smedis v. Brooklyn & R. B. R. Co. 88 N. Y. 13; *Glenn v. Columbia & G. R. Co.* 21 S. C. 466; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487; *Collins v. St. Paul & S. C. R. Co.* 30 Minn. 81; *Bishop, Non-Cont. L.* §§ 88, 672, 1024; *Indianapolis & St. L. R. Co. v. Galbreath*, 63 Ill. 436; *Burling v. Illinois Cent. R. Co.* 85 Ill. 18; *Chicago & N. W. R. Co. v. Taylor*, 69 Ill. 461, 18 Am. Rep. 626; *Bailey v. New Haven & N. Co.* 107 Mass. 496; *Robinson v. Western Pac. R. Co.* 48 Cal. 409; *Kennedy v. North Missouri R. Co.* 36 Mo. 351; *Hathaway v. Toledo, W. &*

W. R. Co. 46 Ind. 25; *Becks v. Missouri Pac. R. Co.* 9 L. R. A. 164, 103 Mo. 544

Where a traveler upon the highway approached a crossing and could neither see nor hear any indications of an approaching train, he is not charged with negligence for assuming that there is no train sufficiently near to make the crossing dangerous.

Kennayde v. Pacific R. Co. 45 Mo. 255; *Tabor v. Missouri Valley R. Co.* 46 Mo. 858, 2 Am. Rep. 517.

A defendant cannot impute want of vigilance to one injured by his act as negligence if the very want of vigilance was in consequence of an omission of duty on the part of the defendant.

Pennsylvania R. Co. v. Ogier, 35 Pa. 60.

No duty necessarily rests upon a person to stop his team, and whether he should or not is generally a question to be determined by the jury.

Guggenheim v. Lake Shore & M. S. R. Co. 66 Mich. 158; *Thomas v. Chicago & G. T. R. Co.* 86 Mich. 504; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 380; *Laverens v. Chicago, R. I. & P. R. Co.* 56 Iowa, 689; *Davis v. New York Cent. & H. R. R. Co.* 47 N. Y. 400; *Masboth v. Delaware & H. Canal Co.* 64 N. Y. 581; *Terry v. Jewett*, 78 N. Y. 388; *Spencer v. Illinois Cent. R. Co.* 29 Iowa, 55; *Duffy v. Chicago & N. W. R. Co.* 82 Wis. 269.

Montgomery, J., delivered the opinion of the court:

The question of most importance involved in this case is that of the contributory negligence of the driver of plaintiff's vehicle when they approached the crossing where the accident occurred. The scene of the accident is indicated by the diagram appended to the opinion of *Mr. Justice Grant*. The highway and the railroad do not meet at right angles, so that in traveling from the west towards the railway track the view would not be directly in the face of an approaching train. The night when the injury occurred was very dark. The evidence shows that when approaching the crossing the horses were on a walk. No stop was made for the purpose of listening, but the driver and those in the vehicle testified that they looked for an approaching train, but saw none, and that they listened and did not hear any signal. The engine was running backward, and the testimony is conflicting as to whether there was any light at the rear end of the cab. The question presented is whether it was the duty of the driver, under the circumstances, to bring his team to a stop in order to listen for an approaching train. Our decisions have settled the law as follows: First. A railroad track is, in and of itself, a warning of danger, calling upon one about to cross to use his senses, and to look and listen for approaching trains. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274. Second. It is not incumbent in all cases for the driver to stop his team, if the track is clear, and he can safely rely on his sense of sight. *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 158; *Thomas v. Chicago & G. T. R. Co.* 86 Mich. 504; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 380. Third. As to whether, in a

particular case, the driver is justified in relying upon his sense of sight alone, must, we take it, depend upon the circumstances of the case presented. No case precisely analogous to the one under consideration has been decided by this court. In *Mynning v. Detroit, L. & N. R. Co.*, 64 Mich. 98, it appeared that on a dark and stormy night the deceased was killed while crossing the track, under circumstances which showed conclusively the negligence of the railroad company; that he was acquainted with the railroad crossing at the street in question; that he walked at a rapid pace towards and upon the railroad track, without checking his speed, or stopping or looking or listening, or taking any precaution whatever, to ascertain whether a train was about to pass; that others who were about to cross, whose opportunities for observation were no better than those of deceased, saw and heard the train. *Mr. Justice Champlin*, in rendering the opinion of the court, said: "Ordinary care would have required him to at least look up and down the track before crossing; and if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause and listen before entering upon the place of danger." In *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616, it appears that the driver of the vehicle was familiar with the crossing; that the railroad track, for some distance before crossing the highway, runs through an orchard; that the trees coming near the surface of the ground, together with other trees and bushes there, partly obscured the view of persons going southward of any train going to the southeast. The track crossed the highway obliquely. The track extends from north to south, and the highway runs in a northwesterly and southeasterly direction. It appeared that the plaintiff, sitting on the hounds of his wagon between the two hind wheels, drove upon the track without stopping, although he testified that he looked in both directions. The court held as matter of law that he was guilty of contributory negligence. In the opinion *Mr. Justice Long* states: "The circumstances stated by the plaintiff showed conclusively that he was not using ordinary care in approaching the crossing. Here was a crossing so much obstructed by intervening objects that, according to his testimony, he could not see a train coming from that direction—riding, as he was, upon the hounds of his wagon—until he was within 20 or 25 feet of the crossing, and then only a little distance up the track,—some few rods. He was riding with his back turned in the direction from which the train was approaching, and he knew that it was about time for its approach; and yet he drove along and upon the track without stopping; and even when his horse halted on reaching the track he urged her forward with the lines. . . . It was shown further that there was a mill near the crossing, which was in operation, and creating some noise and confusion. Others standing near there saw the train approaching, and had heard the sounding of the whistle at the crossing above.

Some of them attempted to call the attention of the plaintiff to the train's approach, but were unable to do so, as he appeared to take no note of what was passing. As the facts are presented by this record, it was the duty of the plaintiff to have stopped his team, and to have taken some precaution to ascertain if the train was approaching, which he knew was about due." And further, it was said: "A greater duty was imposed upon the plaintiff in the present case by the fact that he knew the crossing to be a dangerous one. He knew its condition, and that he would be unable to see the train until arriving at the crossing. He had no right to close his ears, and drive along without stopping, when he must have known that the noise of his wagon and of the mill would shut off the sound from the approaching train." In the present case there was no obstruction other than the darkness, which, of course, would not have prevented the plaintiff and her companions from seeing a headlight. The sense of sight was therefore as safe a guide as in the daytime, unless it be held that travelers are guilty of contributory negligence as matter of law in not anticipating that trains will be run in the open country without headlights. We think the law ought not to be so. It is most unusual and extraordinary for this to occur. And we think it should be at least a question for the jury as to whether a traveler is in fault in failing to anticipate and guard against such an unusual thing as the running of a train without a headlight. The case might be different in a yard where switching is done, and where cars are switched in the night-time without the use of a headlight, as was the fact in the *Myaning Case*.

Exception is taken to the language of the court in that portion of the charge where it is said: "The blowing of the whistle and the ringing of the bell a mile away from the crossing would, of course, give no warning to people about to cross the railroad track." The court added this: "The object of it is to warn people about to cross the railway track that a train is approaching, so that the warning should be given within such a reasonable distance as would fairly notify people who are about to cross the track of the approach of the train." We think there was no error in this part of the charge, when read in connection with the whole charge, and when it is considered in the light of the request of defendant's counsel which had been given by the court immediately preceding, as follows: "The law requires of a railroad company that it cause the whistle to be blown not less than forty rods from the crossing. It is not required to be blown within forty rods of the crossing, nor within any other distance except a reasonable distance." The court added to this: "The law does not require the whistle to be blown within forty rods, nor does it specify the exact distance at which the whistle shall be blown and the train hands begin ringing the bell. That distance, however, should be a reasonable one. It must be more than forty rods, but it must be a reasonable distance." It must be remembered that preceding this charge the court had already directed the

jury that, if the whistle had been sounded at St. John's crossing, and the plaintiff and her party could have heard it by remaining quiet and listening, and they were at such a point that it was their duty to remain quiet and listen at the time, they would be guilty of contributory negligence if they did not hear it. It is evident from this that the court was calling the attention of the jury merely to what would be a reasonable distance under the statute which requires the whistle to be sounded. We see no error in that part of the charge.

Counsel for defendant requested the court to charge as follows: "It does not appear from the testimony of the plaintiff herself that she looked and listened for a coming train when the vehicle in which she was riding was approaching the track; and, as she was more familiar with the locality than her driver, and as she has the burden of proving her personal freedom from contributory negligence, and as she was bound herself to look and listen for a coming train, she has not shown her personal freedom from contributory negligence, and she cannot recover in this action." The plaintiff was called as a witness, and testified that she could remember nothing except going to Hartford and starting homeward. She was injured in her back, and her limbs paralyzed so that she was unable to walk, and a great share of the time since the injury she had been entirely helpless. The last recollection, she testifies, she has was the party leaving Hartford going towards home, and that it was a dark night. The witnesses called in her behalf, who were her companions in the buggy in which she was riding, however, testified that before they reached the crossing, and at some point which is not very definitely fixed, the plaintiff did look and was apparently listening to see if she could hear the approach of a train. We think there was some evidence from these witnesses proper to be submitted to the jury upon the question of her due care in approaching the crossing, and that the jury, under the general charge of the court, were fully and fairly instructed upon this branch of the case, and the rights of the defendant fully guarded.

Counsel for defendant requested the court to submit the following special questions of fact to be found by the jury: (1) Did the train in question make a rumbling noise as it passed over the bridges before reaching the place of the accident? (2) If the driver, Cavanaugh, had been listening for the coming train as he drove towards the track, could he have heard the train in question as it crossed the bridges? (3) Was there any noise which prevented plaintiff and her party from hearing the approaching train when they were within 100 feet from the track? (4) Was the whistle blown at all after leaving Hartford, and before the place of the accident? The court submitted the first three questions. To the first the jury answered, "Yes;" and to the second and third answered, "No." The fourth question the court refused to submit to the jury, but directed them to answer "Yes," which they did. It is con-

tended upon the part of defendant that the direction of the court to answer "Yes" was prejudicial to the rights of the defendant, for the reason that it had a right to know whether the jury were finding the facts in accordance with the evidence, or whether the jury entirely overlooked and ignored the evidence upon a given point when it was all one way; and whether the jury were applying the law as given by the court to the facts as they found them. The court was not in error in directing the answer to this question, for, as is well said by the court in directing the answer, "the testimony was all one way." It was shown by witnesses both for plaintiff and defendant, and not disputed, that the whistle was blown after the train left Hartford and before it reached the crossing, and there was no testimony tending in any degree to contradict this. Whether it was blown soon after the train left Hartford, at St. John's crossing, or at some other point on the road, is in dispute; but the question was not directed to the point as to where it was blown, but whether it was blown at all after the train left the village. These special questions to the jury are intended for the purpose of a finding upon some particular questions of fact in dispute on the trial. *Fowler v. Hoffman*, 81 Mich. 215; *Pigott v. Engle*, 60 Mich. 221. There could have been but one answer to the question, and that was the affirmative one, which the court properly directed.

Defendant further requested the court to charge as follows: "It appears by the testimony on the part of the plaintiff that at the time of the accident the plaintiff was engaged in an unlawful occupation, in that she was driving from the railroad station on Sunday, for pleasure, and not in any work of charity or necessity, and for this reason the defendant is not liable to the plaintiff for injuries resulting from the negligence of its employes." This question was not presented by the oral argument, but we pass upon it because it is insisted upon in the brief of counsel. How. Stat., § 2015, provides: "No person shall keep open his shop, warehouse, or workhouse, or shall do any manner of labor, business, or work, or be present at any dancing, or at any public diversion, show, or entertainment, or take part in any sport, game, or play, on the first day of the week. The foregoing provision shall not apply to works of necessity and charity, nor to the making of mutual promises of marriage, nor the solemnization of marriages. And every person so offending shall be punished by fine not exceeding ten dollars for each offense." It cannot be said that under the testimony in this case the plaintiff was engaged in any unlawful enterprise, even within the terms of this statute, in riding from the railway station to her home in a peaceable and quiet manner on a Sabbath evening. If she had been engaged in an unlawful enterprise within the meaning of the statute, she would be subject to the penalty fixed by the statute. In nearly all the states it has been held under quite similar statutes that a party traveling upon the highway upon a Sabbath, either from necessity or

pleasure or business, who is injured by a collision with a railway train at a crossing, is not barred from recovery against the railroad company for its negligence from the fact that the injury occurred on Sunday. *Knowlton v. Milwaukee City R. Co.* 59 Wis. 278; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 130 (Gil. 110), 18 Am. Rep. 860; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind. 18; *Smith v. New York S. & W. R. Co.* 46 N. J. L. 7; *Carroll v. Staten Island R. Co.* 58 N. Y. 124, 17 Am. Rep. 221. It was said in *Sharp v. Evergreen Twp.*, 67 Mich. 443: "A person has the right to travel on a public highway on Sunday for any lawful purpose, and the township charged with the duty of keeping such highway in repair is liable for injuries received under such circumstances, the same as if received on a week day." The request was properly refused.

Judgment is affirmed with costs.

McGrath, J., concurred with **Montgomery, J.**

Hooker, Ch. J., concurring:

To permit the recovery of a judgment for negligence against a railroad in a case where the injured party drives upon a straight track in daylight the circumstances should be exceptional. And, while darkness may reasonably make the use of the senses—other than sight—the more imperative when approaching a track, the necessity and uniform use of headlights may well lead travelers to expect and rely upon them. In the present case we must assume that the engine and caboose made comparatively little noise, which, if heard, might naturally lead to the inference that it was distant, or upon another railroad, which the absence of a headlight would be likely to confirm. The reflection from the headlight upon the end of the caboose, if where it could be seen, might be equivalent to a headlight, but from the relative directions of the railroad and highway we cannot say that it should have been seen, that being a proper question for the jury. The inference should not be drawn that absence of light excuses negligence, but under the facts in this case we cannot say as matter of law that the plaintiff did not exercise the care and caution which the ordinarily prudent traveler upon a country highway would have exercised. In my opinion, the circuit judge was right in submitting this question to the jury.

Long, J., dissenting:

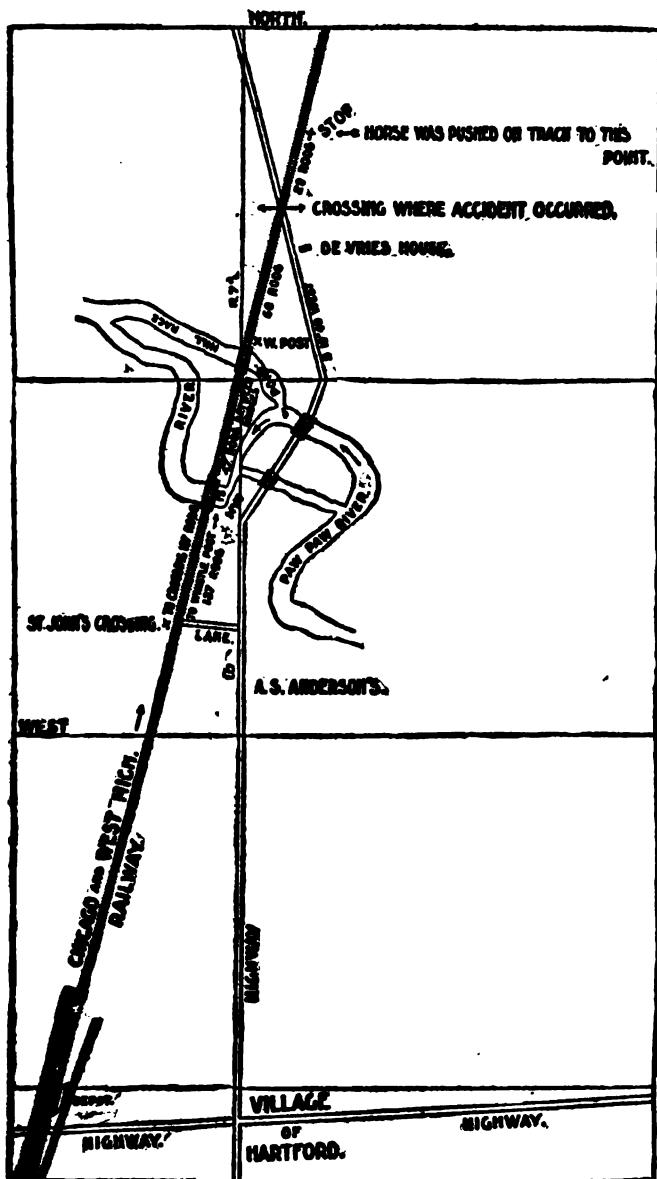
I am unable to distinguish this case upon principle from *Myning v. Detroit, L. & N. R. Co.*, 64 Mich. 93, and from *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616, and am of the opinion that under the circumstances shown the plaintiff and her party should have stopped and listened before entering upon the track. In actions for negligent injuries the burden of proof is upon the plaintiff to show that the defendant is entirely responsible for the injuries, and that negligence on the part of plaintiff does not contribute thereto; and negligence on the part of the driver of a team is imputable to the plaintiff under well-settled rules in this state. The evidence in

this case shows beyond dispute that the train with which plaintiff collided was making great noise, and the plaintiff and her party could undoubtedly have heard its approach if they had stopped. The fact that it was so dark a night that one could scarcely see the length of the team necessitated that the plaintiff should exercise more than ordinary care; and, as said in *Mynning v. Detroit, L. & N. R. Co.*, *supra*, if it was difficult to distinguish an approaching train, then ordinary care required a resort to her sense of hearing, and to pause and listen before entering upon this place of danger. This it is not pretended she did do, and I think the court should have instructed the jury that the

plaintiff, under such circumstances, could not recover.

Grant, J., dissenting:

I think the court should have directed a verdict in this case for the defendant, on the ground of the plaintiff's own negligence. She, and those who were with her at the time of the accident, testify that the night was very dark; so dark that they had difficulty in finding their team, which had been hitched to the fence by the roadside, to await the arrival of the excursion train upon which two of the party were to come. The situation of the railroad and of the highway appears in the following diagram:



The distance from the depot to the crossing along the railroad is a little over a mile; from St. John's crossing, where it is conceded that the whistle was blown, to the crossing is one-half mile; from Anderson's to the crossing, in a direct line, is over half a mile; from the depot to the first bridge is about three quarters of a mile. Plaintiff and all the members of her party, including the driver, were entirely familiar with the situation. They knew that they were nearing this crossing, which, under all the authorities, is a warning of danger. Trains are liable to approach at any time, and at a high rate of speed. The care to be exercised must be measured by the danger which is imminent. The greater the danger, the greater must be the care. The question is what care, under the circumstances, the plaintiff and those with her owed to themselves and to the defendant in approaching the crossing. The claim of the plaintiff is that she and her party were not obliged to stop their team and listen, but that they had performed their whole duty when they looked back, as they were riding along, to see if they could see signs of an approaching train, and had listened, as well as they could, amid the noise made by their carriage and their two horses. If this constitutes in law proper care and prudence on their part, then the verdict should be sustained; otherwise it should not. The road was gravel, mixed with clay. William Cavanaugh testified that the wagon was making a little rattling on the stones, and again that the wheels made a little noise running over the pebbles. Another of plaintiff's witnesses, Mr. Hilliard, said that it was what was called a "gravel road," covered with a gravelly cement; that it packed, and was as hard almost as stone. One of the party, Miss McShannock, testified that the wagon was making no more noise than an ordinary wagon would make. It is apparent that two horses, and a carriage containing four passengers, going over such a road, would make considerable noise, even upon a walk. It is moreover apparent that the only listening done was done while they were engaged in ordinary conversation. One of the party—John McShannock—testified: "Question. What did you do in the way of listening to hear if there was anything coming? Answer. Well, we all listened. Wasn't making any great amount of noise talking." Miss McShannock testified that they chatted and visited until they got within a little way of the track. Mr. McShannock testified that they were engaged in ordinary conversation, and were sometimes laughing. The only evidence that plaintiff looked or listened comes from one of the party, who says: "I know she looked around,—moved around in her seat. She was looking that way. I don't know whether she did or not. I supposed she did from her movement." She herself testifies that she remembers nothing that occurred. There is no evidence in the record that they all at one time ceased talking and listened. It requires but little noise in close proximity to one to prevent hearing another and greater noise at a distance, which would otherwise be distinctly heard. The night

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was still. There was no intervening object to obstruct the hearing. All the witnesses agree to this. In daylight the train would have been in plain sight of the plaintiff all the way from the village. The little mound or rise of ground was not above the line of vision, and could therefore have formed no obstruction to hearing. If plaintiff could not see, it became her clear duty to stop and listen. In *Brady v. Toledo, A. A. & N. M. R. Co.*, 81 Mich. 616, the plaintiff was held guilty of negligence in attempting, without stopping and listening, to cross a railroad track so obstructed by intervening objects that he could not see a train approaching from one direction until he was within from 20 to 25 feet of the crossing. In that case plaintiff was alone, and, sitting upon his wagon, was approaching the crossing at a walk, and was looking for a train, which he knew was about due. He testified that he did not hear because the wind was blowing the sound from him. He was held guilty of contributory negligence. It was there said: "A person familiar with a railroad crossing, having been frequently over it, and knowing its location, when approaching the same is under the highest possible obligation to observe such precautions as are needful to avoid a collision; and failure so to do is contributory negligence that will prevent recovery for damages, if any accrue," citing *Haas v. Grand Rapids & I. R. Co.*, 47 Mich. 401. The highest possible obligation certainly requires the exercise of every reasonable precaution to avoid the danger. It certainly makes no difference in what manner one's view of a railroad near a crossing is obstructed, whether by trees, or embankments, or by intense darkness. The duty in the one case is no other or different than in the other. If Brady, whose view was obstructed by trees, could not recover, on account of his own negligence in not stopping and listening, neither should plaintiff in this case, whose view was obstructed by intense darkness. If there is any difference in principle between the two cases, I am unable to discover it.

It is proven beyond controversy that, had the plaintiff and her party stopped their team and listened at any point within 10 rods of this crossing, they would have heard the approaching train, and the distressing accident would not have occurred. Under the evidence, when they were 5 rods from the crossing, the train was from 15 to 20 rods therefrom, and, of course, the distance between them and the train was about 5 rods less. Besides, it is a matter of common experience and knowledge that one can, upon a still night, with nothing to obstruct the hearing, or distract the attention, hear an approaching train in time to avoid collision at a crossing. To hold otherwise would be "to fly in the face" of a fact known to all, and to discredit our own senses. What plaintiff's witnesses heard, under circumstances as favorable or more unfavorable, certainly plaintiff must be held able to have heard if she had listened. One Fred F. Allen was driving over this same road on his way home from the depot at the same time, and heard the train when

it was 20 or 25 rods distant. He also testified that he had heard the train on still nights, going over this piece of road, when he was a mile away. This witness had his wife and child with him. One Orange Hutchins was living at the Anderson Place, marked upon the diagram. He was 20 rods from the train, and after the accident heard the voices at the crossing half a mile distant. John Bracken-gast came to Hartford on the same train, and walked home on this same road. When at Anderson's he heard the train, and heard the whistle on the St. John's crossing. Joseph De Vries lived close by this crossing, and was therefore in the same direction from the approaching train as was the plaintiff. He heard the train come over the bridges. R. W. Stickney also came to Hartford on this train, went into the depot and remained a while, and when he came out he heard the train going across the bridge, three quarters of a mile distant. He was more than twice as far from the first bridge as was the plaintiff when nearing the crossing, and more than three times as far from the second bridge. Henry Thomas was approaching another crossing when this same train came along, and testified that he was driving within 10 or 15 rods of the crossing, when his attention was attracted by the rumbling noise of the train. The above were all witnesses for the plaintiff. For the defense one August Ament, who lived 70 rods north of this crossing, testified that on a still night he could hear trains crossing these bridges. The driver, Cavanaugh, testified that when about four rods from the crossing he started his horses from a walk into a trot, but he thinks that they came to a walk when within about two rods of the crossing, and the first knowledge he had of an approaching train was when the horses stepped upon the plank of the crossing, when he "noticed the locomotive loom up."

I think this case is ruled by *Brady v. Toledo, A. A. & N. M. R. Co.*, *supra*. It is true that in that case Brady knew that a train was about due, but that can make no difference with the rule. Railroads have the right to run trains out of schedule time, and are constantly doing it. It is the duty of every passenger upon a public highway to approach these crossings with the same care and caution as he would if he had the knowledge that a train is due. When one drives, on a dark night, upon them, without stopping to listen, he is, in my judgment, guilty of gross negligence. He not only disregards his duty towards himself, but his legal duty to those who are traveling upon railroads, for he endangers not only his own life, but the lives of others. See *Groetick v. Detroit L. & N. R. Co.* 90 Mich. 594; *Apsay v. Detroit, L. & N. R. Co.* 88 Mich. 482.

Railroad companies and travelers upon the highway are alike bound to the exercise of great care in approaching these dangerous places. The former are liable if they neglect the statutory signals. But this does not justify the latter in assuming that they will hear these signals without stopping to listen when they cannot see. If these signals were given, and the traveler should drive his team

upon the crossing without stopping and listening, he would certainly be guilty of negligence, and liable in damages for all the injury which resulted. Neglect of duty by either does not excuse the negligence of the other. When both neglect this plain duty, both are equally guilty, and neither can recover, because each, by the exercise of proper care, could have avoided the accident. The rule as to care must apply to the citizen in his individual as well as in his corporate capacity. The rule requiring the traveler to stop and listen when he cannot see is reasonable. It imposes no hardship or inconvenience. A stop of a few seconds would, in this instance, have warned them of the approaching train. Upon what principle of reason or justice can plaintiff and her companions be held excusable for not doing so? They do not say, nor is it claimed, that they could not have heard the noise of the train if they had stopped. They only say that they believe that they could have heard the whistle and bell without stopping the noise which they themselves were making, and which was under their own control.

The plaintiff and her companions ask the jury to believe their opinions that, notwithstanding that the noise made by their horses and carriage and their conversation was sufficient to drown the noise of the train until it struck them, yet it was not sufficient to drown the noise of the whistle and bell, and that they would have heard them had they sounded. And this, too, in the face of her other witnesses that they heard the train at a much greater distance from the track than was she, and that they also saw the lights upon it. If one must use all his senses, it is his clear duty to put himself in condition to use them, otherwise he has not complied with the law, which requires him not only to listen, but to listen attentively. The duty to stop and listen is supported by the following authorities: *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 85; *Pennsylvania R. Co. v. Beale*, 78 Pa. 504, 13 Am. Rep. 753; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 98; *Chase v. Maine Cent. R. Co.* 78 Me. 353; *Flemming v. Western Pac. R. Co.* 49 Cal. 258; *Henze v. St. Louis, K. O. & N. R. Co.* 71 Mo. 636; *Pence v. Chicago, R. I. & P. R. Co.* 63 Iowa, 746; *Merkle v. New York, L. E. & W. R. Co.* 49 N. J. L. 473. Beach on Contributory Negligence, says, (section 181 :) "In attempting to cross the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. It is also so consonant with right reason and the dictates of ordinary prudence, and so much in line with the ordinary care which the average of mankind display in the daily routine of life, that it should seem to be scarcely dependent upon the authority of decided cases in law courts. The traveler on the highway must even come to a halt for this purpose; but he is not required to get out of his wagon, and go forward on foot for the purpose of looking, especially when such a course would not have prevented the collision, but would rather have exposed the

traveler to the very peril it was designed to avoid." In *Mynning v. Detroit, L. & N. R. Co.*, *supra*, it is said: "Ordinary care would have required him [the traveler] to at least look up and down the track before crossing; and, if the night was so dark as to make it difficult to distinguish a train approaching, then ordinary care would have called upon him to resort to his sense of hearing, and to pause, if need be, and listen, before entering upon the place of danger." In *Union Pac. R. Co. v. Adams*, 33 Kan. 427, plaintiff, in company with others, was riding along the public highway, and drove upon the track without stopping. In that case, as in this, plaintiff's testimony was that she and her companions did not see the train. It was there said: "It is the duty of the traveler upon a highway about to cross a railroad track to make vigilant use of his senses in order to ascertain whether there is present danger in crossing. . . . It is true that the wind was blowing in nearly an opposite direction from that from which the train was coming, but several of the plaintiff's witnesses heard the train, and we have no doubt that if the plaintiff or Adams had given heed and listened they would have discovered its approach, and could thus have avoided the accident." In that case it was proven that the whistle was not sounded 80 rods from the crossing, as required, and the negligence of the defendant was regarded as proven. See also *Grippen v. New York Cent. R. Co.* 40 N. Y. 50. It is said in *Chase v. Maine Cent. R. Co.*: "The verdict is clearly wrong. The rule is now firmly established in this state, as well as in courts generally, that it is negligence *per se* for a person to cross a track without first looking and listening for a coming train. If his view is unobstructed, he may have no occasion to listen, but, if his view is obstructed, then it is his duty to listen, and to listen carefully. And if one is injured at a crossing by a passing train or engine, which might have been seen if he had looked, or heard if he had listened, presumptively he is guilty of contributory negligence; and,

if the presumption is not repelled, a recovery for the injury cannot be had. This [the obstruction] would make it his duty to listen, and to listen carefully and attentively. To do this, if riding in a sleigh, and especially with bells attached, it would become necessary to stop his horse, for surely he could not listen carefully and attentively without stopping his horse, and thus stilling the noise of his own team." This was what was called a "wrecking train." It had been sent out to repair a fallen bridge near by. After repairing the bridge they returned to Hartford, late in the day, to await orders. It arrived at Hartford at about 7 o'clock, where it waited for an excursion train to pass. The engine and tender were built solid, and the tender was about 10 or 12 feet shorter than the ordinary kind of tenders. The cab projected out over the tender. Defendant's witnesses testified that a red light was hanging from a hook in the center of the back end of the roof of the cab. This is the customary place for hanging a lantern in running backward. There were two white lights on the front of the engine, near the pilot, one light on each side of the caboose towards the rear end on the corner, and one on the rear and near the top. The engine was in front of the train running backward. Its headlight was burning, and reflected against the end of the car behind it. It was necessary to run the train in this manner, because there was no turntable between the fallen bridge and the place of the accident. It was not, therefore, negligence *per se* to run this engine backward. This oftentimes becomes necessary. In *Mahlen v. Lake Shore & M. S. R. Co.*, 49 Mich. 585, a passenger train was running without a headlight, and this was excluded by the court from the consideration of the jury. Several of the witnesses for the plaintiff saw the lights upon the train and in the caboose where there were several men. Judgment should be reversed, and a new trial ordered.

Rehearing denied October 4, 1893.

INDIANA SUPREME COURT.

William H. THORNBURG *et al.*, *Appts.*,

v.

Daniel S. WIGGINS and Wife.

(.....Ind.....)

1. A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in

severalty in him and descends to his heirs upon his death.

2. Husband and wife do not take as tenants by entirety, but as joint tenants, under a conveyance to them "in joint tenancy."

3. A joint tenant's interest in property is subject to execution.

(October 12, 1893.) ;

A PPEAL by defendants from a judgment of the Circuit Court for Randolph County in favor of plaintiffs in an action brought to en-

NOTE.—The nature of the estate created by a deed to both husband and wife is the subject of a note to *Baker v. Stewart* (Kan.) 2 L. R. A. 424, and is discussed and decided also in *Mittel v. Karl* (Ill.) 8 L. R. A. 855; *McLeod v. Tarrant* (S. C.) 20 L. R. A. 846; but the above case shows the exception where a 22 L. R. A.

deed is expressly made to the parties "in joint tenancy."

As to effect of divorce on tenancy by the entirety, see *Stelz v. Schreck* (N. Y.) 13 L. R. A. 825, and note. As to tenancy by the entirety in a bond and mortgage, see *Re Albrecht* (N. Y.) 18 L. R. A. 329.

join an execution sale of certain real estate.
Reversed.

The facts are stated in the opinion.

Messrs. Thompson, Marsh & Thompson for appellants.

Messrs. Watson & Watson and J. L. Engle for appellees.

Dailey, J., delivered the opinion of the court:

This was an action instituted in the court below, in two paragraphs, in the first of which appellees allege, in substance, that on and before December 15, 1884, one Lemuel Wiggins was the owner of a certain tract of real estate, therein described, containing 80 acres; that on said day said Lemuel and his wife, Mary, executed and delivered to the appellees a warranty deed, conveying to them the fee simple of said real estate; that at the time of said conveyance the appellees were, ever since have been, and now are, husband and wife; that said deed conveyed to the appellees the title to said real estate, which they took and accepted, ever since have held, and now hold by entireties, and not otherwise; that appellees hold their title to said real estate by said deed of Lemuel Wiggins, and not otherwise; that on the 24th day of April, 1877, Isaac R. Howard and Isaac N. Gaston, who were defendants below, recovered a judgment in the Randolph circuit court for the sum of \$408.70, and costs against one John T. Burroughs and the appellee Daniel S. Wiggins as partners doing business under the firm name of Burroughs & Wiggins; that on May 12, 1886, said Howard and Gaston caused an execution to be issued on said judgment, and placed in the hands of the appellant Thornburg, as sheriff of said county, and directed him to levy the same on said real estate, and that said sheriff did, on the 25th day of May, 1886, levy said execution on said real estate, or on the one-half interest in value thereof taken as the property of said appellee Daniel S. Wiggins, to satisfy said writ; that pursuant to the levy thereof said sheriff proceeded, by the direction of said Howard and Gaston, to advertise said real estate for sale under said execution and levy to make said debt, and did on the 8th day of June advertise the same for sale on the 8d day of July, 1886, and will on said day sell the same unless restrained and enjoined from so doing by the court; that said Daniel S. Wiggins has no interest in said premises subject to sale thereon; that the appellees hold the title thereto as tenants by entireties, and not otherwise; that the sale of said tract on said execution would cast a cloud on the appellees' title, etc. The second paragraph is the same as the first in substantial averments, except that in this paragraph the appellees set out as a part thereof a copy of the deed under which they claim title to said real estate as such tenants by entireties. The granting clause of the deed is as follows: "This indenture witnesseth that Lemuel Wiggins and Mary Wiggins, his wife, of Randolph county, in the state of Indiana, convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins, his wife, in joint tenancy,"

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etc. Appellants separately and severally demurred to each paragraph of the complaint, and their demurrers were overruled by the court, to which the appellants excepted, and, refusing to answer the complaint, judgment was rendered in favor of appellees on said demurrers. Appellants appeal, assigning as errors the overruling of said demurrers, and urge that the appellees under the deed took as joint tenants, and hence that the husband's interest is subject to levy and sale upon execution.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent, in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him, and descends to his heirs upon his death. It must always arise by purchase, and cannot be created by descent. Such estates may be created in fee, for life, or years, or even in remainder. But the estate held by each tenant must be alike. Joint tenancy may be destroyed by anything which destroys the unity of title. Our law aims to prevent their creation, and they cannot arise except by the instrument providing for such tenancy. *Griffin v. Lynch*, 16 Ind. 398, 9 Am. & Eng. Encyclop. Law, 850, says: "Husband and wife are, at common law, one person, so that when realty or personalty vests in them both equally, they take as one person: they take but one estate as a corporation would take. In the case of realty, they are seised, not *per my et per tout*, as joint tenants are, but simply *per tout*; both are seised of the whole, and each being thus seised of the entirety, they are called tenants by the entirety, and the estate is an estate by entireties. Estates by entireties may be created by will, by instrument of gift or purchase, and even by inheritance. Each tenant is seised of the whole, the estate is inseverable—cannot be partitioned; neither husband nor wife can alone affect the inheritance, the survivor's right to the whole." This tenancy has been spoken of as "that peculiar estate which arises upon the conveyance of lands to two persons who are at the time husband and wife, commonly called 'estates by entirety.'" As to the general features of estates by entireties there is little room for controversy, and there is none between counsel. Our statute re-enacts the common law. *Arnold v. Arnold*, 30 Ind. 305; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471. Strictly speaking, estates by entireties are not joint tenancies (*Chandler v. Cheney*, 87 Ind. 391; *Hulett v. Inton*, 57 Ind. 412, 26 Am. Rep. 64); the husband and wife being seised, not of moieties, but both seised of the entirety *per tout*, and not *per my*. *Jones v. Chandler*, 40 Ind. 589; *Davis v. Clark*, and *Arnold v. Arnold*, *supra*. It has been said by this court in some of the earlier decisions that no particular words are necessary. A conveyance which would make two persons joint tenants will make a husband and wife tenants of the entirety. It is not even necessary that they be described as such,

or their marital relation referred to. *Morrison v. Seybold*, 92 Ind. 302; *Hadlock v. Gray*, 104 Ind. 596; *Dodge v. Kinzy*, 101 Ind. 102; *Hulett v. Inlow*, 57 Ind. 414, 26 Am. Rep. 64; *Chandler v. Cheney*, 37 Ind. 395. But the court has said that the general rule may be defeated by the expression of conditions, limitations, and stipulations in the conveyance which clearly indicate the creation of a different estate. *Hadlock v. Gray*, *supra*; *Edwards v. Beall*, 75 Ind. 401. Having its origin in the fiction or common-law unity of husband and wife, the courts of some states have held that married women's acts extending their rights destroyed estates by entirety, but this court holds otherwise (*Carver v. Smith*, 90 Ind. 223, 46 Am. Rep. 210); and the greater weight of authority is in its favor. Our decisions hold that neither alone can alienate such estate. *Jones v. Chandler*, and *Morrison v. Seybold*, *supra*. There can be no partition. *Chandler v. Cheney*, 37 Ind. 391. A mortgage executed by the husband alone is void (*Jones v. Chandler*, 40 Ind. 591); and the same is true of a mortgage executed by both to secure a debt of the husband (*Dodge v. Kinzy*, 101 Ind. 105); and the wife cannot validate it by agreement with the purchaser to indemnify in case of loss arising on account of it. *State v. Kennett*, 114 Ind. 160. A judgment against one of them is no lien upon it. *Barren Creek Ditching Co. v. Beck*, 99 Ind. 250; *McConnell v. Martin*, 52 Ind. 484; *Orthwein v. Thomas* (Ill.) 13 N. E. Rep. 564 [See also 127 Ill. 554, 4 L. R. A. 484]. Upon the death of one, the survivor takes the whole in fee. *Arnold v. Arnold*, *supra*. The deceased leaves no estate to pay debts (*Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577); and during their joint lives there can be no sale of any part on execution against either. *Carver v. Smith*, *supra*; *Dodge v. Kinzy*, 101 Ind. 105; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Chandler v. Cheney*, *Davis v. Clark* and *McConnell v. Martin*, *supra*; *Cox v. Wood*, 20 Ind. 64. The statutes extending the rights of married women have no effect whatever upon estates by entirety. *Carver v. Smith*, 90 Ind. 223, 46 Am. Rep. 210. Such estate is in no sense either the husband's or the wife's separate property. The husband may make a valid conveyance of his interest to his wife, because it is with her consent. *Enyeart v. Kepler*, 118 Ind. 84.

The rule that husband and wife take by entireties was enacted in this territory in 1807, nine years before Indiana was vested with statehood, and has been repeated in each succeeding revision of our statutes. It has thus been the law of real property with us for eighty-six years. Section 2922, Rev. Stat. 1881, provides that "all conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint ten-

ancy." Section 2923 provides that the preceding section shall not apply to conveyances made to husband and wife. Under a statute of the state of Michigan, similar in all its essential qualities to our own, the court held that, "where lands are conveyed in fee to husband and wife, they do not take as tenants in common" (*Fisher v. Provin*, 25 Mich. 347); they take by entireties. Whatever would defeat the title of one, would defeat the title of the other. *Manwaring v. Powell*, 40 Mich. 871. They hold neither as tenants in common nor as ordinary joint tenants. The survivor takes the whole. During the lives of both, neither has an absolute inheritable interest; neither can be said to own an undivided half. *Aetna Ins. Co. v. Resh*, Id. 241; *Allen v. Allen*, 47 Mich. 74.

While the rule of entireties was predicated upon a fiction, the legislative intent in this state has always been to preserve this estate, and has continued the peculiar statute for this purpose. Estates by entireties have been preserved as between husband and wife, although joint tenancies between unmarried persons have been abolished, so as to provide a mode by which a safe and suitable provision could be made for married women. *Carver v. Smith*, 90 Ind. 227, 46 Am. Rep. 210. "Where a rule of property has existed for seventy years and is sustained by a strong and uniform line of judicial decisions, there is but little room for the court to exercise its judgment on the reasons on which the rule is founded. . . . Such a rule of property will be overruled only for the most cogent reasons and upon the strongest convictions of its incorrectness. . . . It is evident that the Legislature of 1881 did not intend to repeal the statutes establishing tenancies by entireties. They simply intended to enlarge in some particulars the separate power of the wife, which already existed under the Acts of 1852 and the years following. . . . It did not abolish estates by entireties as between husband and wife, but provided that when a joint deed was made to husband and wife, they should hold by entireties, and not as tenants in common or as joint tenants." *Carver v. Smith*, *supra*. In *Chandler v. Cheney*, 37 Ind. 396, the court says: "It was a well-settled rule at common law that the same form of words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entirety. The rule has been changed by our statute above quoted." The whole trend of authorities, however, is in the direction of preserving such tenancies, where the grantees sustain the relation of husband and wife, unless from the language employed in the deed it is manifest that a different purpose was intended. Where a contrary intention is clearly expressed in the deed, a different rule obtains. "A husband and wife may take real estate as joint tenants or tenants in common, if the instrument creating the title use apt words for the purpose." 1 Preston, Estates, 182; 3 Bl. Com., Sharswood's note; 4 Kent, Com. *368; 1 Bishop, Married Women, §§ 616 et seq.; Freem. Coten. § 72; *Fladung v. Rose*, 58 Md. 13-24. "And in case of de-

wise and conveyances to husband and wife together, though it has been said that they can take only as tenants by entireties, the prevailing rule is that, if the instrument expressly so provides, they may take as joint tenants or tenants in common." Stewart, Husb. & W. §§ 807-810; Tiedeman, Real Prop. § 244. "And as by common law it was competent to make husband and wife tenants in common by proper words in the deed or devise," etc. (*Hoffman v. Stigers*, 28 Iowa, 810; *Brown v. Brown*, 188 Ind. 476), "so it seems that husband and wife may by express words be made tenants in common by gift to them during coverture." *McDermott v. French*, 15 N. J. Eq. 80. In *Hadlock v. Gray*, 104 Ind. 599, a conveyance had been made to Isaac Cannon and Mary Cannon, who were husband and wife, during their natural lives, and the court says: "The language employed in the deed under examination plainly declares that Isaac and Mary Cannon are not to take as tenants by entirety. The result would follow from the provision destroying the survivorship, for this is the grand and essential characteristic of such a tenancy. . . . The whole force of the language employed is opposed to the theory that the deed creates an estate in fee in the husband and wife." The court further says: "It is true that where real property is conveyed to husband and wife jointly, and there are no limiting words in the deed, they will take the estate as tenants in entirety. . . . But, while the general rule is as we have stated it, there may be conditions, limitations, and stipulations in the deed conveying the property which will defeat the operation of the rule. The denial of this proposition involves the affirmation of the proposition that a grantor is powerless to limit or define the estate which he grants, and this would conflict with the fundamental principle that a grantor may for himself determine what estate he will grant. To deny this right would be to deny to parties the right to make their own contracts. It seems quite clear, upon principle, that a grantor and his grantees may limit and define the estate granted

by the one and accepted by the others, although the grantees be husband and wife." The court then adopts the language of Washburn (1 Washb. Real Prop. 674) and Tiedeman, *supra*. In *Edwards v. Beall*, *supra*, the court holds that when lands are granted husband and wife as tenants in common they will hold by moieties, as other distinct and individual persons would do. If, as contended by appellees, the rule prevail that the same words which, if the grantees were unmarried, would have constituted them joint tenants, will, they being husband and wife, make them tenants by entireties, then it would result as a logical conclusion that husband and wife cannot be joint tenants, because by this rule, words, however apt or appropriate to create a joint tenancy, would, in a conveyance to husband and wife, result in an estate by entireties; joint tenancy would be superseded or put in abeyance by the estate created by law,—tenancy by entirety. The result of such reasoning would be to destroy the contractual power of the parties where this relationship between the grantees is shown to exist. Any other process of reasoning would carry the rule too far, and we must hold it modified to the extent here indicated. Husband and wife, notwithstanding tenancies by entirety exist as they did under the common law, may take and hold lands for life, in joint tenancy or in common, if appropriate language be expressed in the deed or will creating it; and we know of no more apt term to create a joint tenancy in the grantees in this estate than the expression "convey and warrant to Daniel S. Wiggins and Laura Belle Wiggins in joint tenancy." These words appear in the granting clause of the deed conveying the land in question, and the estate accepted and held by the grantees is thereby limited, and they hold, not by entireties, but in joint tenancy. A joint tenant's interest in property is subject to execution. *Freem. Executions*, 125.

Judgment reversed, with instructions to the circuit court to sustain the demurrer to the paragraph of the complaint.

CONNECTICUT SUPREME COURT OF ERRORS.

Ass L. CHAMBERLAIN *et al.*, *Appts.*,

v.

Willett HEMINGWAY *et al.*

(.....Conn.....)

1. A sluiceway between the parts of a bridge, extended above and below between the filling, by which flats have been reclaimed,

through which the tide ebbs and flows, but which has no water in it at low tide, is not a watercourse which can be the basis of riparian rights.

2. Permitting tide water to flow for more than fifteen years through a sluiceway, made when flats were filled in by leaving an opening above and below a bridge corresponding to that between its piers, does not create any adverse right in owners of adjoining

NOTE.—The above case is a novel one on the subject of watercourses. For another peculiar case on the question what constitutes a watercourse, see *Case v. Hoffman* (Wis.) 80 L. R. A. 40.

For swales as watercourses, see *Wharton v. Stevens* (Iowa) 15 L. R. A. 680, and note, also *Lambert v. Alcorn* (Ill.) 21 L. R. A. 611.

For rights as to flow of surface waters, see *Gray* 32 L. R. A.

v. McWilliams (Cal.) 21 L. R. A. 598, and note; *Willems v. Chicago, B. & K. C. R. Co.* (Iowa) 21 L. R. A. 608.

For rights in subterranean waters, see *Southern Pac. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92, and note.

For effect of grant upon rights in percolating water, see *Paine v. Chandler* (N. Y.) 19 L. R. A. 99, and note.

uplands through which the sluiceway extends to the continuance of such flow, so as to prevent an owner from filling in the sluiceway on flats in front of his uplands.

(March 6, 1898.)

A PPEAL by plaintiffs from a judgment of the Superior Court for New Haven County in favor of defendants in an action brought to enjoin defendants from filling up certain sluiceways. *Affirmed.*

The facts are stated in the opinion.

Mr. H. G. Newton for appellants.

Messrs. H. Stoddard and S. A. York, Jr., for appellees.

Andrews, Ch. J., delivered the opinion of the court:

All the questions of law made in this case depend upon a question of fact. In their complaint the plaintiffs say they are the owners of a piece of land adjoining a sluiceway running out of and into Quinnipiac river. In the second count the sluiceway is spoken of as "a river or watercourse." If the sluiceway so spoken of is a "river" or "a watercourse," so that the owners adjoining it on either side have riparian rights of the same kind and to the same extent that landowners upon the banks of an inland stream possess them, then the contention of the plaintiffs is correct, and there is error in the judgment of the superior court; otherwise there is no error. From the finding it appears that the Quinnipiac river flows southerly, and empties into New Haven harbor. The lower part of the river is a part of that harbor. That part of the city of New Haven which lies on the easterly side of the river at this point is called "Fair Haven." On the Fair Haven side the flats spread out originally very wide between the upland and the channel of the river. The highway which has always existed from Fair Haven to New Haven is now known as "Grand Avenue." About one hundred years ago a bridge was built across the Quinnipiac river as a part of this highway. In building it a causeway was constructed from the upland on the Fair Haven side over the flats to a point where a pier was placed. About 20 feet westerly from that pier another pier was erected. Over the space between these two piers a bridge was laid. From the second pier the causeway was continued westerly about 100 feet further, and constructed solid by filling in earth, where a third pier was built. From the third pier the bridge was carried across upon a series of piers to the westerly side of the river. The space so left between the first and second piers afforded a passageway, through which the water passed and repassed with the tides. At low tide there was no water at that place. At high tide the water was about six feet deep. The plaintiffs' predecessors in title were the owners of the upland on the north side of the highway. The predecessors in title of the defendants owned the upland on the south side of the highway. These, and other owners north and south of the highway, have from time to time reclaimed the flats lying in front of their respective pieces of upland. In doing

so they have conformed to the plan of the causeway and bridge; that is to say, they have each left an open space in the filling, for the water to pass through, at the same place and of the same width as the one left in the causeway. The sluiceway so formed extends north of the highway about 200 feet, and south of the highway about 125 feet, is open at both ends to the water of the harbor when the tide runs, and is the "river" or "watercourse" described in the complaint, for the obstruction of which the plaintiffs seek to recover damages. The reclaimed land of the plaintiffs, as well as that of the defendants, with the opening through it, as is above stated, had been in substantially the same condition that it was in for more than fifteen years before this suit was brought.

The plaintiffs asked the court to hold that the sluiceway had become a watercourse, in which they, as riparian proprietors, had all the usual rights of riparian proprietors. The court did not so decide. The only reason of appeal which it is necessary to consider is that "the court erred in holding that the premises in question had not become upland and said sluiceway a watercourse, and that the plaintiffs were not entitled to the ordinary rights of a riparian owner in such watercourse." All the waters on the face of the earth may be divided into tide waters and inland waters. It is only to the latter that the term "watercourse" can be applied. Watercourses are commonly denominated rivers, rivulets, or brooks, according to their magnitude. It is only upon watercourses that riparian rights exist. *Chancellor Walworth, in Child v. Starr, 4 Hill, 375, said that "a watercourse had ripam, but not littus."* So, conversely, it may be said that the tide water has *littora*, but not *ripas*. Littoral are very different from riparian rights. A watercourse consists of bed, banks, and water. Yet the water need not flow continually; there are many watercourses which are sometimes dry. To maintain the right to a watercourse it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks and sides. *Angell, Watercourses, § 4; Gould, Waters, § 41.* "It may be natural, as where it is made by the natural flow of the water caused by the general superficies of the surrounding land from which the water is collected into one channel; or it may be artificial, as in case of a ditch or other artificial means used to divert water from its natural channel, or to carry it from lowlands, from which it will not flow in consequence of the natural formation of the surface of the surrounding land." *Earl v. De Hart, 12 N. J. Eq. 283, 284, 72 Am. Dec. 895.* A watercourse implies a source, a current, and a place of discharge. "A river or stream begins at its source, where it comes to the surface." *Angell, Watercourses, § 46.* "A watercourse is a stream of water usually flowing in a definite channel, having a bed and sides or banks, and usually discharging itself into some other stream or body of water." *Luther v. Winnisimmet Co. 9 Cush. 174; Gillett v. Johnson, 80 Conn. 180.* "A river is a considerable stream of water, that

has a current of its own, 'flowing from a higher level, which constitutes its source, to its mouth, where it debouches.' *The Garden City*, 26 Fed. Rep. 766. "It is the moving of the water from the source to the mouth that makes the watercourse." *Challenor v. Thomas*, Yelv. 143. "Pons aqua, aqua currens, et ostium, est aqua cursus." The word 'river' is derived from the Latin 'rivus.' 'Rivus est locus per longitudinem depressus quo aqua decurrit.' Ulpian's Dig. "De Rivis." And it is used constantly by the Latin authors in a sense that implies a current from a source to a mouth. "Rivorum a fonte deductio." Cicero. "Omnia flumina aique rivos qui ad mare pertinebant." Caesar. *State v. Gilmanston*, 9 N. H. 461, 14 N. H. 477. "It is a river or watercourse from the point where the water comes to the surface, and begins to flow in a channel, until it mixes with the sea, arm of the sea, lake, or other water. It may sometimes be dry, but in order to be within the above definition it must appear that the water usually flows in a particular direction, and has a regular channel, with bed, banks, or sides." *Dudden v. Clutton Union Guardians*, 1 Hurlst. & N. 627; Gould, Waters, 41; *Gallup v. Tracy*, 25 Conn. 10, 17; *Stanchfield v. Newton*, 142 Mass. 110, 116, and note. "A large stream of water flowing in a channel on land towards the ocean, a lake, or another river; a stream larger than a rivulet or brook." Webster, Dict. "River." "A large inland stream of water flowing into the sea, a lake, or another river; a stream larger than a brook." Worcester, Dict. "A stream flowing in a channel into another river, into the ocean, or into a lake or sea." Stor. Dict. "A large stream of water flowing through a certain portion of the earth's surface, and discharging itself into the sea, a lake, marsh, or another river." Imp. Dict. "A considerable body of water flowing, with a perceptible current, in a certain definite course or channel, and usually without cessation during the entire year." Century Dict. "A 'watercourse,' as defined in the law, means a living stream, with definite banks and channel, not necessarily running all the time, but fed from more permanent sources than mere surface water." *Jeffers v. Jeffers*, 107 N. Y. 650; *Joliet & O. R. Co. v. Healy*, 94 Ill. 416, 421.

We have cited these numerous authorities for the purpose of showing clearly that the sluiceway in question was not and is not a watercourse, as that term is known in the law. If it be granted that the reclaimed land owned by the plaintiffs may be treated as upland, it does not follow that the sluiceway is a river, or any other kind of watercourse. At the most it is like an inlet or ravine in the land, into which the water of the harbor runs when the tide rises, and out of which the water flows when the tide falls. That it is open at both ends, so that the water may run clear through,—in one direction when the tide is rising and in the other direction when the tide falls,—can make no difference. If by a figurative use of speech this sluice can be said to have banks and a bed, it certainly has no water of its own.

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The water of the harbor runs into it and runs out again. A man can take as many steps on a treadmill as on a highway, but he cannot perform a journey on it. The treadmill is not a highway. Water may flow into this sluice and flow out again, but it does not therein pursue a course. There is no stream of water passing through it in the sense of a watercourse. There is no current, as the word "current" is applied to a stream of water. It has no source distinguishable from its mouth, and it has no mouth distinguishable from its source. It is not a watercourse.

In their brief and in their oral argument the plaintiffs made their claim in another form,—that the court erred in holding that they, the plaintiffs, had not the right to have the waters ebb and flow in the sluiceway as they had been accustomed to flow. This is only claiming that the ordinary riparian rights which attach to an inland stream of water ought to apply to the water of the sluice. The plaintiffs say that the waters of the harbor have ebbed and flowed through the sluice for more than fifteen years, and that thereby they have obtained the right to have the waters continue to so ebb and flow by adverse use. We are not able to see that anything has been done or omitted by the plaintiffs or by the defendants which was adverse to any right of the other. The plaintiffs have done nothing which they had not a perfect right to do. They have done nothing to which the defendants could have made any legal objections. The plaintiffs and their grantors were the owners of the upland adjacent to the water. They exercised their unquestioned right to reclaim the flats in front of their land by filling them up in such manner as they chose, as far out as the channel of the harbor, or as far as they desired to do. They did not make the filling continuous, but left a space unfilled, into which the tide has ever since caused the water to flow. They owned the land next north of the causeway built as an approach to the Grand avenue bridge. In that causeway there had been left an open space twenty feet wide. The plaintiffs put their unfilled space so that it connected with the open space in the causeway, and they have at all times since made such use of their unfilled space as they desired, at no time doing anything of which the defendants, or any other owner, could make any legal complaint. The defendants and their grantors owned the upland bordering upon the tide water next south of the causeway. They too exercised their right to reclaim the flats in front of their land by filling them up in such manner as they chose, as far out as the channel of the harbor, or as far as they desired to do; but they did not make their filling solid and continuous. They left an unfilled space, so that it connected on the south with the opening in the causeway, and into which the tides have ever since set the waters of the adjacent river. They have made such use of their open space as they desired, at no time doing anything they had not the most perfect right to do, and at no time doing anything of which the plaintiffs, or any other owner, could have made legal complaint. So that

nothing has been done at any time by either of these parties which was adverse to any right of the other. Let this be tested in another way. Suppose the defendants had never filled in their flats further than the east side of the sluiceway, and that they now proposed to continue the filling further west, as far as the harbor line, and to make the filling solid, could the plaintiffs cause them to be enjoined? Obviously not, for the defendants would be doing only that which

they had the clear right to do. *Prior v. Swartz*, 62 Conn. 182, 18 L. R. A. 668; *Mather v. Chapman*, 40 Conn. 382, 16 Am. Rep. 46. If the plaintiffs could not successfully resist an obstruction to the sluice in the way supposed, it is certain that they cannot lawfully complain of what the defendants are now doing.

There is no error in the judgment appealed from.

The other Judges concurred.

FLORIDA SUPREME COURT.

Albert C. SAMMIS, *Appt.*,

v.

James BENNETT.

(.....Fla.....)

*1. The provision of the Act of May 11, 1893, chapter 4130, that all appeals in chancery, whether from final decrees or interlocutory orders, must be taken within six months after the entry of the decree or order appealed from, has no retroactive effect, but applies only to decrees and orders entered after the act becomes operative. The act took effect August 1, 1893, or sixty days after the final adjournment of the legislature.

2. The purpose of section 18 of article 3 of the Constitution, that a statute shall not take effect until sixty days from the final adjournment of the legislature at which it may be enacted unless otherwise specially provided in the act, was to enable the people to become acquainted with the provisions of legislation, and not to require them to govern their actions by the same before it has become operative.

(November 27, 1893.)

MOTION for a supersedeas to a decree of the Circuit Court for Duval County, affirming a decree revoking the probate of the last will and testament of Mary Williams, deceased, an attempt to appeal from which had previously been made. *Motion granted.*

The facts sufficiently appear in the opinion.

Mr. M. C. Jordan for the motion.

Messrs. Walker & L'Engle contra.

Raney, Ch. J., delivered the opinion of the court:

On the 26th day of May, 1892, a decree was rendered in the circuit court of Duval county affirming, on appeal, a decree which had been previously made by the county judge revoking the probate of an alleged last will and testament of Mary Williams, *alias* Mary Bennett, and from the stated decree of the circuit court the above-named Sammis entered an appeal in October of the present year to the January term, 1894, of this court, and now he moves for a supersedeas to the decree appealed from. Rev. Stat., § 1280, provides that appeals from the circuit court

to the supreme court, in matters arising before the county judge and pertaining to his probate jurisdiction, shall be governed in all respects by the law and rules regulating appeals in chancery. Prior to the enactment of chapter 4180, Laws of 1893, approved May 11, 1893, the period of time allowed for taking such appeals to this court was two years (Rev. Stat. § 1456), but the mentioned statute of the present year, "An Act to Limit the Time within Which Appeals in Chancery may be Taken," provides that "all appeals in chancery, whether from final decrees or interlocutory orders, must be taken within six months after the entry of the final decree or of the entry of the interlocutory order or decree appealed from." This act became of force, under section 18 of article 3 of the Constitution, on August 1, or sixty days after the final adjournment of the legislature, its session of 1893 having closed on the second day of June. It was the purpose of the Revised Statutes, § 1280, that the time for taking appeals like the one before us should conform to that prescribed for appeals from chancery decrees of the circuit court.

The purpose of section 18 of article 3 of the Constitution, that a statute shall not take effect until sixty days from the final adjournment of the legislature at which it may have been enacted, unless it is otherwise specially provided in the act, is, according to what we deem the better view, to enable the people to become acquainted with its provisions, but not to require them to govern their actions by the law before it becomes operative. It was contemplated that by the lapse of the sixty days the statutes of the session of the legislature would be published and be accessible to the public, but they are not operative laws until the stated period has expired, and no one can be charged with notice of them reasonably until it does expire, or, what is the same, until they go into effect. *Fries v. Hopkin*, 13 Mich. 318. This statute, if applicable to the case at bar, took the appellant's right of appeal away from him upon its taking effect, or immediately upon his being charged with notice of its enactment, or, in substance, without notice. In the case of ordinary statutes of limitation this could not be done even before the matter was regulated as it is now by our organic law; on the contrary, there had to be reasonable time allowed for bringing action. *Spencer v. McBride*, 14 Fla. 408; *Cooley, Const. Lim.* 451. It is now provided by our constitution that

*Headnotes by *RANNEY, Ch. J.*

NOTE.—As to the time of "passage" of a statute, see note to *State v. Mounts* (W. Va.) 15 L. R. A. 243, 22 L. R. A.

"no statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage." Section 39, article 3. But this view we take of the legislation of the present year relieves us from deciding whether or not statutes limiting appeals are within this organic provision. That statute has, in our judgment, no relation to decrees entered prior to its taking effect, but only to those entered subsequently thereto. Statutes will not be given a retrospective effect unless their terms show clearly that such an effect was intended. The appeals referred to are those from decrees that might be entered subsequently to the act's taking effect, and the language does not justify the conclusion that any other than subsequent decrees are meant. Its language is not such as to justify the conclusion that the legislature intended to

take away, without notice, from parties situated like the appellant, the right to have adverse decrees reviewed by a court which has been expressly provided by the constitution with jurisdiction for such purpose. It does not show that such hardships and injustice were intended, and it is not reasonable to impute to the law-making power such a purpose, in the absence of words clearly evincing that intent. *McCarthy v. Davis*, 38 Fla. 508; *Capelle v. Barker*, 38 Houst. (Del.) 844; Endlich, Interpretation of Statutes, §§ 271, 272, 289; *State v. Thompson*, 41 Mo. 25; *White v. Blum*, 4 Neb. 555; *State v. Stein*, 18 Neb. 529; *Dewart v. Purdy*, 29 Pa. 113; *Taylor v. Mitchell*, 57 Pa. 209; *Gaston v. Merriam*, 38 Minn. 271.

The motion will be granted and the proper order made.

SOUTH CAROLINA SUPREME COURT.

W. S. TILLINGHAST, *Appt.*,
v.
BOSTON & PORT ROYAL LUMBER CO.
et al.

James W. MOORE, *Appt.*,
v.
S. C. FORSAITH MACHINE CO.

(.....S. C.)

1. The place of making the contract is presumably that of its performance, in the absence of anything indicating the contrary.
2. The place from which a telegram is sent to another state is the place of the contract made by the message, in the absence of anything therein to the contrary.
3. No cause of action on contract can arise before the contract is broken.
4. Service in another state upon a foreign corporation after an order of publication has been made is insufficient, where there is no attachment, to give jurisdiction to render a personal judgment against the corporation, although it had no property within the state which could be reached by attachment.

(November 3, 1898.)

A PPEAL by plaintiffs from judgments of the Common Pleas Circuit Court for Hampton County dismissing actions brought to recover the amount alleged to be due on certain contracts made with the defendants, which were foreign corporations, upon which the summons had been served in accordance with the statutes

providing for substituted service of process. *Affirmed.*

In dismissing the complaint in the court below, the judge rendered the following opinion:

"In the first of the aforesaid actions, the complaint was dismissed as to the Boston & Port Royal Lumber Company, because it did not state facts sufficient to constitute a cause of action. As to the S. C. Forsaith Machine Company, the service of summons was set aside, and the complaint in each action dismissed, on motion, because the service of summons was illegal, and gave the court no jurisdiction. The S. C. Forsaith Machine Company is a corporation created under the laws of New Hampshire. It is a foreign corporation, owning no property in South Carolina, and having no agent resident here. The summons in each case was personally served upon an officer of the corporation in the state of New Hampshire. The action in each case is upon a money demand, and a personal judgment is demanded, no writ of attachment having issued, and there being in South Carolina no property to be attached. The plaintiffs claim jurisdiction of our courts over this foreign corporation, because the cause of action arose in the state. I held, on the hearing in open court, that the service of the summons was nugatory, and that the court had no jurisdiction to render a personal judgment in either case, and signed orders of dismissal. I promised to give my reasons for so doing more fully. The simple question is, Can a resident creditor, by open account or written contract to pay money, bring his action in the common pleas in this state

NOTE.—For an extensive note on the validity of personal judgments rendered upon constructive service of process, see *Moyer v. Bucks* (Ind.) 16 L. R. A. 231.

The above case is very important as dealing with constructive service on a foreign corporation in view of statutory provisions in various states assuming to give jurisdiction over foreign corporations without any service other than constructive. These provisions are broad enough, if they were 22 L. R. A.

constitutional, to authorize a personal judgment against a foreign corporation upon constructive service by publication alone, and it seems somewhat remarkable that their constitutionality has not been heretofore tested in view of their seeming conflict with the general rule laid down in the leading case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, although that case did not relate specifically to foreign corporations.

against a foreign corporation having no property here, by serving the summons in the foreign jurisdiction, and recover a personal judgment? I hold that neither section 155 (old 157) of the Code, nor any amendment thereof, gives any such jurisdiction to our courts. The cause of action in each of these cases, if any exists, is the breach of the contract, and this occurred where the provisor resides, to wit, in New Hampshire. This takes it out of our statute; but, even if it did not, I would still refuse to stultify the court by rendering a personal judgment against the defendant in these cases, begun by services of a summons in New Hampshire. The statute of New York is similar to ours, and, if plaintiff's action can be maintained, then almost every corporation created under the law of other states would be amenable to the courts of New York, as I suppose there are few of them that do not owe a debt by bond or otherwise to the citizens of New York. The proposition I deemed untenable. Such is, in brief, my reason for signing the orders of dismissal."

The letter referred to in the opinion of the supreme court is as follows:

"Manchester, N. H., 5-5, '93.

"W. S. Tillinghast, Esq., Hampton C. H., S. C.

"Dear Sir: In accordance with our promise by wire, we write you concerning the subject of your telegram to us on the 27th, reporting that Mr. Mitchell has returned, and given us a statement of affairs at Alameda. We are not clear from him as to your claims, nor is there anything in your message to make same clear: and we ask you to have the kindness to advise us fully what you do claim from this company, and what you claim from the Boston & Port Royal Lumber Company, as we are willing to pay anything that is just therein. But as we understood a reference was to be made, as agreed upon by both parties, as to what would be proper in the amount of fees, but this does not appear to materialize, will you have the kindness, therefore, to give us fully a statement of your claims, and they shall have prompt attention upon our part.

Yours respectfully, W. E. Drew, Agent."

Messrs. C. J. C. Hutson, L. F. Youmans and James W. Moore for appellants.

Messrs. E. F. Warren and C. P. Sanders for respondents.

McIver, Ch. J., delivered the opinion of the court:

These two cases were originally heard and considered together by this court during November term, 1892, and on the 21st of February, 1893, this court filed its opinion affirming the orders appealed from, as may be seen by reference to 17 S. E. Rep. 31. Subsequently, the appellants filed petitions for rehearing, which were granted (17 S. E. Rep. 724, 725), and the cases were reheard during the present term of this court. As we still think there are some differences in the facts of the two cases, notwithstanding the opinion of counsel to the contrary, we

are of opinion that it will be better to consider the cases separately.

In the *Tillinghast Case*, it appears that on the 7th of May, 1892, the plaintiff issued a summons against the two companies named as defendants herein, calling on them to answer the complaint, dated—and, we suppose filed—on the same day. In that complaint the plaintiff alleges that he is an attorney at law, practicing in the courts of this state; that as such he had previously instituted an action in the name of one W. R. Smith against the Boston & Port Royal Lumber Company, alleging insolvency of said company, waste of assets, and asking that a receiver be appointed to take charge of said company's property for the protection of the rights of creditors and shareholders of said company; that he applied for and obtained an order for the appointment of a temporary receiver, who took charge of said assets; that, prior to the day agreed upon for the hearing of the motion for the appointment of a permanent receiver, all the parties interested, either as shareholders or creditors of said Boston & Port Royal Lumber Company, met in the city of Boston, and settled their conflicting claims and interests; that as soon as the said adjustment was made, all parties being desirous that the proceedings for the appointment of a receiver should be discontinued, a telegram was sent by the S. C. Forsaith Machine Company, one of the defendants in the receiver case, that they would be responsible for the expenses of said case, which expenses included plaintiff's fee in said case, which expenses were to be ascertained by a reference; that on receipt of said telegram an agreement, in writing, was entered into between the plaintiff herein, the said W. R. Smith, plaintiff in the receiver case, and E. F. Warren, Esq., attorney for both of the defendants herein, a copy of which is exhibited as a part of the complaint; that, upon the delivery of said agreement to the plaintiff herein, he took an order discontinuing the receiver case, whereupon the assets of the Boston & Port Royal Lumber Company were surrendered by the temporary receiver; that the plaintiff herein, without success, attempted to have the reference contemplated by said agreement, and finally one Hiram Mitchell, who came here as agent, and was the agent of the S. C. Forsaith Machine Company, refused to have the reference, and left the county, returning to New Hampshire; that the Boston & Port Royal Lumber Company is a foreign corporation, created under the laws of the state of Maine, and doing business and owns real and personal property in Hampton county, S. C.; that the S. C. Forsaith Machine Company is a foreign corporation, created under the laws of the state of New Hampshire, and owning an interest in the stock or property aforesaid of the Boston & Port Royal Lumber Company in Hampton county aforesaid; that plaintiff is a resident of South Carolina, and the contract for the payment of his fee, as aforesaid, arose and was made in Hampton county, S. C.; and, after other allegations as to the value of his professional services, the plaintiff demanded judgment for the same.

The following is a copy of the telegram referred to in the complaint: "Boston, Mass., April 9, 1892. To E. F. Warren, Hampton, S. C.: Discontinue all suits against lumber company, and get the matter out of court, and we will be responsible for cost, to be ascertained by reference, as the lumber company will resume business. S. C. Forsaith Machine Company, Manchester, N. H.,"—and the following is a copy of the agreement entered into after receipt of said telegram: "The state of South Carolina, county of Hampton. In common pleas. *W. R. Smith Plaintiff, v. The Boston & Port Royal Lumber Co.* Whereas, all parties interested in above case have agreed to a settlement thereof; and whereas, the S. C. Forsaith Machine Company, of Manchester, N. H., has agreed to pay W. S. Tillinghast, plaintiff's attorney, his fee herein, (it being conceded by all parties hereto that such fee is to be paid, under the law, out of the general assets of the Boston & Port Royal Lumber Company,) such fee to be ascertained by a reference; and whereas, it is agreed that the Boston & Port Royal Lumber Company will protect W. R. Smith in his interest as the same may appear: In consideration of the foregoing, the above-entitled cause is to be withdrawn. It is further agreed that said reference to ascertain the amounts of said fees and costs will be held within next week, before —, if said fees and costs cannot be adjusted without such reference. [Signed] W. S. Tillinghast, Plaintiff's Attorney. E. F. Warren, Defendant's Attorney. W. R. Smith." On the 5th of July, 1892, upon the usual affidavit of the plaintiff, an order of publication was granted by the clerk of the court of common pleas for Hampton county, S. C., requiring publication to be made in the *Manchester Daily Mirror*, a newspaper published in the city of Manchester, state of New Hampshire, once a week for six successive weeks, and that a copy of the summons and complaint be forthwith deposited in the post-office in Hampton, addressed to the S. C. Forsaith Machine Company, Manchester, N. H. Such communication appears to have been sent by registered letter on the 8th of July, 1892, but it does not appear that any publication was ever made; the plaintiff relying upon service of the defendant company in New Hampshire in lieu thereof, as appears by the affidavit (a copy of which is set out in the "case") of one Daniel T. Healey, sheriff of the county in which the city of Manchester is located, made before one Thomas D. Luce, styling himself "Clerk Supreme Court," of said county, and certified to by him under his "hand and official seal," though no copy of such seal is affixed. It may be as well to state here that the action was dismissed as to the Boston & Port Royal Lumber Company upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and, there being no appeal from the order entered to that fact, the case should now be considered as an action against the S. C. Forsaith Machine Company alone. Upon the papers above set forth and referred to, a motion was made before his honor, Judge Hudson, to set aside service of

summons and complaint on the said defendant, made at their place of business in the city of Manchester, state of New Hampshire, and to dismiss the complaint of plaintiff for want of jurisdiction, whereupon the following order was granted: "On hearing the pleadings in above-stated case, and on motion of Jeff. Warren, attorney for the S. C. Forsaith Company, defendant, to set aside service of summons and complaint on the said defendant made at their place of business in the city of Manchester, state of New Hampshire, and to dismiss the complaint of plaintiff for want of jurisdiction, counsel having been heard, it appearing to the satisfaction of this court that the defendant, S. C. Forsaith Machine Company, are a foreign corporation, and nonresidents of this state; that they have no property within the limits of this state, are represented by no agent, and have no place of business therein; that the cause of action, to wit, the breach of the contract, did not arise within the limits of this state; and that service of summons and complaint was made in the city of Manchester, state of New Hampshire,—ordered, that the complaint of plaintiff be dismissed, this court having no jurisdiction, on the grounds above set forth." Subsequently, the judge filed a paper setting forth more fully his reasons, a copy of which may be found in the former report of this case in 17 S. E. Rep. 31, 38 S. C.—, and which, therefore, need not be set out here. From this order, plaintiff appeals upon the three grounds set out in the record, which make, substantially, three questions: (1) Was there error in holding that the cause of action did not arise in this state? (2) Was there error in holding that the breach of the contract constituted the cause of action? (3) Was there error in holding that, even if the cause of action arose in this state, the courts of this state could not take jurisdiction of an action *in personam*, and render a personal judgment against a party served with the summons outside of the limits of this state?

To determine the first question, two inquiries present themselves: First, when was the contract made? Second, where was it to be performed? These inquiries involve mixed questions of law and fact; and, so far as the latter are concerned, the finding of the circuit judge is conclusive, in a case of this kind. *Hester v. Rasin Fertilizer Co.* 33 S. C. 609. But the rule of law is that, "in the absence of anything indicating the contrary, the place of the making of a contract is presumably that of its performance," as was said by *Mr. Justice McGowan in Ournow v. Phoenix Ins. Co. of Hartford*, 37 S. C. 406, quoting with approval from *Bishop, Cont. § 1391*; and, as was held in *Rodgers v. Mutual Endowment Assessment Assn.*, 17 S. C. 410, the cause of action on a contract arises at the place where it is to be performed. Where, then, was the contract made, upon which the plaintiff bases his action, if, indeed, there was any such contract?—a point which is not now before us, and upon which we do not desire to be regarded as even intimating any opinion. It does not appear that the plaintiff ever before had any pro-

professional connection with the S. C. Forsaith Machine Company, and, if made at all, it must be traceable to the telegram copied above; and that was sent from Boston, Mass. We cannot regard the written agreement between Tillinghast, Warren, and Smith, set out above, as any evidence of any contract on the part of the defendant company to pay anything. The fact that Mr. Warren was attorney for that company in a litigation then pending could not invest him with authority to bind his client to pay money, without some authority other than that arising from his professional relations; and, certainly, the terms of the telegram conferred no authority to enter into such agreement. Indeed, the terms of that paper do not show that Mr. Warren undertook to bind his client to pay any sum of money whatever. On the contrary, the agreement contained nothing more than a recital of the fact that the defendant company had agreed to pay the fee of Mr. Tillinghast; and whether that recital was strictly correct or not is not a question now to be considered. If, therefore, there was any agreement on the part of the defendant company to pay the plaintiff's fee, it must be found in the telegram above referred to; and, if it contains any promise to that effect, such promise was not made in this state, but in Boston, and, under the rule above referred to, must be there performed, as it is quite clear that there is nothing in the telegram indicating the contrary. Appellant, in his argument, seems to rely somewhat upon a letter printed in the "case," from the agent of the defendant company to Mr. Tillinghast, as tending to show that defendant acquiesced in the arrangement for the payment of plaintiff's fee. But, as we did not consider that the terms of that letter indicated any such acquiescence, we did not deem it important to set out that letter, in making our statement of the case. Still, we would be glad to have the letter incorporated in the report of the case, in deference to the views of its importance by appellant's counsel. But even if that letter contained a positive promise to pay the fee, or a direct admission of defendant's liability, such promise, whether express or implied, was not made in this state, but in the state of New Hampshire; and hence, under the rule above stated, the cause of action could not be regarded as arising in this state, as there is nothing in the letter indicating that such supposed promise was to be performed elsewhere.

As to the second question presented by the grounds of appeal, we deem it only necessary to say that we cannot understand how any contract can give rise to a cause of action until there has been some breach of such contract. The mere fact that a person has entered into a contract with another can give no cause of action, and none can arise until there is some breach of such contract, which, therefore, must be regarded as the cause of action. The contract may give a party the right to demand its performance according to its terms, but there is no delict, and no cause of action, until the other party refuses or neglects to perform some duty required of him by the terms of the contract. We do not

think, therefore, that there was any error on the part of the circuit judge in holding that the breach of the contract constitutes the cause of action.

The third question presented by the grounds of appeal is more difficult, and is much more important than either of the other questions. The Code provides, in section 148, that "civil actions in the courts of record of this state shall be commenced by service of a summons," and in subsequent sections (155 and 156) proceeds to prescribe how such service shall be made. In section 155 the provision is that, if the action be against a corporation, it must be by delivery of a copy of the summons to certain officers or agents of the corporation, "but such service can be made, in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein, or where such service shall be made within this state personally upon the president, cashier, treasurer, attorney or secretary thereof," followed by a special provision as to certain specified corporations, which have no application to the present case, as the defendant here is not one of the corporations specified. In section 156, provision is made for the service of the summons by publication in certain specified cases, the only one of which, applicable here, is couched in the following language: "Where the defendant is a foreign corporation, has property within the state, or the cause of action arose therein." That section contains this further provision: "Where publication is ordered, personal service of the summons out of the state is equivalent to publication," etc. Section 158 provides that in the case mentioned in section 156 the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. Section 159 provides how proof of the service of the summons shall be made, and contains this language: "When the service is made out of the state, after order of publication, the affidavit of the person making the service shall be made before the clerk of any court of record in the state or district in which such service shall be made, who shall certify the same under his official seal."—which was afterwards amended by the Act of 1884 (18 Stat. at L. 745), so as to include other officers besides such clerk. Section 160 provides that "from the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction."

It must be admitted that, if we look alone to the provisions of the several sections of the code above referred to, there is strong ground for the position taken by appellant,—that, if the cause of action arose in this state, the court had acquired jurisdiction of the defendant corporation, for in view of the findings of *Judge Hudson* that the defendant was a foreign corporation, having no property within this state; that it was duly served with a copy of the summons in the state of New Hampshire, after order of publication has been made,—we must take the facts so found, and there is no room for the objection, taken in the argument, to the proof of serv-

ice as lacking the official seal of the clerk, as no such exception was taken below. So that the naked question now presented is that, even assuming that the cause of action in this case arose in this state, whether the courts of this state could acquire jurisdiction of this foreign corporation, which had no property in this state, through which it might have been reached by a proceeding *in rem*, at least so far as such property was concerned, simply by personal service on such corporation in another state. This question, as it seems to us, has been conclusively settled in the negative by the highest authority in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. In that case, Neff, being a nonresident of the state of Oregon, but owning property therein,—the land in question,—was sued on a money demand, in which action the state court of Oregon undertook to acquire jurisdiction of the person of Neff by publication under a statute of that state practically identical with our code in this respect and rendered judgment against him for the amount of such demand, and under the execution issued to enforce such judgment the land was sold by the sheriff, and bought by Pennoyer. Subsequently, an action was brought by Neff against Pennoyer to recover possession of the land in the circuit court of the United States for the district of Oregon, and carried thence by writ of error to the Supreme Court of the United States. The case turned upon the validity of the sale by the sheriff, or, rather, the validity of the judgment under which such sale was made; and the court held that the state court of Oregon could not acquire jurisdiction of the person of a nonresident defendant in a personal action simply by service by publication, and hence that the judgment was a nullity. As is said by *Mr. Justice Field* in delivering the opinion of the court, one of the well-established principles of public law respecting the jurisdiction of an independent state over persons and property is "that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, *Conf. L.* chap. 2; Wheat. *International Law*, pt. 2, chap. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others; and so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity, and that no tribunal established by it can extend its process beyond that territory, so as to subject either persons or property to its decisions." This doctrine does not deny or interfere with the right of a state to acquire jurisdiction over the property of a nonresident, located or found within such state, by a proceeding *in rem*,—for example, by attachment, or some proceeding in the nature of a proceeding *in rem* provided for by the laws of such state; but under such a proceeding no personal judgment can be rendered against the nonresident, and the judgment can only affect him so far as his property found in the state is concerned. See *Stanley v. Stanley*, 85 S. C. 94. The same 22 L. R. A.

doctrine had been previously laid down in *Galpin v. Page*, 85 U. S. 18 Wall. 367, 868, 21 L. ed. 968, where it is said: "Even the court of king's bench in England, though a court of general jurisdiction, never imagined that it could serve process in Scotland, Ireland, or the colonies, to compel an appearance, or justify a judgment against persons residing therein at the time of the commencement of the suit." The case of *Pennoyer v. Neff* has not only been recognized and followed in numerous subsequent cases, but, so far as we are informed, has never been questioned by any tribunal. Even the learned judge (*Mr. Justice Hunt*) who dissented in that case did not question the doctrine for which we have cited the case, but based his dissent upon the sole ground that, inasmuch as Neff owned land within the state of Oregon at the time the action was commenced in which the judgment in question was recovered, it could be subjected to such judgment, even though no proceeding by attachment had been instituted. It is true that in that case the defendant was a natural person, and not, as here, a corporation, and that the service there was by publication, and not, as here, by personal service outside of the limits of the state. But neither of these circumstances can make any substantial difference between that case and this, for in the case of *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 223, the doctrine of *Pennoyer v. Neff* was applied to a case of a foreign corporation, and it is there said: "The doctrine of that case applies, in all its force, to personal judgments of state courts against foreign corporations." And we are unable to discover any reason why it should be otherwise. See also *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, where the same doctrine was applied in the case of a foreign corporation.

The other point of difference amounts to nothing, for the statute of Oregon, like our statute, expressly declares, "Where publication is ordered personal service of the summons out of the state is equivalent to publication and deposit in the postoffice," thus putting the two modes of service precisely upon the same footing. Besides, in the case of *Sugg v. Thornton*, 182 U. S. 524, 33 L. ed. 447, where the doctrine of *Pennoyer v. Neff* was applied, the case shows that the party who objected to the jurisdiction of the Texas court on the ground that there had been no legal service upon him was actually served in Wyoming territory. It is apparent from what is said in other cases that the Supreme Court of the United States recognizes no difference in the two modes of service, so far as the question we are considering is concerned, for in *Grover & Baker Sewing Mach. Co. v. Rudcliffe*, 187 U. S. 294, 295, 34 L. ed. 672, it is said, upon the authority of *Pennoyer v. Neff*, and other cases there cited, "that a personal judgment is without validity, if rendered by a state court in an action upon a money demand against a nonresident of the state, upon whom no personal service of process, within the state, was made, and who did not appear." And in *Wilson v. Seligman*, 144 U. S. 44, 45, 36 L. ed. 339, the following passages from the

opinion in *Pennoyer v. Neff* are quoted with approval: "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . No state can exercise direct jurisdiction and authority over persons or property without its territory. . . . It is in virtue of the state's jurisdiction over the property of the nonresidents situated within its limits, that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. . . . Where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory, and respond to proceedings against them. . . . Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability. . . . A judgment which can be treated in any state of this Union as contrary to the first principles of justice and as an absolute nullity, because rendered without any jurisdiction of the tribunal over the party, is not entitled to any respect in the state where rendered. . . . To give such proceedings any validity, there must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject-matter of the suit; and if that involves merely a determination of the personal validity of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance."

These being the well-settled principles applicable to a case like the one now under consideration, established by the Supreme Court of the United States,—a tribunal which is invested with final jurisdiction in controversies between citizens of different states,—it seems to us that we are bound, if practicable, to put such a construction upon the provisions of our code, above referred to, as will bring it into conformity with such principles. This, we think, can be done by construing the above-mentioned provisions of our code as applying only to cases in which a warrant of attachment has been issued, or to some other proceeding *in rem*, or in the nature of a proceeding *in rem*, and not to cases of mere personal actions, in which only a personal judgment can be obtained, for it must be remembered that an action cannot now, as formerly, be commenced by a writ of foreign attachment, but that now, under the code, an attachment is merely a provis-

ional remedy in aid of an action; and hence, to make it available, an action must be commenced in regular form, and judgment therein must be recovered before the attachment can yield the fruits which it is designed to produce. We are therefore compelled to construe the provisions of the code, above referred to, providing for the mode of making a nonresident a party to an action, as applying only to such actions as may be regarded as proceedings *in rem*, and not applying to merely personal actions, in which only a personal judgment is sought or can be obtained. This being a purely personal action, in which no warrant of attachment has been or could be obtained, inasmuch as the defendant has no property within this state, we think that the court never acquired jurisdiction of the defendant corporation, by service of the summons out of the state, and hence there was no error on the part of the circuit judge in dismissing the complaint for want of jurisdiction.

The second case mentioned in the title of this opinion—that of Mr. Moore—differs in at least one very material respect from the case just considered. Here the undisputed evidence is that the contract which constitutes the basis of plaintiff's action was made in this state by a duly authorized agent of the defendant corporation, and subsequently ratified by the general agent of said corporation; and, as there is nothing even tending to show that such contract was to be performed elsewhere, it must, under the rule announced in *Tillinghast's Case*, be regarded as a contract made and to be performed in this state, and hence that the cause of action arose in this state. If this were all, then a different conclusion from that reached in the case first considered would follow. But, under the views which we have taken of the third question presented by the appeal of Mr. Tillinghast, we are compelled to conclude that the court never acquired jurisdiction of the defendant corporation by a simple service of the summons in the state of New Hampshire, for in this case, as in the former, there was no warrant of attachment obtained, and none could have been, by reason of the undisputed fact that defendant, though a foreign corporation, had no property within the limits of this state. There was therefore no error on the part of the circuit judge in dismissing the complaint in this case for want of jurisdiction. For the reasons hereinbefore stated, we must adhere to the judgment rendered at the former hearing.

The judgment of this court is that the judgment of the Circuit Court in each of the cases stated in the title of this opinion be reaffirmed.

McGowan and Pope, JJ., concur.

ILLINOIS SUPREME COURT.

J. C. BULPIT, *Appl.*,

v.

T. J. MATTHEWS.

(145 Ill. 345.)

1. The owners of domestic animals are liable at common law for damages committed by them in trespassing, without regard to the negligence of the owner in permitting them to escape, or to the fact of enclosure, or lack of enclosure, of premises on which they are trespassing.
2. The common-law rule as to the duty of the owners of domestic animals to keep them from trespassing exists in Illinois, under the Act of 1874, except in districts where a vote taken under the statute has established the contrary rule, although for a long

period of time the common-law rule was rejected in that state as inapplicable to its conditions.

3. It is a matter of common knowledge that in 1874, and long prior to that date, vacant land in Illinois was comparatively little, and to be found, not upon the prairies as a rule, but in poorer and timber portions of the state.

(Bailey, Ch. J., dissents.)

(June 19, 1893.)

APPPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Christian County, which in turn affirmed a judgment of a justice of the peace in favor of plaintiff in an action brought to recover damages alleged to have been caused to plaintiff's crops by cattle belonging to defendant. *Affirmed.*

NOTE.—As to liability of owner for trespass of cattle.

General liability for trespassing stock.

The common-law doctrine that the owner of stock is liable in damages for trespasses by them, and that it is his duty to restrain them rather than the duty of the owner of land to fence against other persons' stock, has been much changed by statutes, and in some of the states has been denied as not applicable to the wants of the people in a new country. But the tendency of legislation in such states is to restore the common-law liability.

The common rule is that the owner of domestic animals must keep them on his own land, or else he will be liable for damages from their trespasses. *Taber v. Cruthers*, 59 Hun, 619, 39 N. Y. S. R. 331; *Barto v. Stephan*, 19 N. Y. Week. Dig. 164.

In an action for injuries to stock by a railroad train it was said that the common law requiring the owner of domestic animals to keep them on his premises does not apply to the Black Hills country. *Sprague v. Fremont, E & M. V. R. Co.* 6 Dak. 98.

Where plaintiffs, who controlled about 350,000 acres and grazed about 921,000 acres with cattle, attempted to enjoin the owners of sheep from allowing them to graze on the same, thus appropriating to themselves all the use of the public land, it was held that the owner of cattle is not liable for trespass on the unenclosed lands of another. *Buford v. Houtz*, 133 U. S. 320, 33 L. ed. 618.

In an action for injuries to stock from a railroad train, it was said that the common-law doctrine, requiring the owner of livestock to keep them on his premises, does not apply in Florida. *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 609, 58 Am. Rep. 697.

In Colorado the owner of crops cannot recover for damages from trespassing cattle unless the crops are protected by a sufficient fence. *Nuckolls v. Gaut*, 12 Colo. 361; *Morris v. Fraker*, 5 Colo. 625.

In Nevada damages from trespassing cattle cannot be recovered where the field is not inclosed by the fence prescribed by statute, as the rule of common law is repugnant to the law of Nevada. *Chase v. Chase*, 15 Nev. 259.

An action of trespass for damage from cattle and sheep pasturing on unenclosed wild prairie land in Nebraska cannot be maintained, as the common law was not applicable to that state at the time of framing its constitution nor is it now. *De-laney v. Erickson*, 10 Neb. 492.

But Neb. Comp. Stat., art. 3, chap. 2, providing a remedy for trespass by livestock by impounding, is cumulative and does not exclude the remedy by 22 L. R. A.

an action for damages, as the injured party may waive his lien. *Keith v. Tilford*, 12 Neb. 271.

In North Carolina, in an action of replevin, it was said that the owner of stock is not required to restrain them, and is not responsible for their trespasses upon lands of others. *Burgwyn v. Whitfield*, 81 N. C. 281.

The same doctrine was declared also in an action for injuries to cattle from railroads. *Laws v. North Carolina R. Co.* 52 N. C. 468.

And another case decides that a planter not having his land protected cannot recover for trespass from stock. *Jones v. Witherspoon*, 52 N. C. 555, 73 Am. Dec. 293.

In Missouri in order to create a liability for trespassing cattle, the owner of the land must have his ground enclosed by a lawful fence as the common-law liability has been changed by statute. *Held v. Grier*, 12 Mo. App. 556; *Fenton v. Montgomery*, 19 Mo. App. 156; *Storms v. White*, 23 Mo. App. 31; *Moore v. White*, 45 Mo. 206.

In Ohio it is said that the doctrine of common-law liability for trespass by stock may be suitable to an old and highly cultivated country, where all the lands, except the public highways and commons, are under enclosure, but that it has no suitable and proper application in Ohio. *Kerwacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474.

In an action for damages to stock from a railroad train it was said that the rule of the common law requiring the owner of cattle to restrain them under pain of their being trespassers if found on unenclosed lands of another has been held to be the law in Wisconsin though it is generally disregarded by common consent in the newly settled parts of the state. *McCall v. Chamberlain*, 13 Wis. 640.

Where no regulation of stock or fence has been made under Wisconsin Act of February, 1841, allowing the towns to regulate the same, the common-law liability applies and the owner of a close may recover for trespasses by animals, although not inclosed by a sufficient fence. *Stone v. Donaldson*, 1 Pinney, 398.

In Arkansas, where stock was killed by a train, it was said that the common-law doctrine that the owner of cattle permitted to go at large and enter another's land is a trespasser, has never been recognized in that state. *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562.

In Illinois the common law in regard to owners of stock being required to restrain them from trespassing was formerly held not to be in force, and that the owner of land to maintain an action for

It appeared that defendant kept the cattle in a pasture enclosed by a good and sufficient fence. That persons in the neighborhood used a way across the pasture to go to the village of Edinburg. That on the day on which the cattle escaped there was a show in the village, and during the night the gate to the pasture appeared to have been left open by some one passing through it, and the cattle escaped and strayed onto plaintiff's fields, which were unfenced, and inflicted the damage complained of.

Further facts appear in the opinion.

Messrs. John G. Drennan and J. C. McBride, for appellant:

It was decided in the case of *Seeley v. Peters*, 10 Ill. 142, followed by a long line of decisions, that the common law of England, requiring every man to keep his stock on his own premises, at his peril, was not the law of this state, and that stock should

be permitted to run at large, and that owners of land should fence against stock, and laws prescribing the sufficiency of fences were enacted (Ill. Rev. Stat. chap. 54), and this has been the law of this state for many years and acted upon by the people. It was decided in *Seeley v. Peters*, 10 Ill. 142, that section 20 of chapter 54, then numbered 15, applied to outside fences as well as others, and was not limited in its application, and says "it necessarily follows that, unless the fence be good and sufficient, no action lies," etc. To dispense with this law as declared by the supreme court would require an act of the legislature, and only so much of this rule here announced would become extinct as would be expressly and in terms annulled by the legislature.

In 1874 an Act was passed entitled "An Act to Revise the Law in Relation to Permitting Animals to Run at Large," which provided

the trespass of cattle upon his close, must, under the Illinois statutes, have it surrounded by a good and sufficient fence. *Seeley v. Peters*, 10 Ill. 130; *Oil v. Rowley*, 69 Ill. 469; *Stoner v. Shugart*, 45 Ill. 76; *Misner v. Lighthall*, 13 Ill. 609.

But Ill. Rev. Stat. 1874 changes this rule to the extent that it prohibits the running at large of cattle in the absence of a vote of the people of the county allowing them to do so.

And as shown in the main case the present Illinois statutes restore the common-law liability.

The owner of cattle is liable for the damages caused by them to his neighbor, under Ill. Rev. Stat., chap. 8, § 1, which practically re-enacts the common law in such counties as it is in force. *Birket v. Williams*, 30 Ill. App. 451.

Where a township has adopted a herd law prohibiting stock to run at large at night, to that extent it repeals the doctrine announced in *Seeley v. Peters*, 10 Ill. 130, and renders the owner of the stock liable for trespass, although the township law is in the nature of a penalty. *Westgate v. Carr*, 43 Ill. 450.

A party who permits his stock to run at large in violation of Illinois Act of January 13, 1872, is liable in trespass for damages by them to crops. *Fredrick v. White*, 73 Ill. 590.

In Alabama in an action for damages to stock from a defective bridge it was said that no general statute existed requiring cattle or dumb animals to be kept within an enclosure as the general rule is to fence stock out, not in. *Lee County v. Yarbrough*, 35 Ala. 590.

In Alabama the owner of land must protect himself against cattle by fence, except where local laws dispense with this requirement. *Wilbrite v. Speakman*, 79 Ala. 400.

But the Alabama Act of February 19, 1867, giving an action for damages against any one who permits his cattle to trespass within a tract surrounded by a lawful fence and making a boundary line a lawful fence in certain counties, restores the common-law liability in such counties. *Joiner v. Winston*, 68 Ala. 129.

Another Alabama case holds that the owner of hogs is liable for trespass committed by them on another's crop, although the owner of the hogs had no notice of their propensity to rove. *Gresham v. Taylor*, 51 Ala. 505.

Where a fence is not a lawful fence under the statute, in an action for injuries to the trespassing stock the defendant cannot recoup damages to his crops. *Woodward v. Purdy*, 20 Ala. 379.

This action was for trespass by the defendant in carrying away the hinges of the gates, digging up 22 L. R. A.

fruit trees, and taking away other things. The entry of the hogs must have been caused by this trespass but the facts do not appear.

In California premises must be protected by a fence prescribed by statute in order to permit an action for trespass of cattle thereon. *Comerford v. Dupuy*, 17 Cal. 308.

In California in an action against a railroad company for killing a horse it was held that the common-law liability for damages by trespassing stock does not prevail in that state. *Waters v. Moss*, 12 Cal. 535, 73 Am. Dec. 561.

In California the owner of sheep which stray into an unenclosed field without his knowledge, is not liable for an injury done by them, although Cal. Stat. 1861, p. 523, amended March 23, 1868, provides that it shall be unlawful to herd sheep on another's land. *Logan v. Gedney*, 38 Cal. 579.

See subhead "Driving cattle on land of another," *infra*.

But an owner of land is not required to fence it against cattle of another, in Santa Clara county, under the California Act of 1863, amended March, 1872. *Hahn v. Garratt*, 69 Cal. 144.

And the right given by statute in certain counties to proceed against trespassing cattle does not affect the right to sue their owner for damages. *Triscony v. Brandenstein*, 66 Cal. 514.

An action for trespass by animals that is not brought under the California Act of 1874 in certain counties may be brought in three years from the date of trespass. *Heilbron v. Heinlen*, 70 Cal. 482.

Where a complaint is either a declaration in trespass or it alleges "an express promise to pay the amount of damages done after the injury was consummated," an instruction that the law implies a promise by the owner of the stock to pay all damages done is error, there being no count for grain sold and delivered or for pasturage. *Van Valkenburg v. McCauley*, 63 Cal. 708.

The common-law remedy for trespass by cattle is not excluded by the other remedy of distress and sale under the New York statutes. *Colden v. Eldred*, 15 Johns. 220.

And the owner of cattle is liable for their trespass where there is no regulation of the town as to fences or cattle at large. *Wells v. Howell*, 19 Johns. 885.

The owner of sheep is liable for their breaking through a fence and depasturing a meadow, notwithstanding a town by-law allowing them to run at large on a common, unless it is shown that the plaintiff's fence was insufficient or did not conform to the regulation of the town prescribing the kind

a penalty against those who should suffer their animals of the species of horse, mule, etc., to run at large.

Rev. Stat. chap. 8, § 1.

This statute applied only to those who suffered or permitted such animals to run at large, and had no application to such animals escaping against the will of the owner and without his fault or negligence, as in this case at bar, and set forth in the said propositions of law submitted to the court.

Kinder v. Gillespie, 68 Ill. 88; *Collinsville v. Scanland*, 58 Ill. 221; *Fredrick v. White*, 73 Ill. 590; *Weide v. Thiel*, 9 Ill. App. 226.

Messrs. Ricks & Creighton, for appellee:

By the common law every man was bound to keep his cattle on his own land or respond in damages for their trespass, and it was one of the rules that no man was bound to fence his close, but every man is bound to keep his cattle in his own field at his peril.

of fence if any such regulation was made. *White v. Scott*, 4 Barb. 56.

The owner of cattle is liable for damages caused by them where they are in a pasture of another and, by reason of an insufficient fence which such party was bound to repair, they trespass on adjoining land. The statute imposing certain liability on adjoining owners does not take away the common-law liability of the owners of cattle. *Stafford v. Ingersoll*, 3 Hill, 38.

But in an action for damages from trespassing hogs, the plaintiff cannot in the same action recover for feed furnished the hogs while they were kept by him in his pen. *North v. McDonald*, 47 Barb. 528.

If the owner of the land fails to use ordinary care to protect his crops and drive out trespassing stock, he cannot recover for subsequent damage. *Woodmansee v. Kinnicutt*, 30 N. Y. Week. Dig. 512.

In Vermont owners of cattle are required to confine their cattle on their own lands, notwithstanding the Vermont statutes in respect to fences between uncoupled land, and are liable for trespasses by them. *Keenan v. Cavanaugh*, 44 Vt. 263.

And the plaintiff in trespass need not show that he has a legal fence, where the defendant, whose cattle have trespassed, does not claim that it is defective. *Sorenberger v. Houghton*, 40 Vt. 150.

The Pennsylvania Act of 1700, providing that the owner of cattle is liable for damage done in enclosure that is fenced according to law, implies that there is no liability unless such fence is used. *Gregg v. Gregg*, 55 Pa. 227.

The Pennsylvania Act of 1700, in regard to the fence law was repealed by Pennsylvania Act of April 4, 1889, which repeal left the rights of land-owners and cattlemen as at common law, and the owner of cattle must fence them in, and is liable for damages to his neighbor's crops by his cattle. *Barber v. Mensch*, 157 Pa. 390; *Arthurs v. Chatfield*, 9 Pa. Co. Ct. Rep. 34, 21 Pittsb. L. J. N. S. 83; *Thompson v. Kyler*, 9 Pa. Co. Ct. Rep. 205, 8 Lanc. L. Rev. 246.

And in Warren county, Pennsylvania, the owner of cleared land is not bound to protect the same against cattle of others. *Greenlee v. Eisenbrown*, 10 Pa. Co. Ct. Rep. 483.

And the owner of property that is damaged by trespassing animals may maintain an action of trespass *qu. cl. fr.* against their owner. *Ziegler v. Hons*, 6 Kulp, 374, 1 Pa. Dist. Rep. 609, 11 Pa. Co. Ct. Rep. 159.

The Pennsylvania Act of 1706 prohibits swine from running at large without rings in their noses 22 L. R. A.

McCormick v. Tate, 20 Ill. 334.

The owner (says Blackstone, 3d vol. 211) is answerable for the trespass of his stock as of himself.

Starr & Curtis, Stat., chap. 8, § 1, entitled "Animals Running at Large" provides: "that whoever, being the owner or having possession of any domestic animal of the species of horse, mule, ass, cattle, sheep, goat, or swine, shall suffer the same to run at large except when authorized as hereinafter provided, shall be fined not less than \$3 nor more than \$10 for each offense."

The above statute restores the common law.

Lee v. Burk, 15 Ill. App. 651; *Birket v. Williams*, 80 Ill. App. 451; *Westgate v. Carr*, 48 Ill. 450.

Shope, J., delivered the opinion of the court:

The propositions submitted to be held by the trial court as the law, and refused to be

sufficient to prevent turning up the ground and yokes on their necks extending at least six inches from the angular point or corner. *Stewart v. Benninger*, 138 Pa. 437.

And the act authorizing the holding of trespassing cattle does not prevent a recovery for damages done by swine running at large. *Robison v. Fetterman* (Pa.) May 14, 1888.

In the absence of statute a party is not required to fence his lands before he can maintain an action of damages for trespass by cattle thereon. *French v. Cresswell*, 13 Or. 418.

In this case the local law of Umatilla county required no fence against sheep, and the dictum in *Campbell v. Bridwell*, 5 Or. 311, that the common law had been changed by statute is explained by saying that the court did not intend to hold that in the absence of the statute a party would be obliged to fence his land before he could maintain an action for damages from trespass by cattle thereon; and it is held in this case that the common law prevails where not changed by statute.

The fence laws of Oregon requiring fields and enclosures to be protected with certain kinds of fence do not apply to ditches, and the owner of sheep is liable for injuries by them to unfenced ditches, in the absence of proof that the sheep were purposely or negligently driven thereon. *Bileu v. Paisley*, 4 L. R. A. 840, 18 Or. 47.

See subhead, *infra*, "Driving cattle on land."

The common-law rule requiring the owner of cattle to restrain them does not apply in Iowa. One who sues for injury to his crops by cattle must show that he had a lawful fence. *Frazier v. Nortinus*, 34 Iowa, 82; *Wagner v. Bissell*, 3 Iowa, 396.

The Iowa Code, § 912, providing that the owner of the beast is liable for damages except where the injured party failed in his duty to keep up partition fences, applies to partition fences only, and as to outside fences the common law is not in force. *Wagner v. Bissell*, *supra*.

But under Iowa Laws 1870, chap. 23, providing that the owner of stock trespassing on the lands of another shall pay the damages, the liability attaches without regard to whether the land is fenced or not. *Hallock v. Hughes*, 42 Iowa, 516; *Little v. McGuire*, 38 Iowa, 500, 43 Iowa, 447.

But the owner of crops being injured must exercise ordinary care and cannot recover for such damage as he might have thus prevented, as where the gaps were small and the cattle were known to be trespassing and could easily have been driven out. *Little v. McGuire*, *supra*.

When cattle broke through where defendant's

held, fairly present the question whether the owners of domestic animals in this state are required by law to keep them under control, that no damage is done by them to the property of another, at their peril. The circuit court, in effect, held that it was not necessary to fence against stock, but that the owner thereof is liable in damages if they trespass upon the lands of others, whether such land is enclosed or not, and irrespective of the reason or excuse for the animals being at large.

By the common law every owner of cattle was bound to keep them from trespassing upon the close of another, at his peril, and was answerable for their trespasses, as for his own. 8 Bl. Com. 211; 2 Waterman, Trespass, § 858; Cooley, Torts, 337. By section 1, chap. 28, Rev. Stat., of this state, "the common law of England, so far as the same is applicable, and of a general nature,

and all statutes or acts of the British parliament made in aid of, and to supply the defects of, the common law, prior to the fourth year of James the First, [with certain specified exceptions,] and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as in full force, until repealed by legislative authority." This statute, without the exceptions, was passed by the general convention of the colony of Virginia, May, 1776 (9 Hen. Stat. 127), and in its present form was carried into the legislature of the Indiana territory by the Act of September 7, 1807 (Laws 1807, chap. 24), was in force in the territory of Illinois (1 Pope's Laws, Ill. T. p. 34), and was re-enacted by the first state legislature by Act of February 4, 1819 (Laws 1819, p. 3), and has been retained, in the same form, in each succeeding revision of the statute. The question whether the

fence was unlawful and through plaintiff's fence where it was lawful, the fact that other parts of plaintiff's fence were not lawful, will not bar a recovery in Iowa, as Code, § 1449, provides that the owner of animals and the owner of land are both liable where animals escape into the injured enclosure in consequence of the negligence of the adjoining owner to maintain his part of the partition fence. Noble v. Chase, 60 Iowa, 261.

In an action for an assault, it is said that the Iowa Rev., § 1551, and section 1548, provide two distinct remedies for trespassing animals, one by appraisal and one by action. Quinton v. Van Tuyl, 30 Iowa, 554.

Where there is no order permitting stock to run at large, under Ind. Rev. Stat. 1881, § 4895, the owner of such stock is liable for trespass by them without regard to a lawful fence. Atkinson v. Mott, 102 Ind. 431.

The owner of cattle is liable for their trespasses unless they escape through defects in the fence that the injured party is bound to keep in repair. Page v. Hollingsworth, 7 Ind. 317.

Owners of cattle at common law were liable for their trespasses, but are not liable where the statute requires the owner of 'ands to fence against cattle. Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624.

Under the Indiana Act of March 12, 1877, amending section 2 of Ind. Rev. Stat. 1876, p. 495, no action for trespass of animals can be maintained unless they broke through a lawful fence. Clark v. Stipp, 75 Ind. 114.

In the absence of an order of the board of county commissioners permitting cattle to run at large under Ind. Rev. Stat. 1881, § 2637, every owner is required to fence in his own stock, and is not bound to fence out other stock, and the owner of cattle is liable for any trespass by them without regard to quality of fence or whether the cattle are breachy. Stone v. Kopka, 100 Ind. 458.

If the defendant was bound to maintain the part of the fence through which his cattle entered he was liable without regard to whether the cattle were breachy or not. If the plaintiff was bound to maintain the fence the defendant was liable unless he showed that the plaintiff had failed in his duty. The rule of liability is fixed by the statute. Potter v. Danforth, 1 Alb. L. J. 255.

In an action for injuries to cattle from railroad trains it was said that the common law requiring every man to keep his cattle upon his own land is in force in Minnesota. Looke v. First Div. St. Paul & P. R. Co. 15 Minn. 350.

Exemplary damages for trespass by animals cannot be recovered, even where the defendant rescues them when plaintiff is holding the stock for the trespass. Sherman v. Kilpatrick, 58 Mich. 310.

No action will lie in Kansas for injuries by trespassing cattle unless the ground is enclosed with such a fence as is required by Taylor's Kan. Stat., chap. 40, defining a legal enclosure. Darling v. Rodgers, 7 Kan. 562.

This is true even if the owner of the stock was negligent unless his want of care was willful, wanton, or malicious. Larkin v. Taylor, 5 Kan. 434.

But where cattle break through a lawful fence and do injury, the owner of the land may recover damages or hold the cattle for damages, as provided in Taylor's Kan. Gen. Stat., par. 3033, as this remedy is cumulative. Prather v. Beeve, 23 Kan. 627.

In a township in Kansas, where the hog law is the same as the common law, it is no defense to an action for damages to a crop that it was not enclosed by a legal fence. Wells v. Beal, 9 Kan. 567.

In Kansas to recover for damages from swine, the aggrieved party must show that the fields were in a township where the hog law was in force. Scott v. Lingren, 21 Kan. 124.

The owner of stock is not liable for damages committed by such stock, where he turns them into his own field, and they wander out from there to an unenclosed field not used by him, and break into the premises of another through a fence that is not sufficient as required by statutes of Kansas. Fillmore v. Booth, 29 Kan. 134.

The owner of stock in Georgia is liable for damages to land or crops injured by them except in those counties where the herd law does not prevail, and where provision is made for impounding cattle this is only cumulative and is not the exclusive remedy. Bonner v. De Loach, 78 Ga. 50.

Where a river is the dividing line so that a fence cannot be well kept up or maintained on the dividing line, the owner of cattle must prevent them from going on his neighbor's land, as this is not provided for by statute. Bissel v. Southworth, 1 Root, 299.

Where cattle are rightfully on commons thrown open by the towns under the statute, the owner of cattle is not liable for trespass by them where there is no fence. Holladay v. Marsh, 3 Wend. 142, 20 Am. Dec. 678.

In order to recover damages done by horses and cattle if the party intends to recover under the fence statute he must show that his fence was lawful, that the horse got over and did damage, and that the appraisers were chosen. Brittin v. Van Camp, 3 N. J. L. 240.

rule of the common law mentioned was in force in this state first came before this court at its December term, 1848, in *Seeley v. Peters*, 10 Ill. 130; and it was there held, by a divided court, never to have been in force. It was held, following the construction placed upon the statute adopting the common law in *Boyer v. Sweet*, 4 Ill. 121, and *Penny v. Little*, Id. 801, that the common law was adopted and in force "only in cases where that law is applicable to the habits and condition of your society, and in harmony with the genius, spirit, and objects of your institutions." After showing the then unsettled condition of the vast prairies of the state, the scarcity of timber to fence them, and their capability to sustain thousands of cattle upon the natural grasses, the court said, "However well adapted the rule of the common law may be to a densely populated country, like England, it is surely but illy

adapted to a new country, like ours," and after showing the universal habit at that time of enclosing fields devoted to agriculture, and permitting stock to run at large, further says, "We should feel inclined to hold, independent of any statute upon the subject, on account of the inapplicability of the common-law rule to the condition and circumstances of our people, that it does not and never has prevailed in Illinois." But the court, in that case, distinctly placed its decision upon the ground that the legislature, by the enactment of various statutes relating to fences and enclosures, expressly recognized the right of owners of domestic animals to permit them to run at large, and had, as then held, required the proprietors of fields to surround them with a good and sufficient fence before they could maintain an action for the trespass of stock therein. It followed, necessarily, from the construction given these

In an action for damages to stock from railroad trains it was said that in Mississippi the owner of cattle is not liable for damage done by them to his neighbor, whose premises are not enclosed by a lawful fence. *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552.

A person cultivating land in common with others, is liable for trespass of cattle of a stranger, which he permits to mingle with his own and trespass, although he had enclosed his land on three sides leaving only that next to his neighbor open, under Miss. Code 1880, § 984, providing for liability for trespasses of cattle breaking through a lawful fence or running at large in a common enclosure within which more than one person is cultivating land, without the consent of all such persons. *Montgomery v. Handy*, 62 Miss. 16.

Where cattle that are used in making a road stray on unenclosed land against the will of their owner, it is not a trespass. *Cool v. Crommet*, 18 Me. 250.

See also subhead "From the highway."

From the highway.

The owner of stock which trespass on land from the highway must show that they were lawfully on the road before he will be excused for their trespass. *Dovaston v. Payne*, 2 H. Bl. 627.

And the occupant of land cannot recover for damages from cattle entering his land from the highway through his defective fence where stock is on the highway, under N. Y. 1 Rev. Stat., § 40, § 41, § 5, subsec. 11, authorizing towns to determine the time and manner when stock shall be permitted to go at large on the highways. *Griffin v. Martin*, 7 Barb. 207.

If A. has a close next the highway, and beasts come out of the highway into the close of A. and thence they go into a close of B. adjoining, and which B. ought to fence, then in default of enclosure, etc., it is a good plea against A. but not against B. or another stranger. *Harvey v. Gulson*, Noy, 107, 36 Hen. VI., barre. 168.

In an action for holding cattle it was said that if cattle are passing along the highway and enter through an insufficient fence the owner of the cattle must remove them in a reasonable time. *Goodwyn v. Cheveley*, 4 Hurlst. & N. 631.

The owner of cattle driving them along the highway is not liable for their escape to adjoining lands, when he drives them back as quickly as possible. *Rightmire v. Shepard*, 36 N. Y. S. R. 768. New York Laws 1867, chap. 814, § 2, to prevent an-
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imals being at large on the highway, and giving a remedy for cattle trespassing, do not apply to stock of an adjoining owner crossing a division fence. *Jones v. Sheldon*, 50 N. Y. 477.

A landowner failing to keep a division fence in repair is not liable for trespasses to his neighbor from cattle unlawfully on the highway that cross such fence. *Pool v. Alger*, 11 Gray, 489, 71 Am. Dec. 726.

But the owner of cattle cannot excuse the trespass by his stock through insufficient fences, where he has unlawfully turned them into the highway to graze. *Stackpole v. Healy*, 16 Mass. 33, 6 Am. Dec. 121.

So the owner of swine is liable for their trespass in breaking through a defective fence from the highway. *Harrison v. Brown*, 5 Wis. 27.

The owner of a close being only bound under the New Hampshire statute to fence against creatures rightfully on the adjoining land, one whose horse, which had been turned loose to graze, entered from the highway the field of another through a defective fence, is liable for the trespass unless the highway is on the defendant's land, or unless it was plaintiff's duty to repair the fence. *Avery v. Maxwell*, 4 N. H. 36.

In an action of replevin for cattle held for trespass it was said that the general rule of law is that every man is bound to keep his cattle upon his own land at his peril; excepting (1) he may drive them along the highway; (2) he will not be liable to the adjoining neighbor if his cattle escape over a fence that such neighbor was bound to repair, but he will be liable to a third party whose field lies beyond if they trespass there; and (3) the New Hampshire Statute of February 8, 1791, is construed to require the owners of closes to fence them against all creatures lawfully on the highway. *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

The owner of adjoining land not maintaining his part of the division fence which he was bound to do, is not liable for trespasses over the same of cattle of third parties coming on his land from the highway and crossing that fence, notwithstanding N. H. Rev. Stat., chap. 186, § 12, providing for damages for failure to maintain a partition fence that a party is bound to keep in repair. *Lawrence v. Combs*, 37 N. H. 381, 72 Am. Dec. 382.

Cattle are not lawfully on unfenced land which they enter from a highway on which they were lawfully at large, by passing through adjoining land where the Maine statute provides merely that if beasts are lawfully on adjoining lands and escape therefrom in consequence of the negligence of the injured party to maintain his part of a partition

statutes, that the common-law rule was not in force. In the subsequent cases of *Misner v. Lighthall*, 13 Ill. 609; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198, 61 Am. Dec. 65; *McCormick v. Tate*, 20 Ill. 384; and other cases,—the question was more or less directly presented, and the holding in *Seeley v. Peters* considered and approved. The question was again directly presented in *Headen v. Rust*, 39 Ill. 186 (determined at the December term, 1866, of this court). The court there recognizing that the conditions which led the court to hold, in 1848, the principle of the common law inapplicable, because of the physical and social conditions and habits of the people, no longer existed, the decision was placed upon the ground that the law, as declared in *Seeley v. Peters*, had been so long acquiesced in by the people, and the rule recognized by the legislature in the passage of various acts consistent with the holding

in that case, that it belonged to the legislative department of government, more properly than the judiciary, to change it. And after reviewing various of such acts it was said: "This legislation established the fact that the general assembly and the people of the state understand the law to require owners of land to fence against the depredations of stock, and that all persons have a right to permit their stock to run at large on the highways and commons, except so far as they are prohibited by legislative enactment. . . . The conclusion from these enactments seems irresistible that the people have accepted the rule in *Seeley v. Peters* as the law, and have manifested no disposition to disturb it, except in particular localities." A review of the legislation referred to, or the enactments subsequently, prior to the Act of 1872, and relating to fences and enclosures, and regulating the right of stock to run at large in

fence, the owner of the beasts shall not be liable. *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586. See also *Cool v. Crommet*, 13 Me. 260; *Hartford v. Brady*, *infra*.

Driving cattle on land of another.

Generally the owner of stock is liable for damages done by them when he herds or drives them on the land of another against the will of the owner of the land.

"A man is answerable for not only his own trespass but that of his cattle also; for, if by his negligent keeping they stray upon the land of another (and much more if he permits, or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." 3 Bl. Com. 200.

Trespass may be maintained by one whose land is not enclosed against a party herding stock thereon after being forbidden. *Bedden v. Clark*, 76 Ill. 888.

Where by the custom in Colorado sheep are not required to be fenced against but are herded, one whose crops are injured by the negligence of the herder of sheep may recover damages. *Willard v. Mathesus*, 7 Colo. 76.

The owner of cattle which are driven on unenclosed land against the will of the owner of land is liable in trespass, notwithstanding the Iowa law in regard to stock being allowed to run on unenclosed land. *Harrison v. Adamson*, 76 Iowa 337.

A party may recover damages for herding cattle on his land without his consent, although the whole tract may not be improved. *Otis v. Morgan*, 61 Iowa, 712.

So a party is liable for depasturing land with his cattle after a license to allow them to pasture had been withdrawn. *Stone v. Walt*, 50 Vt. 663.

In an action to restrain a party from turning in his cattle it was said that the common-law rule as to liability for damage done by stock on the land of another does not apply in Texas, but if a man enclose his land his enclosure must be respected even if there is not a statutory fence. *Davis v. Davis*, 70 Tex. 123. See also *Pace v. Potter*, *infra*.

In an action for damages by cattle to growing crops, it is no defense that they were not enclosed by a legal fence, where the owners of the cattle drove them on the premises, and were guilty of a wanton and willful want of care. *Powers v. Kindt*, 18 Kan. 74.

One who drives his cattle through a breach in the fence, upon another's land, where the fence has been thrown down without the owner's fault, 22 L. R. A.

is liable for damages done by the cattle. *Erbes v. Wehmeyer*, 60 Iowa, 86.

Where a party turns cattle in an enclosure by permission of another believing that the latter owns all the land enclosed, he will be liable for damages to the crops of a third party owning land enclosed therein. *Daniels v. Aholtz*, 81 Ill. 440.

If a man drive his cattle over a fence into the field of another he is liable in trespass. *Adams v. McKinney*, Add. Rep. 266.

If cattle on unfenced land go across it to the unfenced land of another the owner of the cattle can drive them back again over the same premises. The rule of law in Iowa is that cattle may go upon unfenced land of others. *Camp v. Fisherty*, 26 Iowa, 620.

The owner of cattle is not liable for damages committed by them where they were driven on plaintiff's premises by a third party without the knowledge or consent of the owner. *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 877.

In this case the cattle were being driven along the highway and entering the land of one party were driven by him on the land of another.

See subhead, "From the highway," *supra*.

If sheep strayed on unenclosed land, or were driven there for pasturage and not maliciously, the owner of them is not liable for damages, in Montana, as Mont. Comp. Stat., 5th div., § 1119, subjecting owners of animals to liability for damage by breaking through a lawful fence, negatives the liability of the owner for their being at large. *Fant v. Lyman*, 9 Mont. 61. See also *Logan v. Gedney*, 38 Cal. 579; *Bileu v. Paisley*, 4 L. R. A. 840, 18 Or. 47.

Lack of division fences.

The general rule is that each adjoining owner is liable to the other for damages by his stock, where there is no division or apportionment of a partition fence by assignment, prescription, agreement, or statute.

Parsons, Ch. J., in *Rust v. Low*, 6 Mass. 94, makes the following deductions which have been largely quoted, commended, and followed:

"1. One is not obliged to fence against adjoining landowners except by prescription.

"2. Where he is so compelled he need not fence against cattle of other than adjoining neighbor.

"3. A man is obliged to keep his cattle at home though not bound to fence against his neighbor.

"4. The obligation of joining tenants rests on statutes.

"5. An assignment pursuant to statute imposes the same duty as prescription.

"6. Where there is no prescription or agreement

certain municipalities and political subdivisions of the state, will be unnecessary. It will be found that they recognize the law to be as held in the cases mentioned, and that acts of the legislature authorizing the restraining of domestic animals from running at large in such municipalities and subdivisions formed exceptions to the general rule and policy of the state.

But by the statute now in force (Rev. Stat. chap. 8), passed in 1874, which is, in effect, sections 1 and 2 of the Act of 1872, (rewritten,) a radical change was made. Of the causes producing the rapid development of the state, nothing need be said; but it is a matter of common knowledge that at the time of the passage of the present statute, and long prior to that date, if there was vacant land upon which cattle at large might graze, it was not, as a rule, to be found upon the prairies, but in the poorer and timbered

portions of the state, and there in only comparatively small, and constantly decreasing, quantities. The conditions and circumstances of the country and people had radically changed since the decision of the *Seeley v. Peters* case, and the reasons for rejecting the rule of the common law, so far as its exclusion was based upon the physical condition of the state, and the needs and habits of the people, had ceased to exist. It cannot be doubted that it was in view of these changed conditions, and, it may be presumed, in view of the holding in *Headen v. Rust*, that the legislation of 1874 upon the subject was enacted. Section 1 of the Act of 1874 imposes a penalty upon any person suffering or permitting domestic animals to run at large within the state, except when authorized as in that act provided. Section 2 provides for submitting the question of permitting animals to run at large to a vote of the electors

the statute only requires the tenant to fence against cattle rightfully on adjoining land."

He corrects a citation which is often misquoted and says *Jenk. & Cent. Ca. 5*, from *Fitz. Abr. Bar. 163*, as to 38 Hen. VI., gives the correct translation: "If A. has green acre adjoining his own close black acre which A. ought to fence against, if B's cattle go from his black acre to A's white acre, and then to A's green acre, this is no trespass because A. did not fence his white acre against B's black acre."

"If A. be bound to enclose against B. and B. against C. and beasts escape out of C's land into B's land, and hence into the land of A., in this case A. shall not have trespass against C. But if A. be bound to enclose against B. and B's beast escape into A's land, and thence into the land of one D. a stranger, then D. shall have trespass and B. be put to a *curia claudenda* against A." *F. N. B. 123*. Vin. Abr. title *Fence*.

"If A. has land on one side of a very large field, and ought to fence against it; and B. has land on the other side, and ought to fence against it; if the beasts of A. enter into the field, and thence into the close of B. and for default of the fence of B. yet B. may have trespass against A. and so *vice versa*." *Br. Curia Claud. pl. 2*; Vin. Abr. title *Fence*.

Where A. B. and C. adjoin each other in that order, A. can recover in trespass for damages from C's sheep, and A. is not bound to fence against them, and not being an adjoining proprietor to C. the statutes in regard to fences do not apply. *Wilder v. Wilder*, 38 Vt. 373.

In an action of replevin for holding cattle it was said that each adjoining owner is liable for damages from his cattle on lands of the other, where neither is under obligation to fence. *Churchill v. Evans*, 1 Taunt. 529.

Each adjoining land proprietor is bound to keep his cattle on his own land at his peril, where there has been no statutory assignment of a partition fence between the parties. *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Bradbury v. Gifford*, 53 Me. 99.

The adjoining proprietors are remitted to their common-law rights and obligations to keep their cattle on their own land where there never was any division fence located by viewers or by agreement, and the failure of one party to fence is no defense in an action for damages from cattle of adjoining owner. *Angell v. Hill*, 45 N. Y. S. R. 32.

Where there is no prescription, agreement, statute, or assignment, of division fence no tenant is bound to fence against an adjoining close; but in such case, there being no fence, each owner is bound at his peril to keep his cattle on his own close. *Thayer v. Arnold*, 4 Met. 589; *Gooch v. 23 L. R. A.*

Stephenson, 13 Me. 371; *Eastman v. Rice*, 14 Me. 419; *Little v. Lathrop*, 5 Me. 356; *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233.

In Maine if there is no obligatory division fence between adjoining landowners, each must keep his cattle on his own land. *Sturtevant v. Merrill*, 33 Me. 62.

The rule of the common law prevails where stock enters from adjoining fields and the fence is not a division fence under the statute, and the owner of hogs is liable in damages in such a case for not restraining them on his own land. *McBride v. Lynd*, 55 Ill. 411.

Where wheat has been sown in a field and not separated by a fence from the remainder of the field, the owner of the wheat may recover for damages thereto by cattle kept by another on the other part of the farm, as adjoining owners are equally bound to maintain a partition fence, and where neither does the common-law rule of liability apply. *Stephenson v. Elliott*, 3 Ind. App. 233.

In replevin for holding cattle it was said that the Michigan Act March 17, 1847, providing for no damages from beasts unless they are prohibited by the township from being at large except where the land is enclosed with a lawful fence, applies only to exterior fences and an adjoining landowner is liable to the other for trespass from his cattle where there is no partition fence. *Johnson v. Wing*, 3 Mich. 163.

Where no division is made of a partition fence as is contemplated by statute, and the part and share of each remains undefined, the common law prevails, and the owner of cattle is liable for their trespass on the land of the other. *Coxe v. Robbins*, 9 N. J. L. 477.

The owner of stock willfully allowing it to run at large in a field enclosed in common with that of an adjoining proprietor, is liable to him in damages for injuries to his crops, and it is no defense that the outside fence was not a lawful fence. *Broadwell v. Wilcox*, 22 Iowa, 566, 32 Am. Dec. 404.

Where land is enclosed in common, by agreement, this releases each party from obligation to build a partition fence, and each is liable to the other for damages from his cattle. *Winters v. Jacobs*, 29 Iowa, 115; *Montgomery v. Handy*, 63 Miss. 43; *Milligan v. Wehinger*, 68 Pa. 235.

Where two owners of adjoining lands fence their land in common, but have no partition fence, the owner of each tract is liable for trespasses committed by his cattle on the other's land. *Baker v. Robbins*, 9 Kan. 303; *Markin v. Priddy*, 40 Kan. 684, overruling *Markin v. Priddy*, 39 Kan. 463; *O'Riley v. Diss*, 41 Mo. App. 134.

of the county. Section 3 relates to the form of the ballot, manner of voting, and canvassing and return of the votes. Section 4 provides: "If a majority of all votes cast in the county at such election shall be for domestic animals, or any species thereof, running at large, it shall be lawful in such county, for domestic animals, or such species thereof, to run at large: provided, that if at any such election the vote in any precinct in counties not under township organization, or in any town in counties under township organization, or in any incorporated city, village, or town in any county, shall be against domestic animals, or any species thereof, running at large, it shall not be lawful for such animals to run at large in such precinct or town, or incorporated city, village, or town." Section 5 provides that, in any county wherein animals are allowed to run at large pursuant to a vote theretofore had, on peti-

tion, etc., being filed with the county clerk, a vote may be taken in any incorporated city or village, precinct or town, under the act, and, if a majority of the votes cast shall be against animals running at large, then it shall not be lawful for them to run at large in such city, village, precinct, or town. Section 6 provides that the act shall not be construed so as to prohibit the running at large of domestic animals in any county, precinct, or town, incorporated city or village, "where the same is allowed pursuant to any election held by virtue of any law in force at the time this act shall take effect." *Vogt v. Dunley*, 97 Ill. 424.

Construing these provisions together, it is manifest, we think, that the legislature intended that only as the result of an election at which the question had been submitted under the provisions of this, or some prior statute authorizing it, can domestic animals

The common law still prevails in Missouri as to such fences when not changed by prescription or agreement, and the owner of stock is liable for trespasses by the same on his adjoining neighbor. *O'Riley v. Diss*, *supra*.

But in Texas where unenclosed land of adjoining owners is enclosed by a general enclosure of surrounding owners, one of such adjoining owners is not liable to the other for trespass of his cattle on account of not having a division fence. The rule of common law requiring the owner of cattle to confine them on his land does not prevail in Texas. *Pace v. Potter*, 85 Tex. 473. See *Davis v. Davis*, 70 Tex. 123.

And where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards become the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. *Boyle v. Tamlyn*, 6 Barn. & C. 329.

Removal of division fence.

A person who sows a crop after the fence protecting the land has been removed cannot recover for damages to his crop by cattle. (It does not appear whose fence was removed by the defendant, but it was a division fence, and it does not appear whose cattle damaged the crop.) *Hassa v. Junger*, 15 Wis. 598.

Where there is an inner and outer fence in a field a party who has not the exclusive right therein cannot remove the inner fence and expose his crops without suffering the consequences of the damages. *Buckmaster v. Cool*, 12 Ill. 76. See *McCormick v. Tate*, *infra*.

A partition fence cannot be removed until the parties interested in its remaining are notified. *McCormick v. Tate*, 20 Ill. 334.

This case approves *Buckmaster v. Cool*, *supra*, which seems to oppose *Seeley v. Peters*, 10 Ill. 130, but *Buckmaster v. Cool* limits and qualifies the other to stock on the highway and commons and leaves the common law applicable to inside fences.

A party wrongfully removing a division fence is liable to the adjoining owner for damages done by cattle in consequence thereof. *Deimel v. Obert*, 20 Ill. App. 557.

A party removing a partition fence without giving the three months' notice required by statute is liable for damages sustained thereby to the crops. *Richardson v. M'Dougall*, 11 Wend. 46.

No recovery can be had in trespass *qu. cl. fr.* for damages to crops by cattle, caused by the removal of a fence, without showing how it was erected or

that defendant's cattle trespassed. *Richardson v. Milburn*, 11 Md. 340.

Damages for loss of crop may be recovered in an action of trespass *vi et armis* for removing a fence. *Hardin v. Kennedy*, 2 McCord, L. 277.

If one proprietor of a line fence take down a portion and notify the other to remove his cattle which he neglects to do, but shortly afterwards removes the remainder of the fence, he is liable for a subsequent trespass by his cattle on the other's land. *Van Slyck v. Snell*, 6 Lana. 299.

Where the defendant built his fence near the line on his own land and removed part of a line fence leaving a gap in plaintiff's field, it was the duty of the plaintiff to protect his crops in a reasonable time otherwise the defendant would not be liable. *Smith v. Johnson*, 76 Pa. 191.

Defects in partition fences.

An action either of case or trespass lies if the cattle of an adjoining owner trespassed on the other, where it was the duty of the owner of the cattle to fence. *Star v. Rookesby*, 1 Salk. 386.

This liability exists although the trespass is due to a breach in the fence made in the night-time by some party unknown. *Kron v. Kirkendall*, 1 Alb. L. J. 238.

Where horses break through defendant's portion of a division fence which is defective, a recovery may be had although plaintiff's part of such fence is also defective. *Osburn v. Adams*, 70 Ill. 291.

A person is not liable for cattle not under his control passing through his land on to that of another. *Cook v. Morea*, 33 Ind. 497.

The Michigan Laws, 1861, p. 291, providing that damages shall not be recovered for trespass by a beast where the partition fences are lawful, does not apply unless the adjoining proprietor improves his land, nor unless a portion of the division fence has been assigned to him to keep it in repair. The mere fact of an insufficient fence between adjoining premises will not bar a recovery as one adjoining owner is not bound to keep up the fence unless apportioned. *Aylesworth v. Herrington*, 17 Mich. 417.

The owner of land who fails to perform his duty in keeping up his share of a division fence, cannot recover in trespass for damages done by trespassing animals resulting therefrom. *Webber v. Cloason*, 35 Me. 26; *D'Arcy v. Miller*, 86 Ill. 102, 29 Am. Rep. 11; *Rangler v. McCreight*, 27 Pa. 95; *Phelps v. Cousins*, 29 Ohio St. 135; *Northcott v. Smith*, 4 Ohio C. Ct. Rep. 555; *Shepherd v. Hees*, 12 Johns. 439; *Roach v. Lawrence*, 56 Wis. 478; *Keenan v. Cavanaugh*, 44 Vt. 238; *Studwell v. Ritch*, 14 Conn. 232;

lawfully be at large within this state. Prior to the passage of this law, as we have seen, the territory in which they were prohibited from running at large was an exception out of the general rule. By this statute that rule was abrogated, and the general rule of law established that animals could not lawfully be at large within the state except within such political subdivisions as the people, by an affirmative vote, had formally expressed their desire that such animals should be permitted to run at large. All other running at large of stock upon the highways or commons, or upon the land of others than the owner, without license, is made unlawful. Undoubtedly, as suggested, in proceeding under the first section of the act, it will be necessary to show that the stock was at large by the permission or through the fault of the owner. To impose the penalty therein prescribed, some guilty intention to violate the

law, or willful neglect of the duty imposed, must be shown. *Case v. Hall*, 31 Ill. 632; *Kinder v. Gillespie*, 63 Ill. 88. But this does not affect the question being considered. The stock at large, with or without the knowledge or consent of the owner, is unlawfully and wrongfully at large, unless, by an affirmative vote, the county, city or village, precinct or town, has been excepted out of the general rule and policy of the state. It is thus seen that every reason assigned in former decisions for the exclusion of the common-law rule has ceased to exist. The effect of the Act of 1874 was to remove every impediment found by the court to exist in *Headen v. Rust*, *supra*, to the adopting of the common-law rule in this state. If the principle of the common law requiring the owner of cattle to keep them on his own land at his peril, which is based upon that other principle lying at the foundation of the right

York v. Davis, 11 N. H. 241; *Cowles v. Balzer*, 47 Barb. 552; *Br. Trespass*, pl. 120, citing 19 Hen. VI. 33.

If his part of a partition fence is out of repair the injured party must show that this was not the proximate cause of the trespass. *Phelps v. Cousins*, and *Northcott v. Smith*, *supra*.

Under N. Y. Laws 1888, p. 258, providing that if any person liable to contribute to a division fence shall neglect to make his portion, he shall not recover damages incurred, means incurred by his negligence and the owner of land damaged from stock coming across a boundary fence must show that they entered where defendant was bound to repair, in order to recover. *Deyo v. Stewart*, 4 Denio, 101.

Where an owner of land failed to keep up his share of the division fence under a parol agreement which took the place of statutory requirement as to both maintaining the fence, his tenant could not recover from the adjoining proprietor for damages caused by his cattle in breaking through that part of the fence which the landlord was required to maintain. *Raynes v. Chastain*, 68 Ind. 376.

If cattle cross a fence where it is the plaintiff's duty to keep it in repair, the defendant is not liable for damages done by such cattle, unless the fence is such as good husbandmen generally keep, since under *Indiana 1 Rev. Stat. 1876*, p. 496, a lawful partition fence should be such as to enclose and restrain sheep, unless by mutual consent they agree to build one to restrain horses, mules, or cattle, and under *Indiana Stat., 1 Gavin & Hord*, p. 343, each shall maintain equally partition fences unless otherwise specially agreed. *Hinshaw v. Gilpin*, 64 Ind. 116.

A person turning his cattle in his field when the division fence of an adjoining owner is insufficient, is not liable for damages under *Vermont Rev. Laws*, § 3184, providing that a person bound to support his part of a division fence is liable for damages to the adjoining owner for escape of stock. *Eddy v. Kinney*, 60 Vt. 554.

In an action of replevin for cattle held by the owner of land, it was said that the entry through a partition fence which it was the duty of the owner of the land to repair would not justify holding the cattle. *Akers v. George*, 61 Ill. 378.

The fact that stock was prohibited from running at large in a county will not relieve the landowner from his duty to maintain a partition fence under *Iowa Code*, § 1508, and § 1448, providing that where any one is injured by any domestic animal he may recover his damages, but if they were lawfully on adjoining land and escaped by negligence 22 L. R. A.

of the party injured in failing to repair his fence, he cannot recover. *Duffees v. Judd*, 48 Iowa, 256.

Under Ky. My. Sup. 272, regulating division fences, an adjoining owner cannot recover for damages from the cattle of the other unless the fence through which stock entered was a lawful one or was a division fence between the parties. *Wills v. Walters*, 5 Bush, 361.

But where a cow escaped through an insufficient division fence and a gate was left open by the defendant by reason whereof she strayed on the railroad track and was killed, both parties being alike bound to keep up the division fence, the defendant could not plead the plaintiff's failure to repair as contributory negligence. *Pitner v. Shinnick*, 41 Wis. 676.

The occupier of land owning cattle, and not the owner of the land, is liable for the damages caused by his cattle trespassing over a partition fence which is not divided as to having it kept up and maintained. But if the owner of the land has the custody and care of cattle belonging to another he will be liable. *Tewksbury v. Bucklin*, 7 N. H. 518.

An action on the case for not repairing fences, whereby another is damaged, can only be maintained against the occupier and not against the landlord who is not in possession. *Cheetham v. Hampson*, 4 T. R. 318.

Liability for trespass of stock of third party.

It seems that the owners of stock are only liable for the trespass of their own cattle, and are not liable for the trespass of stock owned by a third party unless such stock is held in common and controlled in common or held by another as agister; which see, under subhead—"As between owner and keeper."

A joint action for trespass from stock cannot be maintained against several owners of such stock. *Cogswell v. Murphy*, 46 Iowa, 44.

But where animals owned jointly by two persons trespass on the land of another the defendants are *prima facie* jointly liable. *Sickles v. Gould*, 61 How. Pr. 23.

And where cattle were "kept" upon a farm and three persons owned and "cultivated" the farm in "common" and each owned certain of the trespassing cattle, they may be sued jointly in an action for trespass committed by them in common. *Jack v. Hudnall*, 26 Ohio St. 255, 18 Am. Rep. 298.

The obligation of an adjacent owner for damages from stock does not apply to stock that does not belong to him passing through his farm. In such a case the owner of the stock is liable. *Little v. McGuire*, 43 Iowa, 447.

to possess and enjoy property in civilized society, "that each shall so use his own as not to inflict injury upon another," was in conflict with the legislation of the state, or opposed to its legislative policy prior to the Act of 1874, it cannot be said to be in conflict with, or opposed to, the policy of that law which makes the running at large of stock unlawful,—the rule and policy of the state. The principle of the common law is in harmony with existing statutes, and, as we have seen, applicable to the habits, circumstances, and conditions of the people. It is fairly to be presumed that this legislation was induced by the changed condition of the circumstances. The court had, just previous to the passage of the present law, which is sections 1 and 2 of the Act of 1872, (re-written,) while recognizing this change in the physical conditions of the state and the habits of its people, declined to recede from

the doctrine of *Seeley v. Peters*, because of the legislative policy of the state. And finding, as we do, that the legislature, by the act, removes the impediment found in *Headen v. Rust* to exist to the adopting of the common-law principle, it is to be presumed that the purpose was to render the principle applicable. We are of opinion that the effect has been that, by virtue of the statute adopting the common law, this principle has become the rule of decision in this state. That this was the intention of the legislature, is, we think, further evinced by the contemporaneous legislation. At the same session of the legislature section 20, chap. 54, ("Fences,") was passed in lieu of section 15, chap. 51, of the Revised Statutes of 1845. After re-enacting, in substance, the original section, providing for the recovery of damages done by domestic animals breaking into enclosures, the fence being good and suffi-

An action lies against one party alone where his cattle trespass with cattle of others. *Brady v. Ball*, 14 Ind. 817.

Where the damages to crops are caused by several lots of cattle and the amount done by those of separate owners cannot be distinguished, the damages may be apportioned. *Powers v. Kindt*, 18 Kan. 74.

Each owner of cattle is only liable for the damage done by his, where cattle of several parties trespass together. *Partenheimer v. Van Order*, 20 Barb. 478.

Damages from cattle of a third party after the original entry and trespass by cattle of another, cannot be recovered in an action against the latter, for the destruction of fences, grain, and herbage. *Berry v. San Francisco & N. P. R. Co.* 50 Cal. 435.

The owner of cattle is not liable in trespass, for damages made by cattle of others entering through the breach made by his cattle, unless under his control. *Durham v. Goodwin*, 54 Ill. 469.

Trespass is not the proper remedy for damages to crops by cattle of third parties where such damage occurred through failure of the defendant to put up a fence. *Crawford v. Hughes*, 8 J. J. Marsh. 433.

As between owner and keeper.

It seems that at common law the owner of cattle was not liable for trespass by them while the cattle were in the hands of an agister. It is believed that the cases holding *contra* arose from a mistake in the translation of the earliest cases. The preponderance of authority now seems to be that the owner is not liable when the stock is in the hands of the agister but that the agister is liable.

In *Rosell v. Cottom*, 31 Pa. 525, it is held that an owner of cattle is not liable for trespass committed by them while in charge of an agister, and it is said that neither *Dawtry v. Huggins*, Clayton, 33, Trials per Pais, 201, nor *Bateman's Case*, referred to in *Dawtry v. Huggins*, holds that either the owner or agister is liable.

As *Dawtry v. Huggins* is recognized as the leading case and is cited so frequently and has been so often incorrectly translated the following review of that case taken from *Rosell v. Cottom*, *supra*, will be of value:

"It is said in 1 Esp. N. P. 387, title, *Trespass*, that 'he who has the care, custody, or possession of the cattle who do the damage, is liable to this action;' and adds, 'as if agisted cattle break into another's land, the agister is liable to the damages. So if the hogs of A. were put into the yard of B. and they break into C's land, action lies against B. even 22 L. R. A.

though A's servant watches them, and so the owner had a special possession.' *Dawtry v. Huggins*, Clayton, 33, Trials per Pais, 201. In 2 Rolle, Abr. 546, it is laid down in one case, that if the beasts of A. agisted by B. trespass on the close of C. it is in the election of C. to bring trespass against A. or B. This is cited in Bacon's Abridgment, 498 (Bouvier, ed.), and is immediately succeeded by a reference to the case in Clayton as follows: 'But it is laid down in another case, that an action in such case lies only against the agister of the beast.' *Bateman's Case*, Clayton, 33. This is an error on the part of the author; *Bateman's Case*, is not reported in Clayton, it is referred to in the case of *Dawtry v. Huggins*. The principle, however, is correctly stated. But in Saunde's on Pleading & Evidence, *Bateman's Case*, Clayton, 33, is cited for authority, that either A. or B. the owner or agister, may be sued in trespass. This is also an error, both as to the principle and name of the case. *Dawtry v. Huggins* is the case reported in Clayton, 33, and is as follows: 'It was ruled upon an evidence if A. hath the custody of the goods of B. as here it was hogs put into the defendant's yard; if these do a trespass to the land of C. adjoining, A. shall be punished in trespass, and this though the owner's servant did wait upon them; and here it was proved the servant of A. did also wait on them and serve them, therefore they were in his special possession; and the like matter was relied on in the case of Stephen Bateman of Wakefield, for agist cattle, if they do commit trespass, the owner of the soil where, etc., shall answer for that trespass.' York Assizes, 1661. This case is accurately cited in 1 Esp. N. P. *supra*. Neither *Dawtry v. Huggins* nor *Bateman's Case* supports the doctrine that either the owner or agister of cattle may, at the election of the injured party, be sued for the trespass of agisted cattle. They are authority to the contrary. The case in Rolle, Abr. 546, refers to the Year Book, 7 Hen. IV., which does not sustain it, being but a question of pleading—whether a stranger to an award could plead it. There was no judgment in the case."

An owner of cattle is not liable in trespass for damages to crops by them while in the hands of an agister unless he selected a reckless and irresponsible agister. *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 551; *Osburn v. Adams*, 70 Ill. 291.

And the owner of cattle is not liable to a third party for trespass by the cattle, where they are in the possession of a tenant under a lease for years. *Atwater v. Lowe*, 39 Hun, 150.

The owner of stock who hires his stock to pasture in the field of another is not liable for their

cient, there was added: "This section shall not be construed to require such fence in order to maintain an action for injuries done by animals running at large contrary to law." And section 21 of the same chapter was also added, which provides that if any such animal shall break into an enclosure, etc., "or shall be wrongfully upon the premises of another," the owner or occupant of such premises may take and keep such animal until damages, with reasonable charges for keeping, are paid, etc. The provisions clearly contemplate that animals may be running at large contrary to law, and wrongfully upon the land of another irrespective of whether enclosed or not. In the case of *Lee v. Burk*, 15 Ill. App. 651, it was held, as early as 1884, that the effect of the Act of 1874 was the practical re-enactment of the common law principle and that since the passage of that act any locality where domestic animals are not permitted by a vote taken under the

statute to run at large, "every man must keep his cattle from his neighbor's premises, or respond in damages for injuries committed by them." The same rule is announced in *Birkat v. Williams*, 80 Ill. App. 451. Neither of these cases came to this court, and the conclusion there reached would seem to have been acquiesced in by the bar and people of the state. The question is for the first time presented to this court, since the passage of the present laws relating to domestic animals; and we are of opinion that the common-law rule has, since the passage of that act, been in force in this state, and that the courts below have therefore decided correctly.

Other errors are assigned, but, in view of the holding, they become wholly unimportant, and need not be considered.

The judgment of the Appellate Court will be affirmed.

Bailey, Ch. J., dissents.

trespasses over a division fence that the party in charge of the stock is bound to keep in repair. *Osburn v. Adams, supra.*

The person in control of cattle is liable for damages caused by their trespassing. *Kennett v. Durgin*, 59 N. H. 560.

A person having control of cattle on a leased farm is liable for damages caused by their trespasses and the fence statutes of Vermont do not relieve the owner of cattle from restraining them. *Moulton v. Moore*, 56 Vt. 700.

A person having the care and custody of cattle is deemed the "owner" under the Connecticut Statute, 218, providing that all damage done by cattle, horses, sheep or swine, when the fence is sufficient, shall be paid by the owners of them. *Smith v. Jaques*, 6 Conn. 580.

The owner in charge of cattle is liable for damages done by them on another's land, as where a cow was turned out of the pasture by a stranger and driven in the direction of plaintiff's close and being left strayed upon it. *Noyes v. Colby*, 80 N. H. 143.

But some decisions hold that the owner is liable for trespass by his cattle even if they are in the control of a third person. Thus in Massachusetts the owner of land who is damaged by cattle may look to either the owner of the cattle or the agister having their custody for damages—and this is not altered by Mass. Rev. Stat., chap. 113, § 4, providing for damages from trespassing cattle except from

failure of injured party to keep up his part of the division fence. *Sheridan v. Bean*, 8 Met. 384, 41 Am. Dec. 507.

So in New Hampshire the owner of sheep is liable for damages caused by them where they strayed from his pasture in the care of his tenant. "The ancient rule that the injured party may, at his election, maintain trespass against the owner or his bailee, is not so clearly devoid of modern reason as to require a decision that it has ceased to exist." *Blaisdell v. Stone*, 80 N. H. 507.

And in Maine either the agister or general owner of cattle is liable in trespass for damages done by the cattle under his charge. *Weymouth v. Gile*, 73 Me. 448.

In Missouri also it is held that the common-law liability of an agister for damages done by cattle in his charge is not repealed by Mo. Rev. Stat., § 5553, making the owner liable for damages where cattle break through a lawful fence. *Reddick v. Newburn*, 76 Mo. 423. See also *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 877.

Matters in regard to "sufficiency of fence or description of fence" are not included in this note but are treated in a note to *Clarendon Land Invest. & Agency Co. v. McClelland*, post, —.

This note is not intended to include certain other matters somewhat similar such as the Herd law, Impounding cattle, "Holding cattle taken damage feasant," "Vicious animals," and "Diseased animals." I. T.

RHODE ISLAND SUPREME COURT.

STATE of Rhode Island

v.

Town Council of SOUTH KINGSTOWN.

(.....R. L.....)

1. The jurisdiction of a court to compel town officers to call a new election for a member of the general assembly, as required by statute, is not defeated by the fact that each

house is the judge of the elections and qualifications of its members, and that the ordering of a new election may involve the question of the validity of a prior election.

2. **Mandamus is peculiarly the proper remedy** to compel a town council to call a new election, as required by statute, where a prior election is inoperative.

3. **The supreme court of Rhode Island holds it a matter of common knowl-**

NOTE.—The power of a court to decide as to the validity of an election and order a new one, when this question involves the title to a seat in the legislature, it will be seen, is decided in the above case 23 L. R. A.

affirmatively, thereby reversing on rehearing and against the dissent of one judge the first decision of the court.

edge that there are many Seventh Day Baptists, so called, living in Hopkinton, who observe Saturday as their Sabbath.

4. **An express repeal of all acts inconsistent** therewith contained in a statute amending a general law so as to create an exception for a particular town does not repeal a prior special statute, which in effect excepted another town from such general law.
5. **A statute providing for a new election** within ten days in a town divided into voting districts, does not violate the Rhode Island constitution, providing for a reopening of the polls in case there is no election, as this applies only to towns which are not divided into districts.
6. **The requirement of a new election within ten days**, in Pub. Stat., chap. 710, § 18, does not limit the power, but is intended to insure its timely exercise, and must be regarded, not as mandatory, but merely directory, where the time named has elapsed without an election.

(*Stiness, J., dissents from proposition 1.*)

(April 22, 1893.)

PETITION by the attorney-general for a writ of mandamus to compel defendants to order a new election to choose a senator and representatives to the general assembly of the state, for the reason that an election held on the first Wednesday in April, 1893, had failed of result, and that a subsequent election ordered by the council in pursuance of the statutory requirements had also failed of result, after which the defendants had refused to order another election, as they were required to do by the statutes. *Judgment for petitioner.*

Heard before Matteson, *Ch. J.*, and Stiness and Douglas, *JJ.*

Messrs. Arthur L. Brown and Charles E. Gorman for petitioner.

Mr. Benjamin M. Bosworth for respondents.

Per Curiam:

The court is of the opinion that it has no jurisdiction to grant the writ prayed for, since Const., art. 4, § 6, provides that "each house [of the general assembly] shall be the judge of the elections and qualifications of its members." Should the court by its writ require the town council to fix a day for a new election beyond the ten days specified in Pub. Laws R. I., chap. 710, § 18, of March 22, 1888, thereby impliedly holding that a new election so held would be legal and binding, and an election of senator and representative should then be made, the senate and house of representatives, being, under the provisions of the constitution quoted, judges of the elections and qualifications of their respective members, might nevertheless determine that such election was void, and thereby render the action of the court nugatory. The court is therefore of the opinion that it is for the general assembly to provide a remedy for the failure of the town council to call an election for senator and representative within the period limited, and not for the court. *Weeden v. Richmond*, 9 R. I. 128, 131. 98 Am. Dec. 373.

23 L. R. A.

A rehearing was subsequently granted after which on May 3, 1893, *Douglas, J.*, on behalf of the court, delivered the following opinion:

The question of jurisdiction lies at the threshold of this proceeding, and requires careful consideration. The constitution secures to the electors of the several towns the right to choose annually their senators and representatives in the general assembly. When the attempt to elect at the annual election meeting is unsuccessful, the constitution, where its provisions are applicable, or the statutes where it is silent, provide for adjournments of the election within certain limits. It is alleged that the statute relating to South Kingstown provides for successive elections until a result is reached. The town council refuse to call a new election, and the first ground taken in opposition to this application is that, if it is their duty to call such election, this court has no jurisdiction to ascertain and enforce that duty. This contention is based upon the fact that each house of the general assembly is the judge of the elections and qualifications of its members; and it is argued that, as the legality or illegality of the holding of the election itself may be a controlling issue in deciding upon the status of a person claiming to be elected, and so become an issue which the house in which he claims membership can alone decide, this court is precluded from any examination or decision of that question. It seems to us that this reasoning is fallacious, and involves assumptions which are subversive of the established distinctions between the several branches of the government. In the first place, it assumes that the decision of either house in the general assembly, acting under this power, has the effect of declaring the law. This is clearly not so, for the senate may seat a senator, and the house of representatives may refuse to seat a member-elect to that house, both coming with similar credentials from the same election; and the senate may specify as the ground of their action that the election was lawfully held, and the house may justify their action on the ground that the election was not lawfully held. Under the constitution, the action of each house with respect to the person claiming to be elected is valid and final; but none of the steps by which that action was reached, and none of the reasons assigned by either house, though they were spread by resolution upon its records, would have any force as declaring the law beyond the case then decided. Neither house of the legislature, by itself, can either make or authoritatively interpret the law as a rule for others. The making of the law under the constitution requires the concurrent vote of both houses; and the declaration or authoritative interpretation of the law, so as to form a precedent for subsequent cases, is for the courts. "To declare what the law is or has been is a judicial power; to declare what it shall be is legislative." *Cooley*, Const. Lim. 118. The late *Chief Justice Ames*, in *Taylor v. Place*, 4 R. I. 324, says (page 361): "Neither the convention which framed the constitution, nor its members,

nor the members of the general assembly, nor even the general assembly itself, can authoritatively expound the constitution; but only the courts." Maxwell, J., in *State v. Elder*, 81 Neb. 169, 10 L. R. A. 796, says: "But it is said that the legislature is a co-ordinate branch of the government, and that it is entitled to construe the constitution and statutes for itself, and therefore is not governed by the construction placed upon it by the supreme court. That it is a very important co-ordinate branch of the government is true, and the supreme court has never, except when its action was invoked in some of the modes pointed out by law, sought to construe statutes or constitutional provisions for the legislature. It is the province of the legislature, however, to pass laws, and of the courts to construe the constitution and laws. . . . It is the duty of the court to carefully investigate every case brought before it, and, after due consideration, place what is believed to be a correct construction upon the language of any of the provisions of the constitution or of the statutes and such construction binds every department of the government, including the legislature, and every person within the state. The construction given by the supreme court becomes the standard to be applied in all cases." And again (81 Neb. 191, 10 L. R. A. 808): "The legislature is a lawful body, elected and organized in pursuance of the constitution and laws for a lawful purpose; and while, within the limits and restrictions of the constitution, it may pass any measure it may deem proper, yet morally it is bound by the same considerations of fairness and justice which control the courts, and it is its duty to dispose of election contests in this manner."

It is doubtless in the power of either house of a future legislature, in its action upon election cases, to disregard equally the statutes and the decisions of the courts; but we see no reason in the fact that this power exists why the legislature should refrain from making laws or the courts from interpreting them. Neither of the co-ordinate branches of the government can anticipate error in the other, or assume that any other will act unlawfully; particularly when the constitution has afforded to the executive and legislative departments means of ascertaining the law when it is doubted and has not been declared by previous judicial decisions. Const. R. I. art. 10, § 8. Again, it does not follow from the fact that one tribunal is the ultimate judge of a question when it arises in reference to a matter proper for its decision that another tribunal may not entertain the same question independently when called upon to decide its own action, or to compel the action of parties lawfully in its jurisdiction; and the recurrence of the same question in both fora does not exclude from the jurisdiction of either tribunal a case normally within it. Such cases are provided for and anticipated in the constitution and in the statutes. For example, the constitution provides (art. 11, § 3) as follows: "The governor and all other executive and judicial officers shall be liable to impeachment but judgment in such cases shall not extend fur-

ther than to removal from office. The person convicted shall nevertheless be liable to indictment and punishment according to law." In such proceedings, whether in the assembly or in the court, questions of construction of the law of the case must arise. The senate, acting as a court to try the impeachment, may construe the law, and act in that proceeding upon such construction. The court trying the indictment may construe the same law, and its construction may determine the result of the trial. Each tribunal acts independently of the other in its own sphere, although in arriving at their several conclusions both may traverse in part the same ground. The statutes also provide (R. I. Pub. Stat. chap. 288, §§ 4, 5) that for officiating as moderator, warden, or clerk, or for allowing his name to be used as a candidate for any legislative office at an illegal election a person shall be punished by fine and imprisonment, and such cases shall be tried by the supreme court. In such a case the person elected may be rejected by the house, and so the legislative body may disapprove the election; and the court, in trying the officer or candidate, may rule the election legal. Shall the court refuse to acquit a person charged with crime because one house of the general assembly has construed the law differently from its meaning as ascertained by the court? If we allow, therefore, to the senate in impeachment cases and to either house in election cases the fullest judicial power which the constitution can be supposed to give them, these powers cannot be interpreted to interfere with the independent power of the court in cases properly before it, or to bind its action as precedents; and still less can such powers in the legislature be held to limit the powers or duties of the court when its action must precede the consideration of the question elsewhere. The holding of an election which the law requires is a necessary prerequisite to bringing before the house the question of the seating of the claimant of the office. To refuse to order the election is to decide the question in advance, and preclude the house from passing upon it at all. To order the election is one step towards bringing the final question of the seating of the claimant before the ultimate tribunal which has the power to decide it. If the people who have the right to elect are not secured in it by the action of the court, they will have lost it irretrievably. The cases, *People v. Hilliard*, 29 Ill. 418, and *State v. Elder*, quoted above, are very persuasive upon this point.

Passing, then, the objection that the construction of the law may arise hereafter in another tribunal, the question is whether the case alleged is a proper one for the issue of a writ of mandamus. One office of mandamus is to enforce obedience to statute law. In general, it lies to compel all officers to perform ministerial duties, as well as to compel subordinate courts to perform judicial duties; but not to compel the exercise of discretion in any particular way. It is not contended that the duty of the town council in this matter is other than ministerial. Mandamus is peculiarly the proper remedy when

other specific remedies are wanting. The remedy which a legislature can provide is to make a law applicable to the case. When the law is made, it is for the court to enforce it, or to punish for disobedience of it. In either function it must construe the statute *i. e.* declare what it means. In the present case, if the law already made imposes a present duty, no further legislation would make it more imperative. Any legislative act designed as a remedy must impose ministerial duties upon individuals. The court must again be resorted to, to compel such individuals to perform those duties. So that in the last analysis this remedy by mandamus is the only specific and efficient one, and if it is not afforded there are no other means which can give to the electors the opportunity to exercise such rights as the law gives them. If the law has not provided for this case, then the sole remedy is with the legislature; but, if the legislature has already expressed its will in the form of law, the sole specific remedy is in the court. It seems incumbent, therefore, upon the court to examine the statute, and see if it gives the right to the electors which is claimed,—not the right to have any particular person seated as a member of the legislature, but the right by lawful methods to express their choice of candidates for that office. It was suggested at the hearing that if the right were given by the statute in words which could not be misunderstood, mandamus would lie; but that, where the statute is not so plain as to exclude all debate as to its meaning, the court ought to refrain from construing it. We think this argument is self-destructive. The reading of any sentence in a living language requires some exercise of judgment and a choice of interpretations. It is hardly possible to write an English sentence in which words will not occur which have different meanings, and from these meanings the reader must select the one consistent with the subject and the context. If the court find a meaning in the statute, that, to them and as controlling their action, is the meaning of the statute, and the command of the law until it is repealed or amended. If the statute which is to be the rule of action of ministerial officers in important public duties presents difficulties of interpretation, it is all the more desirable that its meaning should be ascertained and more plainly declared by the court. These considerations lead us to reconsider the rescript which express the first impression of the court upon this branch of the case, and the petition will stand for argument upon the other questions involved.

Stines, J., dissenting:

I am unable to see that the court has jurisdiction of a petition like this. I do not doubt the authority of the court to issue a mandamus, which involves only a plain ministerial duty; for in such case the court exercises an executive, rather than a judicial, function. But here the controlling question is whether, if an election is called as prayed, the persons chosen at such election will be legally elected; for, unless this is so, clearly we have no right to command the calling of

an election. The gist of the matter, then, is the legality of the election, and this requires the exercise of a purely judicial function, namely, the construction of chapters 710 and 923 of the Public Laws. While this duty, in ordinary cases, is one which pertains exclusively to the court, a difficulty in this case, to my mind, arises from the fact that article 4, § 6, of the Constitution says: "Each house shall be the judge of the elections and qualifications of its members." In *People v. Hall*, 80 N. Y. 117, Folger, J., says: "It is conceded by the text-writers that each of these houses has the sole power to judge thereof, exclusive of every other tribunal,"—citing numerous authorities; and the opinion holds that a gift of judicial power to one co-ordinate body should be construed as reserving the particular power thus bestowed from the general conferment of judicial power, by the same instrument, upon another co-ordinate body. The judicial power thus reserved is general in its terms, and embraces questions of law as well as of fact. *Peabody v. Boston School Committee*, 115 Mass. 383; *People v. State Board of Canvassers*, 129 N. Y. 860, 875, 14 L. R. A. 646.

If this court decides that a member of the legislature may be legally elected, under our construction of the law, at the meeting we are asked to order, the house to which he is so elected may decide differently, and our order for an election will be rendered futile. Of course, the court, merely on account of such difference, should not be deterred from performing a plain duty, for even the two houses of the assembly may differ between themselves as to the validity of the same election; but the possibility of such difference, with the ultimate and controlling power given to another body, seems to me to afford an appropriate test of the question of the jurisdiction of this court. The form of the proceeding is within the jurisdiction of the court; but we must look to the substance of the proceeding, rather than to the form, and the substantial thing to be decided is the legality of the election. It is urged, however, that we do not decide the legality of the election, but simply declare the meaning of the law and require a ministerial duty to be performed accordingly. This seems to me to beg the whole question. It amounts to our holding that we have jurisdiction because we take it, or to administering the law as plain because we say it is plain, when in fact we have gone outside of the terms of the law, and put a judicial construction upon it, which must of necessity declare in advance the legality of the election; while the other tribunal, to whom the constitution has exclusively confided this class of cases, may decide exactly the reverse. We are not asked to order a duty which is apparent upon an inspection of the law, but a duty which can only be arrived at by a judicial interpretation of the law. When the law says a thing shall be done in a certain way, the court may say to the inferior officer, "Do it." It is a straining of terms to say that this is an exercise of judicial functions. And this was all that was done in *People v. Hilliard*, 29

Ill. 418, and *State v. Elder*, 81 Neb. 169, 10 L. R. A. 796, cited by the petitioner, where a certificate was ordered to be given in one case, and returns to be opened in the other, in order that the disputed question might be put before the house. The cases involved no prejudgment of the controversies. But here we must prejudice the validity of the election in order to be warranted in commanding it, and this, too, when we cannot enforce that judgment, nor make it binding upon anybody but the persons to whom our command is issued.

The supreme court of Pennsylvania, in *Re Contested Election of McNeill*, 111 Pa. 235, refused to entertain a writ of certiorari to review the conclusion of the court of common pleas in a contested election for senator, remarking: "Were we to assume jurisdiction to review this advisory action of the common pleas, whether we agreed or disagreed with it, our conclusion would be of no binding obligation on the house." So in *Peabody v. Boston School Committee*, *supra*, Gray, Ch. J., in speaking of a similar clause of the Constitution of Massachusetts, said: "The only form in which the justices of this court can properly express any opinion upon that subject is under that clause of the constitution which authorized each branch of the legislature, as well as the governor and council, to require it upon important questions of law and upon solemn occasions." In *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564, this court refused to issue a mandamus to the governor of the state, and Durfee, J., said: "One reason which has been suggested for refusing the writ is that, if granted, it would tend to provoke a conflict between the judicial and executive branches of the government,—a conflict in which the judiciary would prove the weaker party. Of course, in a case where the jurisdiction is clear, such a consideration could have no weight; but where the jurisdiction is problematical, the consideration affords a presumption which it would be unwise to disregard. For, as Blackstone has remarked, 'all jurisdiction implies superiority of power. Authority to try would be vain and idle without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it.' 1 Sharswood's Bl. Com. 242." It is no answer to this reasoning to say that the court can enforce its mandamus, when the fundamental question on which that mandamus must depend is the legality of the election. In the same line was *Weeden v. Richmond*, 9 R. I. 128, 98 Am. Dec. 373, where the court refused to express an opinion, under the assent of both sides, upon the ground that it had no jurisdiction to enforce it. The mandamus, of course, could have been enforced; but, the decision of the real question involved having been committed to the town council, the court would have no right to enforce it, and consequently lacked jurisdiction of the whole matter. The case, in this respect, seems to me to be identical in principle with the case at bar. The most urgent and plausible reason in favor of the jurisdiction of the court is upon the consideration of conse-

quences. It is urged that town councils, by refusing to call a meeting through ignorance or fraud, may deprive electors of their right to elect. This may be so. But it is a significant fact that in the numerous cases with which the reports of all the states abound in regard to calling elections not one can be found where a court has interfered by mandamus to order an election for senators or representatives. This shows one of two things: either this class of cases has not been considered to be within the jurisdiction of the court, or else official fidelity to an express law has thus far been adequate to secure the rights of the people. If it be the former, the inference is almost conclusive against jurisdiction; if it be the latter, the evil consequences which have been conjectured fade away, and we may safely say that the machinery of the law, which has gone on without a break down to the quadricentennial of the landing of Columbus, does not require the aid of the court by extraordinary remedy, and it may well be trusted for the future. The safeguard of the public is to be found in the general loyalty and honesty of its own officials, and, in exceptional cases, in the penalties provided for a breach of duty. As said in *People v. Fairchild*, 67 N. Y. 384,—a petition for mandamus against the attorney-general: "The attorney-general may have erred in judgment, and for this there is no remedy. If he had acted corruptly, or from unworthy motives, and the legal rights of the relator have been prejudiced, this is not an appropriate remedy." And in *State v. Albin*, 44 Mo. 846: "There is force in the observation of the petitioner's counsel that, if the registration officers refuse to perform their duty, injustice may be done, and a party may be deprived of what he is fairly entitled to. But that would not justify a court in giving validity to a palpably illegal act, though the illegality occurred in consequence of the negligence, wilful default, or even corruption, of officers whose duty it was to perform a given function or execute a trust." In the *Opinion of the Justices*, 10 Gray, 618, it is said: "If it shall be asked what shall be done if one of these apportionments and returns shall be discovered to be erroneous, one answer is that the constitution has provided no power competent to inquire into and correct any such error. . . . All public officers who are charged with the performance of public duties, and who may be guilty of fraudulent, wilful and corrupt conduct in the discharge of them, are liable to prosecution and punishment therefor, by impeachment or indictment; but even punishment for their misdeeds may not necessarily correct them, though it may afford an additional security to the public against their perpetration." It may also be said that, unless the court sets the machinery in motion, the question cannot be brought before the house for decision. But even this, to my mind, does not show that the court has jurisdiction. It is not the province of the court to compel the making of a moot case for another tribunal, nor to supply, in an exigency, a remedy which the law has not provided. The law may be so framed as to enable the

court to enforce its plain terms, but the court cannot take this power to itself by going outside of the constitutional limit to put a construction upon the law, and then administering it as if it needed no construction. Hence the court was correct in its original rescript that we had no jurisdiction, and that the remedy must be provided by law for the future; this instance being *casus omissus*.

These considerations result in the following propositions: The grant of judicial powers over elections, in the constitution, to the two houses of the assembly, is full, embracing law and fact, and is exclusive of all other jurisdiction. The process of the court may be involved in the execution of those requirements which are apparent on the face of the law, but not of such as can only be ascertained by a resort to interpretation of the law, because this is strictly a judicial power which is conferred upon the house, and thus reserved from the jurisdiction of the court. When the main question to be determined is the legality of an election, to which the issuing of process by the court is simply incidental, the court invades the jurisdiction conferred upon another body in prejudging the question; and this is made apparent by the fact that the court has no authority to enforce it in real judgment, the ultimate power being given to the other body. Jurisdiction to try and determine and power to enforce go together. Honesty of purpose and penalties for default, instead of the process of the court, are the sufficient trust of the public, as shown by the fact that the court has never been called upon to act in such a case before. For these reasons I am of the opinion that the court has no jurisdiction to pass upon the substantial question which is raised in this case.

After argument on the demurrer on May 12, 1893, **Rogers, J.**, delivered the opinion of the court:

The writ of mandamus prayed for is to compel the town council of South Kingstown to order a new election of senator and representative, under the provisions of R. I. Pub. Laws, chap. 710, § 18, of March 23, 1888. That chapter was passed at the January session, 1888, and is entitled "An Act to Incorporate the District of Narragansett, in South Kingstown, R. I." As its title indicates, it is a special statute, being applicable to the single town of South Kingstown, and at the time of its passage R. I. Pub. Stat., chap. 10, § 18,* was in force, providing, *inter alia*, that in case of there being no election of senator and representatives in towns divided into voting districts, district meetings held therein for the election of senator and repre-

sentatives shall, at the time of closing of the polls, therein prescribed by law, stand adjourned to the third day next from and after the day so appointed, unless the third day fall on Sunday or a holiday, and in that event to the Monday, or the day following said holiday, with like adjournment therefrom, but no adjournment or adjournments shall exceed seven days from the first meeting. Chapter 710, § 18, provides that, if no election shall have been made of senator and representative in the general assembly, or of either of them, in South Kingstown, upon the day appointed by law for any election, the said town council shall order a new election to be held not more than ten days from the first election, and so on until the election shall be completed. Chapter 710, § 18, then excepted South Kingstown by special statute from the operation of R. I. Pub. Stat., chap. 10, § 18, and applied a different provision of law to that town. April 30, 1890, the general assembly, by chapter 885 of the Public Laws, divided the town of Hopkinton into voting districts, and in the following March, before a single general election had been held it amended R. I. Pub. Stat., chap. 10, § 18, by R. I. Pub. Laws, chap. 923, of March 26, 1891, for the especial benefit of Hopkinton, by simply inserting therein the words: "Provided, however, that in Hopkinton there shall be no election held on Saturday, and if the third day fall on Saturday the meeting shall stand adjourned to the Monday following, being five days from and after the day so appointed." Chapter 923, § 2, was as follows: "All acts or parts of acts inconsistent herewith are hereby repealed, and this act shall take effect from and after its passage." It is contended in behalf of the town council of South Kingstown that chapter 923, § 2, repealed chapter 710, § 18, because the latter is inconsistent with the former. It is a matter of common knowledge that there are many Seventh Day Baptists, so called, living in Hopkinton, who observe Saturday as their Sabbath; and, as the election for general officers and for senator and representatives falls by statute on the first Wednesday in April, a three-days adjournment therefrom would invariably fall on Saturday, a day on which the Seventh Day Baptists, from principle, perform no secular duties. Doubtless, when chapter 885 was passed, dividing Hopkinton into voting districts, the three-day provision of chapter 10 escaped attention, and was not thought of until the next general election was approaching, when chapter 923 was passed for its benefit to remedy the difficulty. Does chapter 923 repeal section 18 of chapter 710? We think not. The general rule of interpreta-

*That section in full is as follows:

"In cities other than the city of Providence, and in towns divided into voting districts, ward and district meetings held therein respectively for the election of senator and representatives, and of members of the town council, or of any one or more of them, shall, at the time of closing the polls therein prescribed by law, stand adjourned to the third day next from and after the day so appointed, unless the said third day shall fall on Sunday or on a holiday, and in that event, to the Monday, or the day following said holiday, with like adjournment

therefrom, but no adjournment or adjournments shall exceed seven days from the first meeting.

Pub. Laws R. I., chap. 710, § 17, March 23, 1888, incorporating the district of Narragansett, in South Kingstown, R. I., provides: "The town council of South Kingstown shall proceed within two days next after the election to count the ballots in the same manner as is prescribed in section 14 of chapter 10 of the Public Statutes for the counting of ballots by the moderators and clerks of town and ward meetings and shall forthwith declare the result."

tion of statutes is that a general statute shall not repeal a special statute unless the purpose so to do is clearly manifest. *Providence v. Union R. Co.* 12 R. I. 473; *Verry v. Woonsocket School Committee*, Id. 578; *State v. Champlin*, 16 R. I. 453; *Tripp v. Torrey*, 17 R. I. 359. In the words of *Chancellor Kent*: "It is an established rule in the exposition of statutes that the intention of the language is to be deduced from a view of the whole and of every part of a statute, taken and compared together. The real intention, when accurately ascertained, will always prevail over the literal sense of terms."

The great object of the maxims of interpretation is to discover the true intention of the law." 1 Kent, Com. 461, 468. To the same purport is the language of *Chief Justice Durfee* in *Dawley v. New Shoreham Probate Ct.*, 16 R. I. 696, viz.: "We like always, in construing a statute, to take the words literally, assuming that the general assembly have chosen such as readily express their intent. This cannot always be done, for it sometimes happens that words have been used that, taken literally, are inconsistent with the predominating purpose. The cases are numerous in which the literal meaning of words and phrases has been restrained or extended by construction to suit the legislative intent." In New Jersey the rule is laid down by *Mr. Justice Magie* in *State v. Mullica Twp.*, 48 N. J. L. 447, 448 in this wise (omitting the names of numerous cases cited): "It has been well settled in this state that a general law on a subject-matter, which has been provided for in certain localities by special law, will not, although it contain a general repeal of acts inconsistent with it, annul or alter the special provisions in those localities [citing cases]; but if the general law expressly repeals the special laws, or shows by implication a manifest intent to supersede their provisions, the latter must yield" (citing cases). See also *Gurney v. Walsham*, 16 R. I. 698; *Dodge v. Walsham*, 16 R. I. 704; *Smith v. People*, 47 N. Y. 330. Is not the intention of the general assembly in the statutes referred to perfectly clear to every careful reader thereof? By chapter 710, § 18, it meant to apply a different rule to South Kingstown from the one then applicable to other towns. By chapter 923 it meant to make still another exception to chapter 10, § 18, in favor of Hopkinton, and to that end it simply amended said last-mentioned section; the very first words of chapter 923 being, "Section 18 of chapter 10 of the Public Statutes is so amended as to read as follows;" and then succeeds section 18 as amended, and in the next section is the repealing clause above referred to. What effect has the repealing clause? Clearly, it would seem that the old statute is repeated to show the context or proper position of the amendatory words as to Hopkinton, and for no other purpose. Repeating the words of chapter 10, § 18, in chapter 923, gave them no greater

force than they had before, unless, indeed, to render them applicable to an exceptional case like South Kingstown; but, inasmuch as by a special statute, viz. chapter 710, South Kingstown had been taken out of the operation of chapter 10, § 18, and the manifest purpose of chapter 923 was to remedy a defect as to Hopkinton, can there be any reasonable doubt that, if the general assembly had intended to withdraw the exception as to South Kingstown, it would, in the repealing clause of chapter 923, have said, "Section 18 of chapter 710, and all acts and parts of acts inconsistent herewith, are hereby repealed?" In our opinion, the repealing clause of chapter 923 was intended to apply only to the amendatory provision of chapter 10, § 18, relating to the town of Hopkinton.

It may be urged that, unless chapter 923, § 2, operated as a repeal of chapter 710, § 18, no effect could be given to the repealing clause of said chapter 923, since the first section of that chapter acted as a repeal by substitution of said chapter 10, § 18, and fully covered the provision as to Hopkinton. The force of this argument, to our minds, is neutralized by the fact that chapter 885, to the subject-matter of which chapter 923 so manifestly relates, had been so recently enacted, and also by the fact that the two chapters are *in pari materia*. Applying the rule laid down in *State v. Mullica*, above referred to, although the general repeal clause of chapter 923 would be broad enough to include chapter 710, § 18, if intended to apply thereto, we fall in the case at bar to find a general law expressly repealing the special law, or showing by implication a manifest intent to supersede its provisions. Otherwise than as applicable to the amendatory clause relating to Hopkinton, we think the repealing clause of chapter 923 is to be regarded as merely redundant.

Having determined that section 18 of chapter 710 is not repealed by chapter 923, the next question to be considered is whether section 18 of chapter 710 is constitutional. We see no reason for deviating from the conclusion arrived at in *Re Narragansett Election*, 16 R. I. 761, and we are therefore of the opinion that section 18 of chapter 710 is constitutional.

Another question is whether ten days having elapsed since the last election for senator and representative in South Kingstown, a new election can take place, under chapter 710, § 18. We are of the opinion that the provision as to time in said last-mentioned section is not mandatory, but is merely directory. *People v. Allen*, 6 Wend. 486; *In Re Census Superintendent*, 5 R. I. 614. The concluding words of the judges in *Re Census Superintendent*, it seems to us, are equally applicable to this case. viz.: "We think that here, without doubt, the purpose was not to limit the power, but to insure its timely exercise."

Demurrer overruled.

KENTUCKY SUPREME COURT.

Alexander SMITH, by Next Friend, *Appt.*,
v.

LOUISVILLE & NASHVILLE R. CO.

(.....Ky.....)

1. The wrongful act of a brakeman in kicking a boy off from a train in rapid motion for failure to pay his fare is within the scope of his employment, so as to render the railroad company liable for the act, where the brakeman's duties included the assistance of the conductor in collecting fares and ejecting persons who had no right to ride; but if he kicked the boy merely for the purpose of injuring him and not with the purpose of ejecting him from the train, the employer would not be liable.
2. The allegation of an answer that plaintiff voluntarily swung himself off the train, from which he alleges he was kicked, is not such an affirmative averment as requires a reply.
3. The use of the term "willful" in charging a railroad company with liability for the wrongful and negligent act of a brakeman, where the latter is not charged with committing the act willfully, does not show that the act is beyond the scope of his employment.

(October 10, 1896.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Franklin County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. James Andrew Scott and Rufus E. Dinkle for appellant.

Mr. John W. Rodman for appellee.

Hazelrigg, J., delivered the opinion of the court:

The plaintiff, a minor, suing by his next friend, alleged that while he was riding on the defendant's car from Collins' Station to the city of Frankfort, and while the car was in rapid motion, "the defendant willfully, negligently, and carelessly, by one of its agents and servants, to wit, a brakeman, kicked and threw" him off of its train, thereby breaking his arm and causing him other serious injury. The defendant denied these averments, and for a further defense alleged that the plaintiff secretly got on the rear end of one of its trains for the purpose of obtaining a free ride to Frankfort, and while so riding was discovered by its agent and servant, and thereupon voluntarily jumped off the car when in rapid motion, and whatever injury he receive was caused by his own act. The plaintiff, who was seventeen years of age, and whose home was in Frankfort, tes-

tified that he had been working at Collins' Station, some two miles west of the city, and, becoming sick, had gotten on the train for the purpose of stealing a ride home. That he was sitting on the platform, with his feet on the steps, and was discovered by the brakeman, who demanded his fare, and, upon his not having either a ticket or any money, he was told that he must get off. He replied that he would if the train would stop. The brakeman then said, "I thought I told you to get off of here," and at the same time kicked him upon the hip, which broke loose his hold on the railing, and he fell headlong on the ground, becoming unconscious. The brakeman testified that when he discovered the plaintiff, and ascertained that he had neither a ticket nor money, he told him that he must get off when the train got to the bridge, and that before he finished the sentence the plaintiff answered that he would get off now, and swung himself off in the cut, etc. He also testified, over the objection of the plaintiff, that "he had no authority from the conductor, or in any way, to put persons off the train," and that it was not his duty to do so, but that it was his duty to look after the comfort of the passengers, and to assist them in getting on and off at stations, and, in the absence of the conductor, to take up tickets and collect fares for the convenience of the conductor when he was engaged in other parts of the train; that if the plaintiff had paid him he would have handed it to the conductor, etc. The conductor testified that the brakeman had no authority to put any one off for nonpayment of fare, and he gave him no such instruction. "It is his duty," testified the conductor, "to look after the safety and comfort of passengers, to assist them on and off the train, and to assist me in ejecting an unruly passenger or one who has no right to ride, and, when I am otherwise engaged, to collect tickets and fare, and give them to me," etc. Upon this state of case the court told the jury that if they believed from the evidence "that it was a part of the duty of the brakeman, under his employment as brakeman, to eject or put off of the train persons who failed or refused to pay their fare, and they shall further believe that the brakeman kicked plaintiff off the cars while in motion, or used unnecessary force in putting him off the car, they should find for the plaintiff such damages as he sustained thereby not exceeding \$10,000;" but that if they believed from the evidence "that the plaintiff jumped off the train, and was not kicked off by the defendant's employe, they should find for the defendant," and, lastly, that if they believed from the evidence "that the brakeman was not charged or required, as part of his duty under his

NOTE.—The above very clearly and satisfactorily defines the liability of a railroad company for a tort of its brakeman in driving off a trespasser. It states the rule in a way to command assent although it seems to be somewhat stronger against the company than either *Planz v. Boston & A. R. Co.* 22 L. R. A.

(Mass.) 17 L. R. A. 685, or *Farber v. Missouri Pac. R. Co.* (Mo.) 20 L. R. A. 350, both of which are quite similar in their facts to the present case.

For a note covering the liability of masters for assaults by servants, see *Davis v. Houghtalin* (Neb.) 14 L. R. A. 737.

employment as brakeman, to put persons off the train who had failed to pay their fare, they should find for the defendant." The jury found for the defendant, and did so possibly because, without regard to the question of whether the brakeman kicked the plaintiff off the train, the proof submitted to them was conclusive that the brakeman had not been instructed to put persons off the train, and that such service was no part of his duty.

We are of opinion that the only question under the pleadings and the proof, which should have been submitted to the jury, was whether the brakeman kicked the plaintiff from the train. It was admitted that the brakeman was an employé of the defendant, and that the train was in rapid motion when the plaintiff got off or was kicked off. Whether or not what the brakeman did was in the scope of his authority or in the line of his employment was a question of law, or of mixed law and fact, to be determined by the court alone from the proof, if, indeed, that were required, and from common observation and experience, from knowledge of the nature of the business, and the daily practices which obtain in its exercise. Now, we know it to be held universally that the conductor, using no unnecessary force, may remove from the car persons who refuse to pay their fare, or are drunk, riotous, or unruly. It is an authority conceded to him,—indeed, a duty required of him,—and we would refuse to hear a railroad company's effort to plead or prove that it gave no such authority to its conductors, or did not charge them with such duties: and such, we believe, should be the rule with respect to brakemen. Even from the proof in this case, if we were to be so confined, we learn that he was to assist in the ejection of persons who had not the right to ride, and, upon the conductor's being engaged in another part of the train, he was to collect fares, and necessarily to enforce the regulations of the company to whatever extent the conductor might himself enforce them. We are so fully in accord with the view of the subject taken by the court in *Hoffman v. New York Cent. & H. R. R. Co.* that we quote its language: "It is conceded that authority in a conductor to remove a trespasser in a lawful manner, whether conferred by the rules or not, is implied, and is incident to his position. We think the same concession must be made in respect to the authority of a brakeman who finds a trespasser on the platform of a car. His duties do not primarily pertain to the protection of the cars against intruders; but he is a servant of the company on the train concerned in its management, and fully cognizant of the obvious fact that intruders who jump upon the trains for a ride without intention of becoming passengers are wrongfully there. Suppose a train was standing still, and a trespasser was put off by force by a brakeman, using no unnecessary violence, would it not be a good defense to an action against him for the assault that he was brakeman, and did the act complained of in that capacity, although without express authority? The implied authority in such a case is an inference from the nature of the business,

32 L. R. A.

and its actual daily exercise, according to common observation and experience. But, assuming authority in the conductor or brakeman to remove a trespasser in a lawful manner, the question remains whether, when a conductor or brakeman, without warning or notice of any kind, kicks a boy of eight years from the platform of a car while the train is running at a speed of ten miles an hour, he can be said to be acting within the scope of his employment, so as to make the company liable for the act. Assuming the case made by the plaintiff the act was flagrant, reckless, and illegal. But the point is, Was the act within the scope of the employment and authority? . . . In this case the authority to remove the plaintiff from the car was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it." And the company was held responsible. 87 N. Y. 25, 41 Am. Rep. 387. In this case the brakeman sought to collect the fare from the defendant, not for himself, but for the company. Upon his failure to pay, he sought to eject him from the car, not to accomplish his own ends, but to subserve the interests of the company. The company, it is true, owed the plaintiff no duty arising out of a contract to carry him or to protect him; nevertheless it might not violate the common instincts of humanity, or treat the plaintiff brutally, in its process of ejecting him from the car. Undoubtedly, where the object of the servant—the end sought to be reached by him—is the intentional or malicious infliction of an injury upon the person of the trespasser, the company is not liable for his act, and the existence of malice or intentional and willful design is a question of fact to be ascertained from all the circumstances of the case. If the end sought by the employé was the infliction of an injury,—if the purpose he had in view, when he kicked the plaintiff off the train, if he did kick him off, was to injure him,—then the company is not liable, because the act would be malicious and willful. But if the end sought was the ejection of the intruder,—if his purpose was devoid of evil design and merely to protect the interest of his employer,—then, however careless or reckless the means employed, the company is liable. The case cited by counsel for the appellee, and said to be directly in point, illustrates the distinction. The plaintiff, a boy and a trespasser, was driven off the train by a brakeman, who threw coal at him so as to cut and blind him, and cause him to slip and fall on the track, whereby he was injured. The company was held not to be liable. *Towanda Coal Co. v. Heeman*, 86 Pa. 418. So, this court, in the case of *Winnegar v. Central Pass. R. Co.*, 85 Ky. 547, said: "If one driving the cars for the corporation should leave the car and beat or abuse one on the sidewalk, the company would not be responsible." The principle involved and stated by this court in *Sherley v. Billings*, 8 Bush, 147, 8 Am. Rep. 451, in this language, that "if the servant goes beyond the scope of his employment he is as much a stranger to his master as to any third person, and his acts can in no sense be re-

garded as the acts of his master," is easy of announcement, but sometimes difficult of application. In all cases where unnecessary force is used it may be said that the servant acted without authority, express or implied. It can truthfully be claimed in all cases, and by all companies, that the authority of their servants is limited to the exercise only of force sufficient to eject a trespasser or passenger in a lawful manner. Nevertheless, the company is liable if the servant in the exercise of his authority, within the general scope of his employment and in the line of his duty, use unnecessary force, or use it under circumstances or at a time when the consequences ordinarily would be seriously injurious to the person ejected. In this case it does not matter that the act of ejection is charged in the petition as having been done willfully as well as negligently and carelessly. The willfulness is charged against the defendant company, and for this reason it cannot be said that the use of the term "willful" in itself shows the act to have been malicious on the servant's part, and therefore beyond the scope of his authority. The servant is not charged with committing the

act willfully, but the company is charged to have willfully done it by its agent and servant.

The allegation of the answer that the plaintiff voluntarily swung himself off the train is not such an affirmative averment as required a reply. The simple issue was presented whether or not the brakeman kicked him off. The statement that he swung himself off is merely in emphasis of the denial that he was kicked off. It is mere surplusage, and at any rate is in indirect conflict with the averment of the petition that the plaintiff was kicked off, and is in substance a denial of that averment. We are of opinion that the only issues to be submitted to the jury in this case are whether or not the brakeman kicked the plaintiff off of the car, as testified to by the plaintiff, and whether he did so with or without malice or evil design, as indicated above; and upon the determination of these issues depends the question of the company's responsibility for the plaintiff's injury.

Judgment reversed, with directions to proceed as indicated by this opinion.

MARYLAND COURT OF APPEALS.

Charles B. OLMSTEAD, *Appt.*,

v.

Henry BACH & SON.

1. A contract to hire a person for a year for a certain sum per week, payable weekly, is entire and indivisible.
2. One dismissed from service in breach of a contract to employ him for one year at a certain sum per week, payable weekly, can maintain but one action for the breach, and will not be permitted to maintain a separate action for each weekly installment as it falls due.
3. An employe wrongfully dismissed from service in breach of the contract of hiring cannot maintain an action for unearned wages as such, although he holds himself in readiness to perform his part of the contract, but his action must be for breach of the contract.
4. A satisfied judgment in an action by a discharged employe working under a contract for a year at a certain sum per week payable weekly, against the employer, based on the contract, is a bar to a subsequent action thereon, although the recovery was for only one week's salary.

(Page, J., *dissents*.)

(October 5, 1893.)*

APPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendants in an action brought to recover damages for breach of contract of employment. *Affirmed*.

NOTE.—The above case which as first reported in 18 L. R. A. 53, seemed somewhat inconsistent with that of *Keedy v. Long* (Md.) 5 L. R. A. 759, is now reversed on rehearing.
22 L. R. A.

The facts are stated in the opinion.

Messrs. Charles Marshall and William L. Hodge for appellant.

Messrs. Thomas M. Lanahan and Frank Gosnell, for appellees:

The contract under consideration is an "entire contract," and in the dismissal of the appellant by the appellees there was but one breach, and, therefore, there can be but one cause of action, and the recovery before the magistrate, and the satisfaction of that judgment, is a bar to the present action.

Dugan v. Anderson, 86 Md. 535, 11 Am. Rep. 509; *McCullough Iron Co. v. Carpenter*, 67 Md. 554; *Keedy v. Long*, 5 L. R. A. 759, 71 Md. 385; *Keedy v. Crane*, 71 Md. 395; *Clossman v. Lascote*, 28 Eng. L. & Eq. 140; *Jamas v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 831; *Booge v. Pacific Railroad*, 33 Mo. 212, 82 Am. Dec. 169.

In *Keedy v. Long*, and *Keedy v. Crane*, *supra*, the doctrine of "constructive service" for the first time was urged upon this court, and counsel for Miss Long and Miss Crane relied upon the cases of *Armfield v. Nash*, 31 Miss. 361; *Colburn v. Woodworth*, 31 Barb. 381; *Thompson v. Wood*, 1 Hilt. 97, and *Fowler v. Armour*, 24 Ala. 199, in support thereof, but this court considered the doctrine utterly indefensible and untenable Judge McSherry delivering the opinion, that "it was formerly determined in England, and followed in some cases in this country, that in such a case the servant holding himself in readiness to perform his contract,

*A decision was reached in this case and an opinion handed down by Judge Page on November 18, 1892, in which the judgment of the lower court was reversed. 18 L. R. A. 53. A petition for a rehearing was subsequently filed which resulted in the opinion given herewith.

and being able and willing to do so, was entitled to recover his wages for the whole term, upon the ground of constructive service. This doctrine had its origin in a decision by Lord Ellenborough at *nisi prius*, in *Gandell v. Pontigny*, 4 Campb. 375, 1 Stark. 198. It was followed in other cases, then doubted, again adopted, but finally repudiated altogether in *Elderton v. Emmens*, 6 C. B. 160; *Goodman v. Pocock*, 15 Q. B. 576.

The cases in New York have been expressly overruled by the court of appeals of that state in *Howard v. Daly*, 61 N. Y. 373, 19 Am. Rep. 285; and the remaining cases in Mississippi and Alabama were repudiated and disapproved by that court in that case, and by the supreme court of Ohio in *James v. Allen County*, *supra*; and by the court of appeals of Illinois in *Jones v. Duntun*, 7 Ill. App. 580.

McSherry, J., delivered the opinion of the court:

The declaration in this case alleges that the plaintiff and defendants entered into a written contract under seal, whereby the latter agreed to pay to the former a salary of \$50 per week, payable weekly, as compensation for the services of the plaintiff as cutter in the business of the defendants, and that the plaintiff agreed, in consideration of said salary, to devote his time and attention to the business of the defendants, as is usual in conducting a merchant tailoring business. The agreement further provided that the contract should continue in full force for one year from February 1, 1892, to February 1, 1893. The declaration also avers that the plaintiff entered into the service of the defendants under the above contract, and performed his duty thereunder until April 5, 1892, when the defendants refused to permit him to perform his part of said contract, or to pay him the salary to which he was entitled thereunder, after April 9, 1892. It further alleges that the plaintiff has always been ready and willing to perform his part of the contract, and to render the services which he agreed thereby to perform, and has always held himself in readiness and offered to perform said services according to said contract, but that the defendants have refused to permit him to perform the contract on his part, and have refused, and still do refuse, to pay him the salary of \$50 a week, as therein provided, since April 9, 1892. It concludes with a claim by the plaintiff "that there is due and unpaid to him of the amount payable to him under said contract the sum of \$250, being the amount of said weekly salary stipulated to be paid by said contract to the 25th of May, 1892."

Among the defenses relied on the defendants pleaded that on April 5, 1892, they dismissed the plaintiff from their service, and at the same time paid him all wages or salary due to him under the contract down to April 9, the end of the week terminating four days after his dismissal; that nine days after said dismissal the plaintiff brought suit against the defendants before a justice of the peace upon the identical contract and cause of action sued on in the case at bar, and that thereafter the plaintiff recovered judgment in that

suit for the sum of \$50 and costs, which judgment was fully paid and satisfied by the defendants before the pending action was brought. To this plea the plaintiff replied that after the pretended dismissal of him by the defendants he, notwithstanding the dismissal, presented and offered himself to the defendants as ready and willing to perform his part of the contract set forth in the declaration, and did in fact continuously so offer to perform the same, and that the suit mentioned in said plea was a suit for his salary for one week under said contract. This replication was demurred to. The Baltimore city court sustained the demurrer, and entered judgment thereon for the defendants. The plaintiff thereupon took this appeal from that judgment.

It is apparent from this outline of the pleadings that the wages or salary now sought to be recovered, as well as those sued for before the magistrate, were not wages or salary which had been actually earned, but were wages or salary for work and labor that the plaintiff was ready and willing, but had not been allowed, to perform. That the contract declared on was broken by the defendants when they dismissed the plaintiff is conceded, or, at least, is not denied, by the pleadings. For that breach the plaintiff was clearly entitled to recover. But to what extent, and how often? The answer to these inquiries involves at the very outset an examination of the scope of the agreement set forth in the declaration, as to whether it is an entire or divisible one; because, if it be entire and indivisible, and there has been but a single breach, but one action can be brought therefor. The contract is one of hiring. Under it the plaintiff was employed as a cutter at \$50 per week, payable weekly, and it was expressly provided that this employment and this weekly payment of wages should continue for one year. The duration of the employment was as much an integral part of the agreement as the stipulation relating to the amount of the compensation and the stated periods for its payment. It was not a hiring by the week, payable weekly, because it was explicitly declared that it should continue for a year. It was not fifty-two separate, independent contracts, but one indivisible agreement, covering the period of a year, and making provision for the weekly payment of wages. The consideration for the plaintiff's undertaking was the defendants' agreement to pay him \$50 a week and to employ him as a cutter for one year. The latter was as much a part of the consideration promised him for entering the service of the defendants as the former, for it would be wholly unreasonable to assume, as any other construction must, that it was the intention of the parties that the hiring should be for a week, determinable by notice, or else merely a hiring at will, as it undoubtedly would have been had there been no stipulation as to its duration. *McCullough Iron Co. v. Carpenter*, 67 Md. 554. The good sense and reasonableness of the particular case must always guide and govern courts in determining whether a contract is divisible or entire. *Dugan v. Anderson*, 36 Md. 585, 11 Am. Rep.

500; *Jones v. Dunn*, 8 Watts & S. 109; *Robinson v. Green*, 3 Met. 159. Whether a contract must be sued on as an entirety or is divisible and can become the foundation of separate suits for the infraction of independent stipulations depends on its terms; and, in order to arrive at a correct construction, due regard must be had to the intention of the contracting parties as revealed by the language which they have employed, and the subject-matter to which it has reference. *Broumel v. Rayner*, 68 Md. 47; *Brewster v. Frazier*, 82 Md. 808; *Brantly, Cont.* 216. Obviously the appellant expected and contracted for continuous employment for a year, and not for a weekly or still more precarious hiring at will, and the appellees contemplated securing a permanent cutter in their tailoring business. Certainty in the duration of the employment, as well as exemption from the annoyance incident to frequent changes in such an employ, were manifestly within the contemplation of both of the parties to the contract when it was entered into, and with these considerations before them it seems to us clear that the appellant never supposed himself only hired by the week or at will, and equally clear that the appellees never understood that their employé was at liberty to terminate the engagement upon a week's notice. The hiring was for a year and the wages were payable in weekly installments of \$50 each. The subsidiary provision as to the payment of the wages each week does not split up the contract into as many agreements as there were payments or periods named for payments to be made (*Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366); nor is it inconsistent with a yearly hiring (*Norton v. Conwell*, 65 Md. 362; *Fawcett v. Cash*, 5 Barn. & Ad. 908); for, as said by Lord Kenyon in *King v. Birdbrooke*, 4 T. R. 245: "Whether the wages be to be paid by the week or the year can make no alteration in the duration of the service if the contract were for a year." The contract is, then, an entire, and not a divisible, one. It does not consist of distinct and independent subjects which admit of being separately executed and closed. A dismissal during the year was consequently a breach of the contract as an entirety, and furnished the party not in default with a good cause of action. The contract being entire, and having created the relation of master and servant, and the latter having been, as averred in the pleadings, dismissed before the expiration of the term for which he had been engaged, what redress was open to him? Obviously but one remedy for the recovery of the whole damage sustained by him. In *Keedy v. Long*, 71 Md. 389, 5 L. R. A. 759, this court said: "A servant wrongfully discharged has only two remedies open to him at law, either of which he may pursue immediately on his discharge. First, he may treat the contract as continuing, and bring a special action against the master for breaking it by discharging him, and this remedy he may pursue whether his wages are paid up to the time of his discharge or not; or, secondly, if his wages are not paid up to the time of his discharge, he may treat the contract of hiring as rescinded, and sue his

master on a *quantum meruit* for the services he has actually rendered. These two alternative remedies are the only ones open to him. Mayne, Damages, 159. Upon a *quantum meruit* he can only recover for the services actually rendered. *Archard v. Hornor*, 3 Car. & P. 349; *Smith v. Haywood*, 7 Ad. & El. 544. In an action for damages for a breach of the contract he will be entitled to recover the actual damages he has sustained, in addition to the wages earned; and in case he has by diligence been unable to secure other employment during the entire term, he can recover the entire wages, less the amount he has actually earned during the interim, or the amount he might have earned by the exercise of proper diligence in seeking for employment in the same or similar business. Wood, Mast. & S. 249; Mayne, Damages, 158; *Elderton v. Emmens*, 6 C. B. 160; *Goodman v. Pocock*, 15 Q. B. 576." *Jafray v. King*, 84 Md. 217. In the case at bar the pleadings show that all wages earned by the appellant had been paid to him in full up to the end of the week during which he was dismissed. When he brought suit before the justice of the peace he had earned no wages which had not been paid him, for he had rendered no services after his dismissal. He was, therefore, at that time in no position to sue upon a *quantum meruit* for the value of services actually performed, and he could only recover in that suit damages for a breach of the entire contract, unless the contract was divisible into fifty-two independent agreements, each capable of being separately executed and closed. His wages having been paid in full up to the time of his dismissal, he had no option as to remedies which he might pursue. He was confined to an action for the recovery of damages which he had sustained by a breach of the contract, because successive actions, instituted for the recovery of fractions of the same aggregate damages, cannot be supported. His suit before the magistrate was, whatever it purported to be, a suit for the breach of the contract of hiring. It could have been for nothing else, except for services never rendered, the value of which was measured by the price agreed to be paid for them when actually performed. There was but one dismissal and but one breach, and the plaintiff could not split up his cause of action, recovering a part of his damages in one suit and the remainder afterwards in other suits for that single breach. It is an ancient and familiar rule of law that only one action can be maintained for the breach of an entire contract, and the judgment obtained by the plaintiff in one suit may be pleaded in bar of any second proceeding. Sedgw. Damages, 224; *Dugan v. Anderson*, 36 Md. 584, 11 Am. Rep. 509. It was the appellant's plain duty to include all that belonged to that cause of action—that one breach—in the first suit, so that one proceeding and one recovery should settle the rights of the parties. It would be at his own risk and peril if he negligently or ignorantly omitted a part of what might properly have been embraced in the cause of action in the first suit. Or, as expressed by Lord Camp-

bell in *Clovesman v. Lacoste*, 28 Eng. L. & Eq. 140, "if the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract, and that he may recover therein all the damages that may ensue to him in consequence." Again, as clearly put by the supreme court of Ohio in *James v. Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821: "As a result of the authorities, as well as upon principle, we are satisfied that in such a contract as the one in the case at bar, where the employé is wrongfully dismissed, but all wages actually earned up to that time are paid, the only action the employé has, whether he brings it at once or waits until the entire period of time has expired, is an action for damages for the breach of contract; and the measure of damages will be the loss or injury occasioned by that breach, and one recovery upon such claim, whether the damages be denominated 'loss of wages' or 'damages for breach,' is a bar to a future recovery." Wood, Mast. & S. 246.

It is to be observed that the case at bar is distinguishable from a class of cases alluded to in *Clovesman v. Lacoste*, *supra*, where, there having been no dismissal of the servant, the only breach of the contract consisted in the failure of the master to pay, when due, the wages or installments of wages actually earned. In those instances, the contract not having been broken by the dismissal of the servant, and he not having been prevented from performing his work, and the relation of master and servant still continuing, an action on the contract could be maintained to recover the salary or wages due for a past stated period. *Keedy v. Long*, 71 Md. 393, 5 L. R. A. 759. But a dismissal of the servant, or, differently stating the same thing, a refusal to allow him to continue to work, while not a rescission of the contract, is a breach of it that will authorize a recovery of damages for the whole injury which the servant may have sustained. And such a suit may be instituted though the time for the completion of the service has not elapsed. *Keedy v. Long*, *supra*. This conclusion does not involve an application or adoption of the principle laid down in *Hochster v. De La Tour*, 20 Eng. L. & Eq. 167.

The law of the case just cited relates to cases where there is a precontract for future services, or the performance of some act or duty at a future period, and where performance cannot be commenced, and was not by the contract contemplated, until that period arrives, and where the promisor, prior to that time, announces his intention not to abide by the contract. But that is not this case, where performance had been commenced, and the plaintiff was prevented by the defendants from further executing it.

But it is insisted the pending suit is not for damages for dismissing the plaintiff, but that it is an action on the contract to recover the plaintiff's salary for the five weeks following the one for which a recovery had been had before the justice of the peace. And the right to recover this salary as salary,

and not as damages for a breach of the contract, is based upon the plaintiff's readiness and willingness to perform his work, and not upon his actual performance of it; in other words, he seeks to recover installments of salary for work which he never performed, and to recover them merely because he was willing to perform it, but was prevented from doing so. As thus presented, under a contract that is indivisible, and which covers a hiring for a whole year at a salary payable in weekly installments, it is a claim to recover for constructive services. Had the action been *indebitatus assumpsit*, it is conceded the doctrine of constructive service would be involved, but, as the suit is on an express contract prescribing the amount of each installment of the compensation, it is urged that the defendants are liable for the stipulated price of the services the plaintiff agreed to perform, but never did perform, and that they are liable, because the plaintiff was not permitted to perform them, though ready and willing to do so. In both *indebitatus assumpsit* and in an action on an express contract to recover wages for services which have not been performed, a recovery is sought for the amount that the plaintiff would have been entitled to recover had the services in fact been rendered; and such recovery is sought, not because the services have been rendered, but because the plaintiff was ready and willing to render them, and the defendant prevented him. In both instances, therefore, the readiness of the plaintiff to perform and the refusal of the defendant to allow a performance, constitute, when unearned wages are sued for, the ground of the actions, though the forms and the allegations of the pleadings are widely different. That which is sought to be recovered in both cases is the same thing, viz. wages as wages, though in the one case it is under the allegation of work and labor done, which allegation is attempted to be supported by the proof of a readiness and willingness to perform; and in the other it is under an allegation of a refusal to allow that work to be done which the plaintiff had agreed to do, and continued ready and willing to do. Salary as salary, definitely fixed and agreed to, and not a sum of money as unliquidated damages for a broken contract of hiring, is what is sued for under the declaration in the case at bar. It is a suit to recover wages, though no services have been rendered at all, and, if maintainable in that form, would preclude the defendants from showing by evidence that the plaintiff could have secured other similar employment during the time covered by the contract; because, if wages, distinctively as wages, can be recovered under such conditions, instead of damages for a wrongful discharge or dismissal, they must be recovered as specific, ascertained debts, the amount of which is fixed by the contract, and is in no way subject to abatement by circumstances which would reduce the damages in a suit founded on a refusal by the defendant to allow the plaintiff to perform his part of an indivisible contract of hiring. In other words, if under such a contract the plaintiff is entitled to recover wages

as wages upon a mere offer to perform, he must be entitled to recover just precisely the wages named in the contract, even though he might have obtained other work of the same kind, at the same price, during the period for which he claims his wages under the contract. This would be recovering for constructive services. That doctrine has been altogether repudiated, both in England and in this country. *Keedy v. Long*, 71 Md. 389, 5 L. R. A. 759. "The doctrine of constructive service has, in England, where it had its origin, been repudiated, and the law there established that a servant wrongfully discharged has not an action for wages, unless something is due for past services actually rendered; and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of *indebitatus assumpsit*." *James v. Allen County*, *supra*; *Howard v. Daly*, 61 N. Y. 362,—where *Gandell v. Pontigny*, 4 Campb. 375; *Thompson v. Wood*, 1 Hilt. 96, and the cases in Alabama, Mississippi, and Wisconsin are distinctly disaffirmed, and the doctrine of constructive service declared to be "so opposed to principle, so clearly hostile to the great mass of authorities, . . . that" it could not be accepted. We hold, then, that the contract declared on is entire and indivisible; that for the breach of it by the defendants in discharging the plaintiff before the expiration of the year, or in refusing to allow him to work, a right of action arose, not for unearned wages or

salary, as such, but for damages for a breach of the contract, the measure of which damages would be the stipulated salary for the stipulated period of one year, less the amount the plaintiff actually earned, or might, by due and reasonable diligence, have earned, after his dismissal (*Jaffray v. King*, 34 Md. 223); that, as there was but one breach, but one action could be maintained therefor; that, having recovered before the magistrate in a suit founded on that breach,—for he could have lawfully recovered upon no other theory,—he is barred, upon the satisfaction of that judgment, from again suing on the same contract, because he could have recovered in one action all the damages he sustained, including that for which he now sues; and that, if the pending action be treated as a suit to recover for installments of salary under the contract, no services having been rendered by him, it must fail, because the services were never rendered, but were constructive. The plaintiff elected to sue before a justice of the peace for a portion of the amount he might have recovered had he claimed more and sued in a different forum, and he must abide the result of that election. He is not at liberty to split up his cause of action into fragments, and successively sue for each, when there has been but one breach of an entire and indivisible contract. As we agree with the court below, its judgment will be affirmed.

Judgment affirmed with costs in both courts.

Page, J., dissents.

ALABAMA SUPREME COURT.

B. F. CHAPMAN, *Appt.*,
v.
FIRST NATIONAL BANK OF MONTGOMERY.

(.....Ala.....)

A statute giving livery-stable keepers a lien for the keeping of animals placed in their charge, without the knowledge or consent of the mortgagee, does not make such lien superior to that of a prior duly recorded mortgage on the animals, even though the law day has passed and the animals are still in the mortgagor's possession.

(July 27, 1888.)

APPEAL by defendant from a judgment of the Circuit Court for Montgomery County in favor of plaintiff in an action brought to recover the money which defendant had received for the sale of certain mules upon which plaintiff held a mortgage and which had been placed in possession of a liveryman to be cared for, who claimed a lien superior to plaintiff's mortgage. *Affirmed*.

Appellee held a mortgage executed on the

NOTE.—On the disputed question of priority between agister's liens and chattel mortgages, see, in connection with the present case, that of *Wright v. Sherman* (S. Dak.) 17 L. R. A. 792, and *note*. 22 L. R. A.

See also 40 L. R. A. 761.

31st day of August, 1888, by one R. J. Chambers, on certain mules to secure a debt due by Chambers to appellee. This mortgage was duly recorded in the proper office. Subsequently, and while the mortgage remained unpaid but after it had become due, Chambers put the mules in the livery stable of John H. Clisby to be kept and fed. For this service Chambers became indebted to Clisby in the sum of \$200, for the satisfaction of which Clisby claimed a lien on the mules. The mortgagor and Clisby entered into an agreement that the mules should be sold by defendant and the proceeds held by him for the benefit of whichever party should be entitled to them. After the sale, the bank brought this action to recover the proceeds.

Further facts appear in the opinion.

Mr. A. A. Wiley, for appellant:

Animals must be preserved and their preservation really inures to the benefit of the mortgagee; the lien is a statutory creation and a mortgage, executed while the statute is of force, is taken in subordination thereof, and is subject to such statute as a general rule of law. The mortgagee takes his mortgage with full knowledge of, and subject to, the statutory lien of the liveryman as he would to a common-law lien.

Hammond v. Danielson, 126 Mass. 294; *Colquitt v. Kirkman*, 47 Ga. 556; *Smith v. Stevens*,

36 Minn. 803; *Case v. Allen*, 21 Kan. 217, 80 Am. Rep. 425; Code, § 8089.

In *Johnson v. Hill*, 3 Stark. 172, it appeared that one who had obtained wrongful possession of a horse, took it to a livery-stable keeper, and left it; and it was held that a lien existed in favor of the latter against the owner.

In *Williams v. Allsup*, 10 C. B. N. S. 416, a shipwright, who had done repairs on a vessel at the instance of the mortgagor, was given a lien paramount to that of the prior mortgage; and the same conclusion was reached in the case of *Scott v. Delahunt*, 5 Lans. 372.

See also Herman, Chat. Mortg. 308; *Brown v. Holmes*, 18 Kan. 492; *The St. Joseph*, 1 Brown, Adm. 202; *The Granite State*, 1 Sprague, 277; *Donnell v. The Starlight*, 108 Mass. 227-233; Jones, Chat. Mortg. §§ 473-475. The act is constitutional.

Smith v. Stevens, *supra*; *Laird v. Moonan*, 32 Minn. 358.

The statute (section 3089 of the Code) gave Chambers as mortgagor or bailor the right to put a lien on the mules in question in order to preserve them.

Colquitt v. Kirkman, 47 Ga. 558.

Messrs. Tompkins & Troy, for appellee: The law gives to the livery-stable keeper a lien on stock kept and fed by him, but it nowhere provides that it shall be superior to the liens created before his, of which he had notice, actual or constructive.

Code 1886, §§ 3089-3090; *Bissell v. Pearce*, 28 N. Y. 252; Jones, Liens, § 691.

To give it such construction would make the act unconstitutional. The legislature would have no authority to pass a law authorizing the divestiture of a title without the consent of the party whose title was divested; or without giving him a day in court.

Wimberly v. Mayberry, 14 L. R. A. 805, 94 Ala. 240.

Haralson, J., delivered the opinion of the court:

The only question presented by this record is, Has the statutory lien of a livery-stable keeper, given by section 3089 of the Code, for the keeping and feeding of stock, precedence over a mortgage on the animals previously given by their owner, the law day of the mortgage having passed and the animals remaining in the possession of the mortgagor? That section reads: "Any keeper, owner, or proprietor of a livery stable shall have a lien on all stock kept and fed by him, for the payment of his charges for keeping and feeding such stock, and he shall have the right to retain the stock, or so much thereof as may be necessary, for the payment of such charges." This question is an undecided one in this state, and there is a conflict in the authorities on it. Mr. Jones, in his work on Liens, with these conflicting authorities before him, says: "A chattel mortgage upon a horse is superior to a subsequent lien of a livery-stable keeper, where the horse is placed in the stable by the mortgagor after the making of the mortgage, without the knowledge of the mortgagee," and, as reasons leading to this conclusion, he adds: "It is not to be supposed that a statute giving a lien for the keeping of ani-

mals was intended to violate fundamental rights of property, by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights, as against the mortgagee, by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien, without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears, from the language of the statute, to be unavoidable." In support of these views he cites *Jackson v. Kasseall*, 30 Hun, 281; *Bissell v. Pearce*, 28 N. Y. 252; *Charles v. Neigelsen*, 15 Ill. App. 17; *Sargent v. Usher*, 55 N. H. 287, 20 Am. Rep. 208; *State Bank v. Love*, 22 Neb. 68; *Easter v. Goyne*, 51 Ark. 222; *McCreary v. Gaines*, 55 Tex. 485, 40 Am. Rep. 818; *Small v. Robinson*, 69 Me. 425, 81 Am. Rep. 299; Jones, Chat. Mortg. § 474.

The contrary construction, sustained by respectable authority, proceeds upon the idea that the animals must be preserved, and that their preservation inures to the benefit of the mortgagee; that the lien is of statutory creation, purely, and a mortgage executed while the statute is of force is taken in subordination thereof, and is subject to such statute, as a general rule of law; that a mortgagee, when he takes a mortgage, takes it, in legal contemplation, with full knowledge of, and subject to, the rights of a person who may keep the property at the request of the mortgagor or other lawful possessor, under the statutory lien, as he would do, to a common-law lien. *Hammond v. Danielson*, 128 Mass. 294; *Colquitt v. Kirkman*, 47 Ga. 555; *Smith v. Stevens*, 36 Minn. 308; *Case v. Allen*, 21 Kan. 217-220, 80 Am. Rep. 425; *Williams v. Allsup*, 10 C. B. N. S. 417; *The Granite State*, 1 Sprague, 277.

It is for us to determine which of these conflicting views is more consonant with reason, and the policy of our own statutes. Thus aided, we may the more readily arrive at the intention of the legislature in the creation of this statutory lien. Our registration laws proceed upon the idea that no one with notice of a mortgage on personal property has the right to deal with it, in any wise, to the prejudice of the mortgagee, and that, with knowledge or notice of the existence of the mortgage, he can acquire no rights in or title to the property mortgaged which are not in subordination to those of the mortgagor; and we can perceive no reason, in the absence of a provision of the statute to that effect, to exempt a livery-stable keeper, more than any other person, from the force and effect of our registration laws. It

is not for us to give these statutes any such construction unless we are constrained to do so by the manifest intention of the legislature. These laws are of universal and unvarying application to all persons and classes not specially exempted by statute. Code, § 1814. Accordingly, we have held that the due registration of a mortgage on personal property is constructive notice to those who deal with the property, as binding on them as actual notice would be (*Hudmon v. Du Bose*, 85 Ala. 446, 2 L. R. A. 475; *Heflin v. Slay*, 78 Ala. 180; *Mayer v. Taylor*, 69 Ala. 403), and that a factor or commission merchant, for instance, receiving and selling cotton for a mortgagor, without actual notice of the mortgage, is liable in trover to the mortgagee, if the mortgage has been properly recorded in the county in which the cotton was raised (*Marks v. Robinson*, 82 Ala. 70; *Hudmon v. Du Bose*, *supra*).

It will hardly be contended that if the

mortgagor, when he took the animals mortgaged to the livery-stable keeper, had notified him that the plaintiff held a mortgage on them to secure a debt which he owed it, the stable keeper would have been justified and protected, under our statute and decisions, in taking them into his charge and keeping, to the prejudice of the plaintiff, and yet the registration of plaintiff's mortgage was as effective as actual knowledge of plaintiff's rights and interests in the premises. The legislature, in the creation of this lien, did it, we must presume, with reference to our registration statutes, and the general policy of our law for the protection of mortgagees of personal property. In the adoption of the statute, it gave no preference or priority of lien over prior mortgages or incumbrances. The court below did not err in giving the general charge for the plaintiff, and in refusing a like charge for defendant.

Affirmed.

MINNESOTA SUPREME COURT.

D. F. GIBBONS, *Respt.*,

v.

Ole O. BENTE, *Appt.*

(.....Minn.....)

***Where a contract is executory, one party has the power to stop performance on the other side by an explicit direction**

! *Headnotes by COLLINS, J.

to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance of his part at that stage in the execution of the compact. The party thus forbidden to proceed cannot afterwards go on, complete the contract, and recover the contract price, as such; his only remedy being for damages for breach of contract.

ON REMARKING.

1. The contract referred to in the original opinion construed, and held, to create

NOTE.—Is a subscription contract joint or several?

In case of an ordinary subscription contract, where the undertaking is to pay the amount set opposite the respective signatures of the parties for some benevolent or other enterprise the general practice has been to regard the contract of each subscriber as separate from that of others, so as to sustain an action against each subscriber individually. Most of the cases upon the subject have been brought and decided, however, with no attempt to raise the question of whether or not they were properly brought,—at least so far as the reports of the cases themselves are concerned. The following are examples of that class of cases, and although it is not meant to be exhaustive, sufficient of them have been collected to show the universality of the practice: *Randolph County Comrs. v. Jones*, 1 Ill. 108; *McClure v. Wilson*, 43 Ill. 356; *Trustees of M. E. Church v. Garvey*, 53 Ill. 401; *Snell v. Trustees of M. E. Church*, 58 Ill. 290; *Beach v. First M. E. Church*, 96 Ill. 177; *McDonald v. Gray*, 11 Iowa, 508, 79 Am. Dec. 509; *Carr v. Bartlett*, 72 Me. 120; *Haskell v. Oak*, 75 Me. 519; *Trustees of Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Bridgewater Academy v. Gilbert*, 2 Pick. 579, 13 Am. Dec. 457; *Bryant v. Goodnow*, 5 Pick. 228; *Thompson v. Page*, 1 Met. 585; *Mirick v. French*, 2 Gray, 420; *Springfield Street R. Co. v. Sleeper*, 121 Mass. 29; *Underwood v. Waldron*, 12 Mich. 78; *Workman v. Campbell*, 46 Mo. 305; *Conn v. McCollough*, 12 Mo. App. 366; *James v. Clough*, 25 Mo. App. 147; *Swain v. Hill*, 30 Mo. App. 436; *McAuley v. Billenger*, 20 Johns. 89; *Stewart v. Trustees of Hamilton College*, 2 Denio, 403; *Trustees of Hamilton College v. Stewart*, 1 N. Y. 582; *Reformed Prot. Dutch Church of Westfield v. Brown*, 29 Barb. 336; *Richmondville Union Sem. & Female Collegiate Inst. v. Brownell*, 22 L. R. A.

37 Barb. 585; *Van Rensselaer v. Aikins*, 44 Barb. 547; *Barnes v. Perine*, 12 N. Y. 18, affirming 15 Barb. 249, 9 Barb. 202; *Presbyterian Soc. of Knoxboro v. Beach*, 74 N. Y. 72; *Twenty-third Street Baptist Church v. Cornwell*, 6 L. R. A. 807, 117 N. Y. 601; *Sperry v. Johnson*, 11 Ohio, 452; *Caul v. Gibson*, 3 Pa. 416; *Chambers v. Calhoun*, 18 Pa. 13, 55 Am. Dec. 583; *Hopkins v. Upshur*, 20 Tex. 89, 70 Am. Dec. 375; *Cooper v. McCrimmin*, 33 Tex. 383, 7 Am. Rep. 289; *Buchel v. Lott* (Tex.) Jan. 18, 1890; *State Treasurer v. Croes*, 9 Vt. 280, 31 Am. Dec. 623; *King v. Ilwaco R. & Nav. Co.* 1 Wash. 127.

And it is immaterial that there are two contracting parties, a promisee as well as a promisor. *Williams v. Rogan*, 59 Tex. 438.

The language of most of the contracts is such that no question as to their being several or joint could arise. For instance, in a contract of subscription to maintain a minister the language was, "We, whose names are here underwritten, promise, covenant, and pledge each one for himself individually and severally that we will pay or cause to be paid such sums as are respectively annexed to our names," and a separate action against a single subscriber was maintained. *First Religious Soc. in Whitestown v. Stone*, 7 Johns. 118.

The same result has followed in most instances where a question has been raised as to the proper form of the action. With few exceptions the action against the individual has been held proper.

The subscription paper should be regarded as the separate promise of each subscriber to pay the money set opposite his name when the contract is complied with, which becomes a binding individual contract when it is accepted and the contract complied with. *Wayne & Ontario Collegiate Inst. v. Smith*, 36 Barb. 574.

a several liability on the part of each subscriber to the amount of his subscription only.

2. *Held*, further, that in other respects the interests of the subscribers were joint, and that all must unite in order to repudiate and renounce the contract.

3. *Held*, also, that the trial court erred in not submitting to the jury the question as to fraudulent representation and concealment made in order to obtain the defendant's signature to the instrument.

(February 23, 1892.)

A PPEAL by defendant from an order of the District Court for Stearns County refusing to grant a new trial after judgment in favor of plaintiff in an action brought to recover upon an alleged contract subscribing money for the erection of a certain building. *Reversed.*

The contract in this case was composed of three printed sheets, marked respectively a, b, c, with the necessary blanks for descriptions, amounts, and signatures. Each paper contained an undertaking on the part of Davis & Rankin, the parties of the first part, to erect a certain building, which differed from the building described in each of the other contracts, and as appears from a clause in the contract, subsequently set out the particular specifications which should become binding, would depend on the amount subscribed. The material portion of the contract was as follows:

"We Davis & Rankin, party of the first part, with the undersigned subscribers hereto, party of the second part, agree to build, erect, com-

plete, and equip for said party of the second part a combined butter and cheese factory" at or near a certain place, with certain dimensions and equipments, the specifications for which were more particularly described on the back of the contract. The parties of the second part hereby agree to furnish suitable lands for said building, together with sufficient water on said lot for the use of the business, and they shall be credited therefor as a payment on this contract the sum of \$——. And it is further understood that in case the said second party shall fail to furnish said land and water within ten days after the execution of this contract, then the said Davis & Rankin, at their option, may furnish said land and water.

"Davis & Rankin further agree to provide and keep hired, at the expense of the stockholders, an experienced butter and cheese maker for one year, if desired.

"Said Davis & Rankin agree to erect said butter and cheese factory as set forth by the above specifications for \$—— payable in cash.

"We, the subscribers hereto, agree to pay the above amount for said butter and cheese factory, when completed. Said building to be completed within ninety days or thereabout after the above amount (\$——) is subscribed. All subscriptions to this contract to bear interest at the rate of eight per cent per annum from date of completion until paid.

"As soon as the above amount of \$—— is subscribed, or in a reasonable time thereafter, the said subscribers agree to incorporate under the laws of the state, as therein provided, fixing

Each signature to a subscription paper in aid of a railroad constitutes a separate contract, and if one subscriber adds to his signature a certain condition an action will lie against him upon complying with that condition although others added other conditions which have not been complied with. *Miller v. Preston*, 4 N. M. 314.

The action will lie against one alone. *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446.

A separate action may be maintained by each subscriber to recover back the amount paid under a subscription paper reading, "We, the subscribers, do most cheerfully agree to pay the sums written against our names," although a joint receipt was given for payment made in satisfaction of the subscription; the subscriptions being several, the character of the transaction was not changed by the form of the receipt. *Carter v. Carter*, 14 Pick. 424.

Under a contract "that we do promise and agree that we will indemnify and save harmless the committee" for the money borrowed to complete the building "in the proportion to the number of shares for which we have respectively subscribed," the subscription paper reading "We do hereby promise and agree to take the number of shares set against our respective names and to pay the amount therefor," the subscribers are not copartners but merely shareholders in certain proportions, and a separate action at law could be maintained against each. The number could have no effect on the amount to be paid by each, and there would be no right of contribution. *Hall v. Thayer*, 12 Met. 180.

The following covenant was held to be several: "We, the subscribers, hereby mutually bind ourselves to each other jointly and severally to pay, each according to his relative respective interest and proportion in said land, all costs and charges and expenses which shall or may be incurred" in

certain actions, which were to be brought to recover their possession. *Ludlow v. McCrea*, 1 Wend. 223.

A contract, "We promise to pay the following subscriptions," will be held to bind each for only the amount set opposite his name, although there are no words in the contract limiting it to that amount. *Landwerlen v. Wheeler*, 106 Ind. 523.

An agreement to pay the sum "annexed to their names" is several. *Moss v. Wilson*, 40 Cal. 159.

A contract that "we promise to pay the sum annexed to each of our names" is several. *Robertson v. March*, 4 Ill. 198.

A contract, "We agree to pay the sum set to our respective names," will sustain a separate action. *Watkins v. Eames*, 9 Cush. 537.

A contract for the purpose of building a meeting-house which provides, "We promise to pay the sum annexed to our individual names, the meeting-house being finished will be the property of the subscribers in proportion to the amount invested by each individual," makes the subscribers tenants in common and not partners, within the jurisdiction of equity to settle partnership affairs. *Woodward v. Cowing*, 41 Me. 9, 66 Am. Dec. 211.

But in *Darnell v. Lyon*, 85 Tex. 455, it is intimated that if the contract was simply, "We hereby promise and agree," the undertaking would be joint; although it is decided that the insertion of a provision that "each subscriber shall be liable for only the amount set opposite his name makes the obligation several.

And in *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311, a bill against the subscribers jointly was brought on a subscription contract for the building of a church.

Stock subscriptions.

There seems to be no question but that subscriptions to the stock of corporations are separate ob-

the aggregate amount of stock at not less than \$——, to be divided into shares of \$100 each. Said share or shares as above stated to be issued to the subscribers hereto in proportion to their paid up interest herein.

"It is further distinctly understood by and between the parties hereto that if the subscriptions hereto shall amount to more than \$—— and less than \$—— the foregoing agreement, designated "Contract A," shall constitute the agreement between the parties. If the subscriptions hereto shall amount to more than \$—— and less than \$—— then the foregoing agreement designated as "Contract B," shall constitute the agreement between the parties; and if the subscription hereto shall amount to over \$—— then the foregoing agreement designated as "Contract C," shall constitute the agreement between the parties hereto.

"For the faithful and full performance of our respective parts of the above contract, we bind ourselves, our heirs, executors, administrators, and assigns.

"Executed and dated this — day of —, 18—."

Messrs. T. T. Ofsthun, D. C. Van Camp, Nelson & Treat and Jenkins & Treat, for appellant:

The element of mutual assent, both in law and in morals, lies at the foundation of all contracts, and where this is wanting there is no binding obligation.

2 Kent, Com. 477; *Uiley v. Donaldson*, 94 U. S. 29, 24 L. ed. 54; *First Nat. Bank of Quincy*

v. Hall, 101 U. S. 49, 25 L. ed. 825; *Hamlin v. Wistar*, 81 Minn. 418; *Cutts v. Guild*, 57 N. Y. 229; 1 Benjamin, Sales, § 50; *Phillips v. Bistolli*, 2 Barn. & C. 511.

Where the party intentionally or by design misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him,—in every such case there is a positive fraud in the truest sense of the term. There is an evil act with an evil intent—*dolum malum ad circumveniendum*. And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead as well as by positive assertions.

1 Story, Eq. Jur. § 192; 1 Benjamin, Sales, § 640.

As against an illiterate person who is unable to read the contract and has no knowledge of its language or contents, a representation as to its meaning and effect is a representation of a fact, on which he has a right to rely, and against which he is entitled to relief, if injured.

Miller v. Sawbridge, 29 Minn. 442; *Schuylkill County v. Copley*, 67 Pa. 386, 5 Am. Rep. 441; *Jackson v. Hayner*, 12 Johns. 469; *Calkins v. State*, 13 Wis. 389; *Cummings v. Thompson*, 18 Minn. 256; *Maxfield v. Schwartz*, 10 L. R. A. 606, 45 Minn. 150; *Albite v. Minneapolis & P. R. Co.* 40 Minn. 476; *Davis v. Snider*, 70 Ala. 315.

Nor is it true, under all circumstances, that a misrepresentation of the law is beyond belief.

Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678.

In such a case as between the original parties,

though all the signatures are to one paper. The wording of the contract is doubtless usually such as to make them several, but even when the language has been doubtful the uniform construction has been that each was separate.

Each subscription to the stock of a proposed corporation. "We do hereby agree with said corporation to take the number of shares respectively placed against our names," constitutes an independent undertaking, in no way affected by the terms of other subscriptions. *Connecticut & P. Rivers R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181.

A contract, "We promise to pay \$25 for each share of stock opposite each of our names," while in form joint is to be treated as several, and each stockholder is liable separately for the amount opposite his own name. *Price v. Grand Rapids & I. R. Co.* 18 Ind. 187.

A contract, "We do hereby subscribe for the number of shares set to our respective names and hereby promise that we will pay for the same at the rate of \$10 for each share by us subscribed," will maintain a separate action against each subscriber. *Ives v. Sterling*, 6 Met. 310.

Subscriptions to corporate stock are separate contracts. *Whitlessy v. Frantz*, 74 N. Y. 456.

One signing a subscription paper to the capital stock of a railroad company, in which each subscriber severally agrees to take the number of shares set opposite his name—in his own name for a certain number of shares and again as executor for a certain number of shares may be sued upon each subscription, and the pendency of one suit is no bar to the other. *Erie & N. Y. City R. Co. v. Patrick*, 2 Abb. App. Dec. 72, 2 Keyes, 256.

Contracts in which there is a promisee.

In some few cases a distinction has been made between the simple subscription contracts in which 22 L. R. A.

there is no promisee and which do not become binding until acted on, and those in which the promise by the subscribers is met by a promise or undertaking on the other side so that the contract is binding as soon as it is complete. This distinction does not, however, appear to have found much favor, for the general practice has been to construe both classes of contracts by the same rules.

A contract by the owner of property to sell it for a certain price, to be divided into shares of a certain amount, to parties who subscribe for such shares, each subscriber agreeing severally for himself and not jointly, was construed by the supreme court of New York to be a separate contract on the part of each subscriber, so that a separate action could be maintained against him on his subscription; but that the interests in the property were jointly holden, so that the contract was not complete until all the shares were subscribed for. The latter holding was, however, reversed by the court of errors, and it was held that the action would lie, although some of the shares were not subscribed for. *Sandford v. Halsey*, 2 Denio, 255; *Sandford v. Handy*, 25 Wend. 475.

In *Frost v. Williams* (S. Dak.) Jan. 21, 1892, the party of the first part in consideration of the sum of \$300, to be paid by the second parties, agreed to build and run a cheese factory, and the contract provided, "We," the parties of the second part, "guarantee the above named sum of money," and the contract was signed by a number of persons, with a certain sum set opposite each name. The court held it to be a several and not a joint contract, placing some reliance on the fact that the factory, when completed, was not to be the property of the second parties.

Most of the cases of this class have arisen out of this Davis and Rankin contract. And it has been held that—

or those standing in their shoes, the party to whom the misrepresentation of the instrument is made has a right to rely on the same and is not guilty of negligence or want of care in not seeking other information.

Mazfeld v. Schwartz, supra; Aultman v. Olson, 84 Minn. 453.

And even where the party can read he has a right to rely on the representation, and it is not necessarily negligence to omit to read or examine the instrument.

Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; Mead v. Bunn, 82 N. Y. 275.

To constitute a fraudulent misrepresentation, it is not necessary that statements should be made in terms expressly affirming the existence of some untrue fact.

Bigelow, Fr. p. 5; Lee v. Jones, 17 C. B. N. S. 482; Albitz v. Minneapolis & P. R. Co. supra; Mianer v. Russell, 29 Mich. 229.

The fraudulent representations which may be questioned are not necessarily limited to the contents or effect of the instrument, but may relate wholly to the consideration or inducement for the same.

Elass v. Moore's Hill Male & Female Collegiate Inst. 77 Ind. 72; Albitz v. Minneapolis & P. R. Co. and Cummings v. Thompson, supra.

It is not necessary that the false representations should have been the sole motive; it is enough if they had a material influence upon plaintiff although combined with other motives.

Moline-Milburn Co. v. Franklin, 87 Minn. 137.

When it appears that the representations are material and false, the burden will be thrown upon the party making them to show that they were not relied on by the other party.

Fishback v. Miller, 15 Nev. 428; Kerr, Fraud & Mistake, 75; Holbrook v. Burt, 22 Pick. 546.

A subscription contract for the erection of a butter and cheese factory which reads, "We, the subscribers hereto, agree to pay the above amount," naming the whole contract price, is not a joint contract which will render each liable for the whole amount and permit all to be sued jointly, if each subscriber place after his name the number of shares he will take and the amount to be paid therefor. *Davis & R. Bldg. & Mfg. Co. v. Barber, 51 Fed. Rep. 148.*

The contract has also been held to be several in *Davis v. Belford, 70 Mich. 120; Gibbons v. Grimsel, 79 Wis. 385.*

But in *Davis v. Shafer, 50 Fed. Rep. 764*, the contract was held to be a joint one, although the addition to a signature of the words, "only responsible for three shares," limited the responsibility of that signer to the amount so stated.

So *Davis v. Bronson, 16 L. R. A. 655, 2 N. Dak. 800*, holds the contract to be joint, and in discussing the right of one subscriber to withdraw from his contract, the court distinguishes the case from those of voluntary subscription, on the ground that in the latter cases the consideration for each subscription was the promise of the other subscribers, while in this case the consideration was the promise of the other contracting party.

Effect of agreements among subscribers and their relation to each other.

The fact that the subscription contract contains an agreement by the subscribers among themselves 25 L. R. A.

Messrs. D. Wilcox and Taylor, Calhoun & Rhodes, for respondent:

A party cannot sign an instrument without reading it or asking that it be read, and thereby be relieved from liability on the instrument so signed for the reason that he did not know all its contents.

McCall v. Bushnell, 41 Minn. 37; Parlin v. Small, 68 Me. 289; Brown v. Blunt, 72 Me. 415; Martin v. Berens, 67 Pa. 459; Cannon v. Jackson, 40 Ark. 417; Cummings v. Baars, 36 Minn. 350; Barteau v. Barteau, 45 Minn. 132.

The complaint shows a right of action in plaintiff. If there are other provisions that change this right, defendant should set them forth in his answer as a defense.

Jones v. Ewing, 22 Minn. 157.

The manifest purpose was that each such subscriber should thus pay the amount of his particular subscription, and not that he should become liable jointly with all the other subscribers for the aggregate amount of all the subscriptions. In other words, the amount which each subscriber thus agreed to pay was limited to the amount which he thus subscribed; otherwise a few responsible subscribers might be made liable for numerous irresponsible subscribers. The interest of the respective subscribers in the contract was manifestly intended to be separate, and hence the liability thereby created was severable.

Gibbons v. Grimsel, 79 Wis. 385; Landuerlen v. Wheeler, 106 Ind. 523.

The contract was not repudiated by one party so as to prevent performance by the other. In the case at bar the party supposed to have repudiated the contract consisted of sixty-seven persons, and only twenty-seven or twenty-eight united in the repudiation.

When several are joint obligors or parties, the only theory on which the act of one can be

to incorporate, and that the stock to which a subscriber is entitled has been taken and paid for by a third person, will not relieve the subscriber from his liability to pay his subscription. *Davis v. Johnson, 49 Mo. App. 240.*

One subscriber to a creamery contract will be bound by the action of his associates for the common benefit, if he never objects to them until called upon to pay his subscription. *Gibbons v. Ellis, 88 Wis. 434.*

If the agreement is between the subscribers to contribute money for the erection of a building for business purposes, it may constitute them partners, and one subscriber may be sued for his subscription by the other signers. *White v. Scott, 26 Kan. 476.*

Where, in a contract of subscription by several, there is no agreement between the various subscribers to pay or guarantee the payment of each others subscriptions, and afterwards one subscriber fails to advance the amount which he has agreed to loan, another subscriber who has paid his subscription cannot, upon obtaining judgment against the borrower, thereafter compel the delinquent promisor as garnishee in attachment to pay his subscription. *Nellis v. Coleman, 98 Pa. 465.*

An offer to subscribe money to a corporation provided it will do a certain thing may be withdrawn by each subscriber at any time before it is accepted. Hence the death of a subscriber before acceptance will revoke the subscription. *Wallace v. Townsend, 43 Ohio St. 537, 54 Am. Rep. 829.*

H. P. F.

held to bind or affect the others is that of agency. By associating themselves together each clothes each of the others with the power to act for him and bind him by such acts. The case of *Davis v. Bronson*, 16 L. R. A. 655, 2 N. Dak. 300, assumes that any one can act for the whole to the extent of repudiating the contract and that all are bound by and responsible for such repudiation. With all due deference to that court we must insist that both principle and authority fall far short of sustaining that position.

Willoughby v. Irish, 85 Minn. 63, 59 Am. Rep. 297; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 823; *Bell v. Morrison*, 26 U. S. 1 Pet. 351, 7 L. ed. 174; *Thompson v. Bowman*, 73 U. S. 6 Wall. 316, 18 L. ed. 736; *Lewis v. Woodworth*, 2 N. Y. 512, 51 Am. Dec. 819; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 Am. Dec. 95; *Wallis v. Randall*, 81 N. Y. 164.

Each joint debtor is bound only by his own acts unless an agency exists.

Merritt v. Scott, 3 Hun, 659; *Young v. Black*, 11 U. S. 7 Cranch, 565, 3 L. ed. 440; *Thompson v. Richards*, 14 Mich. 172.

If several men enter into a valid contract, it cannot be fundamentally altered but by unanimous consent.

Mowrey v. Indianapolis & O. R. Co. 4 Biss. 86; *Central R. Co. v. Collins*, 40 Ga. 617.

Each has contracted with the others to accomplish the common purpose, and can compel the performance of the contract to the extent necessary to protect himself from any other or different liability than that which he voluntarily assumed.

Conat v. Harris, 1 Turn. & R. 496; 2 Morawetz, Priv. Corp. §§ 641-646, and cases cited; *Lindley*, Partn. bk. 3, chap. 2, § 8; *Von Schmidt v. Huntington*, 1 Cal. 55; *Livingston v. Lynch*, 4 Johns. Ch. 573, 1 L. ed. 941; *Jennings' App.* (Pa.) 2 L. R. A. 43; *Zabriskie v. Hackenack & N. Y. R. Co.* 18 N. J. Eq. 184, 90 Am. Dec. 617; *Clarke v. Omaha & S. W. R. Co.* 5 Neb. 346; *Ervin v. Oregon R. & Nav. Co.* 27 Fed. Rep. 631; *Hartford & N. H. R. Co. v. Croswell*, 5 Hill, 338, 40 Am. Dec. 854; *Brewer Boston Theatre Props.* 104 Mass. 878; *Ferguson v. Meredith*, 68 U. S. 1 Wall. 26, 17 L. ed. 604; *Irvine v. Forbes*, 11 Barb. 589; *Henry v. Deitrich*, 84 Pa. 293.

In the government of the majority there is a distinction between public and private bodies. (Story, Partn. 182.) In the latter the power of the majority is strictly limited to acts that come within the object for which the association was formed, and they can exercise no power not contemplated in the inception of the contract. They cannot change, abrogate, or extend the terms of it. When a diversity of opinion exists as to the conduct and management of the business, or other purpose for which the parties have combined, the opinion of the majority must govern, provided the minority have been consulted.

Minnit v. Whinery, 5 Bro. P. C. 489; *Lloyd v. Loaring*, 6 Ves. Jr. 777; *Conat v. Harris*, *supra*; *Kirk v. Hodgson*, 3 Johns. Ch. 400, 1 L. ed. 662; 8 Kent, Com. 5th ed. 45 and *note*; *Fisher v. Murray*, 1 E. D. Smith, 841; *Western Stage Co. v. Walker*, 2 Iowa, 504, 65 Am. Dec. 789; *Minneapolis Threshing Mach. Co. v. Davis*, 8 L. R. A. 796, 40 Minn. 110, 23 L. R. A.

It seems to us that any one examining this contract must conclude that the intention of the parties was to limit the liability of each subscriber to the amount set opposite his name, and not to impose upon him the liabilities of a joint obligor.

Davis v. Belford, 70 Mich. 120; *Frost v. Williams* (S. Dak.) Jan. 21, 1892.

Collins, J., delivered the opinion of the court:

The contract out of which this litigation arises was an executory one, entered into by Davis & Rankin, of the first part, (by plaintiff, who was then their agent, and has succeeded to their rights under the contract by assignment,) and defendant, with some sixty other persons, as parties of the second part. In it the parties of the first part agreed to erect and complete a butter and cheese factory for those of the second part within ninety days after the amount of the contract price had been obtained by subscription,—the scheme being to secure subscribers to the stock of a corporation in shares of \$100 each; and the parties of the second part agreed to pay the contract price in three installments, commencing upon the completion. The defendant subscribed for one share, and is sued for the sum of \$100.

Without stopping to consider other points referred to by counsel for appellant, we proceed to an examination of one which goes directly to respondent's right to maintain an action for any part of the contract price, as such, although the factory has been completed in accordance with the terms of the contract. It was undisputed that soon after it was entered into, but before Davis & Rankin had commenced to perform, a meeting of those who had signed as parties of the second part was held. The plaintiff attended and participated. At this meeting a large majority of those present—defendant being of the number—voted and determined that they would go no further in the enterprise, and that the factory should not be built. The plaintiff was then and there notified not to erect the factory, and to proceed no further under the contract. He responded in somewhat vigorous language, and declared that the factory should be erected inside of two weeks. As agent of Davis & Rankin, he then proceeded to erect and equip the plant. Defendant and others refused to accept it when completed, or to pay. The question is as to the power of the parties of the second part to repudiate and arbitrarily break their contract, by refusing to perform, and by renouncing all liability under it, and thereby prevent Davis & Rankin from recovering the full contract price, should they disregard the breach and fully perform on their part. There seems to be no room for doubt upon this subject. While a contract is executory a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then

recover such damages of the other party. *Danforth v. Walker*, 37 Vt. 239; *Clark v. Maraglia*, 1 Denio, 317, 68 Am. Dec. 670; *Butler v. Butler*, 77 N. Y. 472, 33 Am. Rep. 648; *Collins v. Delaporte*, 115 Mass. 159. The question is very fully considered in the recent case of *Davis v. Bronson*, 2 N. Dak. 300, 16 L. R. A. 655, in which cases other than those above noted are referred to.

The legal right, on general principles, of either party, to violate, abandon, or renounce his contract, on the usual terms of compensation to the other for the damages which the law recognizes and allows,—subject to the jurisdiction of equity to decree specific performance in proper cases—is universally recognized and acted upon. Among the many authorities which might be cited on this, see *Bishop*, Cont. par. 887; *Leake*, Cont. 868, 1044; 1 *Sutherland*, Damages, 113; 2 *Sutherland*, Damages, 198, 526; *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967; *American L. Ins. Co. v. McAden*, 109 Pa. 899; *Frost v. Knight*, L. R. 7 Exch. 112; *Roper v. Johnson*, L. R. 8 C. P. 167; *Laird v. Pim*, 7 Mees. & W. 474; *Hochster v. De La Tour*, 2 El. & Bl. 678.

From an examination of the adjudged cases just cited, it will be seen that ordinarily the party who is willing to abide by an executory contract may treat it as subsisting up to the time when performance should commence, for the purpose of insisting that the other party, who has previously repudiated it, shall then and finally determine whether he will comply with its terms, or persist in his resolution not to perform upon his part. But the party who has not broken his compact is not allowed to treat it as in force, for the purpose of performing in direct opposition to the refusal of the other to abide by its terms, and then enforce the payment of the contract price. One reason for this is found in the general rule that a person who has been injured by a breach of contract must put forth reasonable exertion to render the injury as light as possible. He cannot negligently or willfully allow the damages to be unnecessarily enhanced; or, if he does, the increased loss falls upon him.

Order reversed.

Gillilan, Ch. J., absent, (sick,) took no part.

A reargument was subsequently granted after which on December 8, 1892, *Collins, J.*, delivered on behalf of the court the following opinion:

On the presentation of this case at the October term, 1891, appellant's counsel filed their brief, and made a short oral argument. Counsel for respondent were not present, submitting wholly on brief. After its service on the latter, there had been interpolated in appellant's brief the point that as he, with some twenty-eight other subscribers, renounced the contract before *Davis & Rankin* had commenced the erection of the factory building, their assignee could not recover upon the contract, but was relegated to an action for damages, caused by the breach thereof. The decision which followed was squarely placed upon that ground. Later, 22 L. R. A.

by petition for reargument, it appeared that through an oversight the attention of respondent's counsel had not been called to the point, or to the fact that it had been injected into appellant's brief, and, as a consequence, no reference had been made to it by them. For this reason a reargument was ordered.

In the original opinion the true character of the contract signed by defendant and sixty-seven other persons as the parties of the second part was not considered. The respondent's counsel, in order to maintain their action, had to contend that it was several, to the extent of the obligation to pay, at least, and, without deciding the point, we assumed that they were right, although it was strenuously urged by counsel for appellant that his liability was joint, and hence an action against a single subscriber could not be maintained. We are now obliged to consider and determine the real nature of the contract, in order to dispose of a very troublesome question arising on reargument, namely, the right of one or more of these who, as subscribers, became the parties of the second part, to repudiate and renounce the contract, without regard to the wishes or acts of his or their associates. Contracts, in substance the same as the one before us, were construed in *Davis & R. Blg. & Mfg. Co. v. Barber*, 51 Fed. Rep. 148; *Davis v. Belford*, 70 Mich. 120; *Gibbons v. Grinsel*, 79 Wis. 885; and *Frost v. Williams* (S. Dak.) 50 N. W. Rep. 964,—as creating a several liability on the part of each subscriber to the amount set down by him opposite his name, on which he might be sued severally; while in *Davis v. Shafer*, 50 Fed. Rep. 764, an opposite conclusion was reached, it being held that the subscribers to such an agreement became jointly and severally obligated to pay the entire amount of the subscriptions. In none of these cases was the question now before us involved, but in *Davis v. Bronson*, 2 N. Dak. 300, 16 L. R. A. 655, cited in our former opinion, it was raised on reargument, and disposed of adversely to the respondent's views; but of that hereafter. Nor was there anything to suggest in either of the cases first referred to, wherein the obligation to pay was declared several, and not joint, that the contract of the subscribers might be pronounced several in one particular,—for instance, as to the liability to pay,—and joint in all other features. After a careful consideration of the authorities heretofore cited, and others which have a bearing, we are convinced that the better reasoning and the correct conclusion is with those in which it has been held that the contract imposed nothing more than a several liability upon the subscribers, each agreeing to pay the amount of his subscription and nothing more. This has been the practical construction of the contract by the party of the first part, and, we think, the only one which can be sustained under the ordinary rules for construing written instruments. Having determined that the obligation to pay was several, each subscriber being responsible to the amount of his subscription only, we reach the principal question before mentioned, which is, putting it in another form, Can each of the subscribers,

after all of the subscriptions have been obtained, but the contract itself is executory, be regarded as a separate contractor, possessing the power to repudiate and renounce for himself alone and independently of the other signers, or must the sixty-eight persons who have executed it as the party of the second part be treated as a single person, and required to act as a unit, if any or all desire to repudiate and renounce? The question is an exceedingly difficult one to answer satisfactorily. It must be conceded that, if one or any number less than the entire body of the subscribers may repudiate and renounce, the parties of the first part must consequently be absolved from their obligation to construct and equip the factory; they must necessarily be released from a duty to proceed, and also from all liability arising out of nonperformance to those who may be styled the "persistent subscribers." It could not be held that the parties of the first part are under an obligation to the subscribers last mentioned to complete the work, for, if they were, it would be incumbent upon them to fulfill a contract without the right to recover the contract price, and with full knowledge that from the repudiating and defaulting subscribers they could only recover, as for a breach of the contract, the damages, to be measured as of the time of the repudiation or renouncement. It can then be safely asserted that if one, or any number less than all, of the subscribers may lawfully repudiate or renounce the contract, each for himself, no duty to proceed and no liability in case of a failure so to do rests upon the other parties. In *Davis v. Bronson*, *supra*, this view was taken, undoubtedly, and it would seem also that the contract was therein regarded as joint in all respects; and because the persistent subscribers had no cause of action for a breach of contract, and because all were regarded as responsible in damages to the parties of the first part for the default or breach of one, it was held that one could absolutely terminate the contract as to all by repudiation or renouncement. We might be prepared to coincide in the view that no action for damages would lie against the other parties if one of these subscribers could thus end the contract, but we cannot concur in the statement that each and all of the subscribers are liable, as for breach of the contract, if one chooses to repudiate or renounce. Upon principle, we do not think this statement can be sustained, even if we had followed *Davis v. Shafer*, *supra*, and held the contract joint and several in all respects. The logic of the reasoning in *Davis v. Bronson* is that any one of the subscribers to a contract of this kind can act for all to the extent of repudiating it, and that all are bound by and responsible for his acts. Any one is the agent of all, and by associating themselves together as promoters of the enterprise their interest is such that each is clothed with authority to act for and bind each of the others. Every subscriber has become the agent of his associates, for it is only upon the principle of agency that even joint obligors or parties can be held to have authority to act for or bind each other. If this be the law, and repudiation by one

repudiates for all, because of the joint interest which exists between the parties, we fail to see why this joint interest is not sufficient to permit one to change and alter the contract in behalf of all, or to rescind it altogether. Of course, such a position would be wholly untenable.

If this was a several contract in all respects, one of the subscribers, as an independent contractor, could not be denied a right to repudiate it for himself, leaving the parties of the first part under obligations to fulfill as to the balance of the signers. This duty to fulfill would continue so long as one of the subscribers remained faithful. From him the amount of his subscription could be collected, and from the defaulters damages, to be measured, as before stated, as of the day of the repudiation. Nothing could be more unjust, and the contract ought not to be so construed, unless it be demanded by the language thereof. There is nothing in the fact that the obligation to pay has been made several which indicates that in all other particulars the obligation of each subscriber is separate and distinct; nor can we gather from any part of the contract that there was any intent, except in the manner of payment, to make the obligation a several one. Certainly the subscribers did not so understand it, for the repudiation and renouncement relied upon by defendant were by means of a motion made and carried at a meeting held by them, a majority of all being present, but less than a majority of all voting in favor of the motion. We are therefore of the opinion that, while the obligation to pay was several and independent, the subscribers jointly shared the burden, and were united in interest in all other respects. Taken as a whole, the instrument was of a very peculiar character, and evidently, until a stock company was formed, (and it was agreed that this should be done when the full amount of the subscriptions had been obtained,) it was not intended that even a majority should govern or control. It follows that unanimous consent would have to be secured before the contract could be repudiated and renounced. But, if the obligation to pay had been joint, instead of several, thus making the contract joint in all particulars, it is difficult to see by what authority one or more of the subscribers could repudiate for all; the inevitable result being to change the relations existing between the contracting parties. There is nothing in the relation of joint debtors from which authority or agency to alter or extend a liability can be inferred. With simple joint contractors, neither is the agent of the other, and their individual liability is not to be extended beyond their own acts and contracts. Non can an agency or authority be inferred because of the joint relations or united interests assumed by the signers concerning other matters of the contract; for instance, the agreement to form a stock company for the management of the factory when the subscription should be complete. The conclusion heretofore reached in respect to the effect of the action at the meeting was erroneous, but this fact will not change the result. A new trial must be had, because the

court below failed to submit to the jury the question presented by the testimony as to fraudulent representation and concealment, made when the defendant signed the contract, by plaintiff, who was then acting as agent for Davis & Rankin. The defendant was a foreigner, and unable to read the English language. The plaintiff went to his house with the contract fully completed, and already signed by others. It was in triplicate form, containing conditions that have caused the courts considerable trouble, as witness the cases heretofore referred to in which these contracts have demanded interpretation. It is conceded that the defendant could not and did not read the skillfully

drawn document, nor was it read to him. The plaintiff pretended to explain its terms, and the testimony tends to show that material facts were misrepresented and false impressions produced, in order to secure his signature. It is true that the effect of his testimony as to what actually occurred, what was said and done when the plaintiff prevailed upon him to sign, was somewhat weakened by admissions, the result of a skillful cross-examination, no doubt, but there was still an issue between the parties on this question, which should have gone to the jury.

We adhere to the conclusion that a new trial must be had.

TEXAS SUPREME COURT.

W. L. CABELL *et al.*, Plffs. in Err.,
v.

H. D. ARNOLD.

(.....Tex.....)

1. A warrant in the hands of a marshal or sheriff will not justify a deputy, who does not have possession of it in making an arrest, where the statutes require the warrant to be exhibited on request to the person arrested.

2. Liability for an unlawful arrest and detention does not exist merely because the officer who made it did not have a warrant therefor in his possession, if such warrant had been issued and no hurt resulted to the accused because of the fact that the officer did not have the warrant.

(October 26, 1893.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Palo Pinto County in favor of plaintiff in an action brought to recover damages for alleged false imprisonment. *Reversed.*

The facts are stated in the opinion.

Mr. A. T. Watts for plaintiff in error.

Mr. B. G. Bidwell, for defendant in error:

A warrant for the arrest of appellee being in Dallas, Texas, did not authorize his arrest in Palo Pinto County, Texas, by deputies who did not have the warrant with them when the arrest was made, and the fact that he was told that such a warrant had been issued will not defeat his action for an illegal arrest.

Tex. Code Crim. Proc. arts. 226, 281; *Johnson v. State*, 5 Tex. App. 48; *Alford v. State*, 8 Tex. App. 545; *Pratt v. Brown*, 80 Tex. 606; *Harris v. Louisville, N. O. & T. R. Co.* 85 Fed. Rep. 116; 1 Am. & Eng. Encyclop. Law, 740, note 1; *Bomerville v. Richards*, 37 Mich.

299; *Griffin v. Coleman*, 4 Hurlst. & N. 265; *Brushaber v. Stegemann*, 22 Mich. 266; *Pike v. Hanson*, 9 N. H. 491; *Cooley, Torts*, 169, title *False Imprisonment*; *Bath v. Metcalf*, 145 Mass. 274.

If the officer had authority to arrest Arnold without a warrant, it was then clearly his duty to take him before the nearest justice of the peace or other officer named in the United States statutes. This was not done, but Arnold was denied the right to give bail at home, and was carried to Dallas and there placed in jail as a common felon. If the original arrest was wrongful those who made it are answerable to Arnold for his subsequent detention.

Bath v. Metcalf, *supra*.

It cannot be contended that Arnold cannot now recover for a wrongful arrest because he did not resist the officers.

Harris v. Louisville, N. O. & T. R. Co., and *Cooley, Torts*, *supra*.

This is a suit for false imprisonment, which is very different from one for malicious prosecution.

Neill v. Hart, 115 Pa. 847; *Byam v. Collins*, 2 L. R. A. 129, 111 N. Y. 143; *Collier v. Lower*, 85 Ind. 285, 9 Am. Rep. 785.

Plaintiff sues for actual damages alone; pain and mental anxiety and suffering are such.

Stuart v. Western U. Teleg. Co. 66 Tex. 580, 59 Am. Rep. 623; *Beckwith v. Bean*, 98 U. S. 266, 25 L. ed. 124.

That Cabell acted in good faith in making an affidavit for a warrant cannot prejudice the rights of Arnold. There is no mitigation of actual damages.

Ross v. Leggett, 61 Mich. 445; 1 Sutherland, Damages, 227; *Lewis v. Lewis*, 9 Ind. 105; *Beckwith v. Bean*, *supra*.

Stayton, Ch. J., delivered the opinion of the court:

W. L. Cabell, as United States marshal, held a valid warrant authorizing the arrest

NOTE.—The above decision points out a very notable distinction in denying civil liability for an arrest without exhibiting the warrant therefor which had in fact been issued while admitting the illegality of such arrest.

23 L. R. A.

For right to resist illegal arrest, see note to *State v. Hunter* (N. C.) 8 L. R. A. 529.

For note on right to enter dwellings to make arrest, see *DeLaforce v. State* (N. J.) 16 L. R. A. 500.

of H. D. Arnold, on a charge of felony, under the laws of the United States. That warrant was issued by a commissioner at Dallas, and delivered to Cabell, who remained in Dallas, and retained the warrant, but, by telegram, directed one of his deputies to go to Palo Pinto county, and arrest Arnold and others named in the warrant. The deputy and a special deputy made the arrest in Palo Pinto county without any warrant being in their possession, authorizing the arrest, and conveyed Arnold from the place where arrested to Dallas, and there delivered him to the marshal. Arnold was confined in jail one night, and then brought before the commissioner, by whom he was admitted to bail until final examination, upon which, after considerable delay, he was discharged. This action was brought against Cabell and the sureties on his official bond to recover damages for false imprisonment, based on the proposition that the arrest and detention until Arnold was placed under the control of the marshal were illegal, because the deputies had not the writ in their possession at the time the arrest was made, nor during the journey to Dallas. The jury were instructed that the arrest and detention by the deputies without having the warrant in their possession were illegal, and that Arnold was entitled to recover for the arrest and detention until he was delivered to the marshal, at Dallas; and, under this instruction, verdict and judgment went in his favor. On appeal the same ruling was made by the court of civil appeals, and from that decision writ of error is now prosecuted.

The arrest and detention all occurred within the district within which Cabell was marshal, and the material facts transpiring at the time are thus stated by Arnold: "Sisk [one of the deputies] then told me that they wanted me to go to Dallas, Tex.; that Gen. Cabell had telegraphed him to arrest me. They then told me that they would have to carry me. I asked them if they had any papers for my arrest. Sisk said he had none. They did not show me any, but Sisk said there were some at Dallas for me. Gerrin [the other deputy] said, later on, that, if ordered by Cabell, he would arrest one as quick without a warrant as with one. I told them I had to go by home. They carried me by home, and I got my clothes. I did not resist arrest. They carried me to Weatherford, and carried me to Dallas." No facts are shown which would have justified the arrest of Arnold without the issuance of a warrant, and we have the question whether, when a lawful warrant has been issued, and placed in the hands of a marshal or sheriff, his deputy may make an arrest without having the warrant in his possession at the time, without subjecting his principal to liability in a civil action brought by the person arrested. The determination of this question must depend upon the laws in force in this state, prescribing the powers and duties of sheriffs and their deputies. U. S. Rev. Stat. § 788.

The sufficiency of the warrant that went into the hands of the marshal is not questioned, and the statutes bearing on the question of its proper execution provide that all

reasonable means are permitted to be used to effect it; that no greater force shall be used than is necessary to secure the arrest and detention of the accused; and that "in executing a warrant of arrest it shall always be made known to the person accused under what authority the arrest is made, and if requested the warrant shall be exhibited to him." Code Crim. Proc. arts. 255, 257. When the Code of Criminal Procedure fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law must be applied, and govern. Code Crim. Proc. art. 37.

It will not be questioned that the deputies had the same authority to arrest as would have had the marshal, under the same circumstances. It has been held in England, and in some of the courts of this country, that a person may use necessary force to resist arrest, in a case in which a warrant is necessary to authorize it, unless the officer, at the place and time he attempts to make the arrest, has the warrant in his possession, and that such violence towards the officer will not constitute a battery, or other like offense, and, further, that the absence of the warrant may affect the grade of offense committed by violent resistance resulting in the death of the officer. *Galliard v. Laxton*, 9 Cox, C. C. 127; *Codd v. Cube*, L. R. 1 Exch. Div. 352; *Reg. v. Chapman*, 12 Cox, C. C. 4; *People v. McLean*, 71 Mich. 809; *Webb v. State*, 51 N. J. L. 189.

In those cases, warrants existed which would have authorized an arrest. In crimes such as assault, battery, or homicide, the animus with which the act is done becomes an element of the offense; and it may very properly be held, where the arrest of a person is attempted without warrant, in a case in which warrant is necessary, that resistance was under the belief that the act was an unauthorized interference with right to personal liberty, which every person has the right to resist by the use of such force as is necessary. In such cases the existence of the writ, if not present, ought not to deprive the person resisting arrest of the right to act and base his belief upon the facts as they then appeared to him, and to have his intent, upon being charged with crime, determined thereby. The cases referred to, in general terms, declare arrest illegal, in cases in which warrant is necessary, unless the warrant be in the possession of the officer at time and place of arrest; but they were all criminal cases, in which the animus of the party resisting was a vital question. It ought not to be denied that the law contemplates that the warrant directing the arrest of a person charged with crime will be in the possession of the officer when he makes an arrest under it, for he is required to exhibit it, if called upon to do so; and this is based on a wise public policy, one purpose of which is that the officer may have to exhibit such evidence of his authority to make the arrest as will be deemed sufficient to take from the person whose arrest is commanded all right to question the authority of the officer. Does it, however, follow from this that the absence of the warrant at the time and place of arrest, if in fact a

valid warrant was in possession of the officer commanding him to make the arrest, will entitle the person arrested to maintain a civil action as for trespass or false imprisonment? The correct answer to this must depend upon a determination of the facts which confer authority on an officer to arrest a person charged with crime, for, if the authority exists, an irregular exercise of it cannot give cause for civil action, unless that irregularity or mode of execution be of a character to work loss or deprivation of freedom of action to the person arrested, which would not have followed arrest in every respect regular. When it is said that arrest may be made without warrant, it is meant that the issuance of warrant is unnecessary; but, as no facts are shown to have existed that would have authorized the arrest of Arnold without warrant, it is unnecessary to inquire when such arrests may be made.

The first fact necessary to confer authority on a sheriff, or officer of like powers, in a case in which warrant is necessary, is the existence of a warrant, issued by some magistrate or court having power under the law to issue it, commanding him to make the arrest. If the warrant be issued by such magistrate or tribunal, and be in the form prescribed by law, so far as the officer is concerned to whom it is directed, it must be treated as conclusive evidence that the preliminary facts were shown which authorized it to issue. The next step is the delivery of the warrant to the person who is commanded to execute it, and, when so delivered, the officer's obligation, and duty to obey its command, become fixed, and it is clear that authority to do the act commanded must co-exist with the obligation or duty. These are the essentials which confer on a sheriff, or like officer, the authority to arrest on warrant, and so long as they continue operative the authority must exist. The manner and circumstances of execution relate not to the authority, unless expressly or by necessary intendment made to; and, if the law prescribes the modes of execution, this is either to secure the execution of the process, or to guard the person whose arrest is commanded from unnecessary annoyance or oppression, and a departure in this respect ought not to affect the question of authority. But if legal injury results to the person arrested, through departure from the procedure prescribed, this would give ground for civil action; but no legal injury could result if the officer, acting within the territory to which his duties pertain, uses no more force in executing a valid warrant than is necessary, and in other respects obeys the writ. If an officer uses more force than is necessary to arrest and detain, he becomes civilly liable, in so far as would any other wrongdoer; and if he refuses to exhibit the warrant, when called upon to do so, or to make known under what authority he assumes the right to arrest, he may thereby forfeit the right he would otherwise have to compensation for hurt received by force, and in resisting arrest. *State v. Plinney*, 42 Me. 390. If a person arrested should ask a court to discharge him on the

22 L. R. A.

ground that more force was used than necessary to arrest and detain him, on the ground that he was not informed at time of arrest of the authority under which the officer was acting, or that the warrant was not exhibited to him on demand, no court would discharge him, if it appeared that the arrest was made under a valid warrant delivered to an officer authorized to execute it, who, in person or by deputy, had made the arrest. This would follow because the arrest and detention would be under the authority of law, and therefore legal. "If the officer expressly declare that he arrests under an illegal precept and on that only, yet he is not guilty of false imprisonment, if he had at the time a legal one; for the lawfulness of the arrest does not depend on what he says, but what he has. *State v. Kirby*, 24 N. C. 201; *State v. Elrod*, 28 N. C. 250. Undoubtedly, if the jailer had discharged the plaintiff, the sheriff would have been liable for an escape on Jones' execution: for the jailer is the sheriff's deputy, and bound to take notice of the writs in the hands of his superior, and a detention by the jailer is justified, if one by the sheriff himself would have been, by the same process." *Meeds v. Carver*, 80 N. C. 298. The same rule as to legality of arrest was asserted by Lord Holt in *Grenville v. College of Physicians*, 12 Mod. 886.

In the case before us, it is not shown that any act was done in arresting and detaining the plaintiff that would not have been strictly lawful had the warrant been in the possession of the deputies at time and place of arrest, nor does it appear that plaintiff suffered any loss, indignity, inconvenience, or deprivation of freedom which he would not have suffered, had the warrant then been in their hands, and every step in the procedure contemplated by the statute strictly followed; under such circumstances we are of opinion that the charge of the court, to the effect that the warrant did not justify the arrest unless it was in possession of the deputies at time and place of arrest, was erroneous. Authority to make the arrest existing, the manner in which that power was exercised ought not to be held ground for civil action, unless therefrom hurt resulted to plaintiff, which would not necessarily have followed, had the exact procedure contemplated by the statute been pursued. Only one case has been found in which the rulings made in this case were sustained in a civil action based on like facts. Such seems to have been the ruling of the court of errors and appeals of New Jersey in the case of *Smith v. Clark*, 53 N. J. L. 197; but the authorities cited in that case all had application to the question that arises in a criminal case, where a person is charged with assault, assault and battery, or homicide growing out of force in resisting arrest, which are not believed to be applicable to this case.

For the errors in the charge of the court, the judgments of the District Court and Court of Civil Appeals will be reversed, and the cause remanded.

It is so ordered.

CONNECTICUT SUPREME COURT OF ERRORS.

Re James S. BARBER'S ESTATE.

.....Conn.....)

1. **It is reversible error to instruct the jury in a proceeding to establish a will that if from the whole evidence "it is left uncertain whether or not the testator was of sound mind, then it is left uncertain whether a person of sound mind, within the meaning of our statute, has made the will, and the will should not be sustained," although preceded by an intimation that the proponent has the burden of establishing the will by only a fair preponderance of evidence and followed by a statement that to defeat the will because of insane delusions they should be established by a "fair preponderance of evidence."**
2. **Although the burden is on the proponents of a will to establish the sanity of the testator, yet, after favorable testimony by the attesting witnesses, to defeat the will the testimony of contestants must so far overcome that of proponents as to neutralize the effect of the legal presumption of sanity.**
3. **To instruct the jury that the burden is on the proponents of a will to establish the testator's sanity and that they must fail if at the close of the evidence the "scales stand evenly balanced" without instructing as to the legal presumption of sanity, is reversible error.**
4. **The fact that many persons after conversing with a testator and observing his conduct believed him to be insane is not a proper one upon which to base a hypothetical question to an expert as to his capacity to form an opinion regarding testator's sanity,—at least if the conversations and descriptions of conduct are not stated; nor is the fact that persons who observed his conduct advised his wife that it was unsafe for her to remain alone with him.**
5. **In a hypothetical question to an expert as to his capacity to form an opinion regarding the sanity of a testator attacked because of an insane delusion as to the legitimacy of his children, which is based on their being disinherited, the true value of the estate and the amount given the children should be stated, and not the inventory value and the counsel's statement that the children's share was "Inconsiderable" and amounted to "practical disinheritance."**
6. **After enumerating a great number of facts as the basis for a hypothetical question to an expert it is improper to incorporate the entire testimony of a witness without stating it to be considered "in connection with" the other facts and propositions named.**
7. **A hypothetical question to an expert witness testifying to a person's mental condition about which he has no personal knowledge is improper, if it fails to present facts, which it includes, in their just and true relation and causes them to appear in one that is untrue and unjust.**
8. **An appeal from a probate decree approving or disapproving an alleged**

will is not an "action by or against the representatives of a deceased person" within the meaning of Gen. Stat., § 1094, making memoranda in his books evidence of the facts therein stated in such actions.

9. **A large number of letters alleged to have called forth letters, copies of which in a testator's letter book have been admitted on the question of his mental capacity should not be laid in a mass before the jury unread, for them to examine or not as they should feel inclined; but absence of proof of authenticity, that they were received in due course of mail, or of any offer to produce their authors for examination, is not ground for rejecting them if they were found among testator's papers with his memoranda on them.**

(October 25, 1893.)

APPEAL by proponents from a judgment of the Superior Court for Hartford County setting aside a will which had been admitted to probate by the Probate Court for the District of East Windsor. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. W. C. & W. S. Case*, for appellants:

In actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased relevant to the matter in issue may be received as evidence.

Gen. Stat. § 1094.

This is an action.

It is an action by or against the representatives of deceased persons.

Pisley v. Eddy, 56 Conn. 338.

The expert must know from the question itself just what the evidence truly shows, *i. e.*, upon the assumptions of the questioner, or his answer is valueless.

Those interested in his answer must know from the question itself what the expert is believing to be the state of facts, in other words, what the evidence truly shows, or the answer is valueless.

Carpenter v. Blake, 2 Lans. 206; *Reynolds v. Robinson*, 64 N. Y. 595; *Seymour v. Fellows*, 77 N. Y. 178; *Guiterman v. Liverpool*, N. Y. & P. S. Co. 88 N. Y. 858; *Cowley v. People*, 88 N. Y. 470, 88 Am. Rep. 464; *Dilleber v. Home L. Ins. Co.* 87 N. Y. 83.

In order properly to form an opinion, the witness should have had full information as to the ascertained or supposed state of facts upon which his opinion is based. He could not be called upon to determine the truth of the facts sworn to before giving such opinion. It is not his province to draw inferences from the evidence of other witnesses, or to take in such facts as he can recollect, and thus form an opinion.

Guiterman v. Liverpool, N. Y. & P. S. Co. *supra*.

What is "testamentary capacity" in this state?

The court in *Dunham's App.*, 27 Conn. 207,

NOTE.—The subject of burden of proof as to a testator's competency which is very fully considered in the above case is exhaustively annotated with the case of *Prentiss v. Bates* (Mich.) 17 L. R. A. 22 L. R. A.

494, which is somewhat out of harmony with the weight of authority shown by that note and reinforced in the main by the case above.

says: "The proper inquiry in such cases is, Has the testator mind enough to know and appreciate his relations to the natural objects of his bounty, and the character and effect of the dispositions of his will? If he has, then he has a sound and disposing mind and memory, although his mind may not be entirely unimpaired."

In *St. Leger's App.*, 34 Conn. 449, 91 Am. Dec. 739, the court said: "It was not necessary that the testator should have been capable of transacting business generally, but that he had sufficient capacity to make a will if he understood the business in which he was engaged and the elements of it, namely, if he recollected and understood, or in other words, comprehended, the nature and condition of his property, the persons who were or should be the natural objects of his bounty, and his relation to them, the manner in which he wished to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he was making."

The rule is thus stated in *Richmond's App.*, 59 Conn. 245: "The law merely requires that the testator should be possessed of sufficient intelligence and memory to fairly and rationally know and comprehend the effect of what he is doing, and the nature and conditions of his property, to understand who are or should be the natural objects of his bounty, and his relations to them, the manner in which he wishes to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he is making."

In *Comstock v. Hadlyme Ecl. Soc.*, 8 Conn. 261, 20 Am. Dec. 100, the court says: "Those who claim under the will must take upon themselves the burden of proof; and they must not only prove that the will was formally executed, but that the testator was of sound and disposing mind. And where there is necessity for any proof on the part of the plaintiff he ought to begin."

In *Knox's App.*, 26 Conn. 22, the court states that without some evidence of capacity the law did not presume it, as in the ordinary case of a party who executes a deed or other contract.

Without what evidence of capacity? Without a preponderance of evidence on the whole case? Clearly not, or the court would have so stated—nor would it have recognized a presumption of the law unless such presumption exists.

There is but one thing that this phrase can mean, and that is, that the proponents must at the outset introduce their "statutory evidence" upon the statutory requirements, and this having been done, the presumption of law is established, and the burden of proof shifts to those who assail the will.

Denison's App. 29 Conn. 403; *Field's App.* 36 Conn. 277; *Dale's App.* 57 Conn. 132; *Livingston's App.* 63 Conn. 74.

In one sense there is no limit to the latitude which the law gives a testator in the disposition of his property. He may dispose of it by will, and the law concerns itself no farther than this. It is not therefore from the provisions of the will itself that the question of capacity is or can be determined, however apparently unjust or absurd they may appear, but it is from a consideration of the testator's

reasons and motives taken in connection with them, for it must be remembered that testamentary capacity is evidenced as well by withholding as it is by giving.

St. Leger's App. supra.

Mr. John L. Hunter also for appellants.
Messrs. Charles H. Briscoe, Arthur F. Eggleston, and William J. McConville, for appellees:

In *Cowley v. People*, 83 N. Y. 470, 38 Am. Rep. 464, the court said: "The claim is that a hypothetical question may not be put to an expert unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue or fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so, to the satisfaction of the jury; and so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice."

It is only required that the testimony should tend to establish every supposed fact embraced in the question.

Rogers, Expert Testimony, p. 40, and cases cited.

Such a question is not improper because it includes part of the facts in evidence.

Stearns v. Field, 90 N. Y. 640; *Filer v. New York Cent. R. Co.* 49 N. Y. 42, 10 Am. Rep. 327; *Hartnett v. Garvey*, 66 N. Y. 641; *Rogers, Expert Testimony*, p. 40; *Mercer v. Vose*, 67 N. Y. 56; *Woodbury v. Obeary*, 7 Gray, 471; 1 Rice, Ev. pp. 849, 350, and cases cited; *Roraback v. Pennsylvania Co.* 58 Conn. 292.

When the memoranda and the diaries were permitted to go to the jury as evidence on the question of sanity, they went to the jury for the only purpose for which they could go, the issue of sanity being the only issue to which the evidence in the cause is directed.

St. Leger's App. 34 Conn. 447, 91 Am. Dec. 735; *Livingston's App.* 63 Conn. 68.

The written memoranda of the testator stand upon the same footing with his oral declarations, and may be introduced in evidence for the same reasons and for none other than his oral declarations.

Shailer v. Bumstead, 99 Mass. 112; *Lane v. Moore*, 151 Mass. 87; *Woodward v. Sullivan*, 152 Mass. 470; *Robinson v. Adams*, 62 Me. 413, 16 Am. Rep. 473; *Comstock v. Hadlyme Ecl. Soc.* 8 Conn. 254, 20 Am. Dec. 100; *Canada's App.* 47 Conn. 463; *Dale's App.* 57 Conn. 143.

The case at bar is not an action within the meaning of this statute.

Such memoranda are only admissible when the action is in some way to affect the quantity of the estate.

Lockwood v. Lockwood, 56 Conn. 106; *Pizley v. Eddy*, Id. 836.

In the charge as to burden of proof the court is sustained by *Comstock v. Hadlyme Ecl. Soc. supra*; *Knox's App.* 26 Conn. 20; *Canada's App.* 47 Conn. 450; *Dale's App.* 57 Conn. 127; *Richmond's App.* 59 Conn. 226; *Livingston's App.* 63 Conn. 68; *Blaney v. Sargent*, 1 Mass. 335; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Baxter v. Abbott*, 7 Gray,

71; *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Rep. 697; *Barker v. Comins*, 110 Mass. 477; *Gerrish v. Nason*, 22 Me. 488, 39 Am. Dec. 589; *Culley v. Culley*, 84 Me. 162; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Wiltsams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Delafield v. Parish*, 25 N. Y. 9.

The question was whether the testator was of sound or unsound mind, and the burden was upon the proponents of the will to show that he was of a sound mind. The form of insanity had nothing to do with this burden.

Comstock v. Hadlyme Eccl. Soc. supra.

Setting aside cases of dementia and loss of mind or intellect, the true test of insanity is mental delusion.

Riggs v. American Tract Soc. 95 N. Y. 511; *American Seamen's Friend Soc. v. Hopper*, 38 N. Y. 624.

Where the mental disorder is a delusion upon one or a few particular subjects, the testimony of persons with whom he has not had occasion to speak on those subjects is of no weight.

American Seamen's Friend Soc. v. Hopper, 38 N. Y. 621; *Hammond*, Med. Jur. pp. 37, 76.

Fenn, J., delivered the opinion of the court:

An appeal having been taken to the superior court from an order and decree of the court of probate for the district of East Windsor, proving and approving an instrument purporting to be the last will and testament of one James S. Barber, disposing of a considerable estate, on the trial to the jury the validity of said instrument was contested, mainly on the ground that the alleged testator was not of sound and disposing mind and memory at the time of its execution. The jury returned a verdict setting aside said will, which was accepted by the court, and judgment rendered thereon. From that judgment an appeal was taken to this court, and several reasons assigned.

We will consider first, as of the greatest general importance, the exceptions to the charge to the jury. Upon the trial the proponents and present appellants, having introduced the alleged will, also introduced the evidence of the two surviving witnesses to the will, tending to prove, and which they claimed did prove, its due execution, and that the testator was of sound and disposing mind and memory at that time. They then rested, and the contestants went forward and introduced evidence to show the want of capacity, mainly, as was claimed, because of the existence of an insane delusion existing in the mind of said Barber in reference to the paternity of his children. This was met by evidence offered by the proponents in rebuttal. The court, in the course of its somewhat lengthy charge to the jury, made several more or less direct references to the subject of the burden of proof upon the question of capacity. We will quote such portions of these references as seem in any way material. Early in the charge, the court, having explained what constitutes testamentary capacity, said: "If, gentlemen, you are satisfied by a fair preponderance of the evidence that the testator had this kind of mental capacity, understanding, and strength at the time of

making this will, it will be your duty to find that he was of sound mind, and, upon this issue, render a verdict for the proponents in favor of the will. If, on the other hand, you are not satisfied by a fair preponderance of evidence that the testator, at the time of executing this will, had the kind of mental strength and capacity which I have been describing to you, it will be your duty to find that he was not of sound mind, and your verdict should be for the contestants, and against the will. Gentlemen, the burden of proof as to the soundness of mind of the testator lies, in every case, on the parties relying on the will, and they must satisfy you that it is the will of a capable testator; and when the whole matter is before you, on evidence given on both sides, if the evidence does not, by a fair preponderance of it, satisfy you that the will is the will of a competent testator, you ought not to affirm, by your verdict that it is. In other words, if, when the whole matter is before you, on the evidence given on both sides, it is left uncertain whether or not the testator was of sound mind, then it is left uncertain whether a person of sound mind, within the meaning of our statute, has made the will, and the will should not be sustained. In the course of the trial, gentlemen, the balance of evidence may fluctuate from one side to the other, but the burden of proof remains where it was at the outset,—upon the advocates of the will; and unless, at the close of the trial, the balance is with the advocates of the will, unless the beam of the scale tips down on the side of the advocates of the will, they must fail. It is not sufficient that the scales stand evenly balanced. There must be a fair preponderance in the proponents' favor to justify a verdict sustaining a will. As I have before said to you, no person, unless of the age of eighteen years and of sound mind, can dispose of his or her property by will; hence, when the advocates or proponents of the will present the instrument, they must satisfy you by a fair preponderance of the evidence that the deceased, at the time he executed the will, belonged to the class of persons who by law can make wills." Towards the close of the charge, the court said: "In the case at bar the burden of proof is upon the executor to show that James S. Barber was, at the time of the execution of his alleged will, of a sound and disposing mind; and if, upon the whole evidence, you are uncertain whether James S. Barber, at the time of the execution of said alleged will, was of sound mind or not, then it is left uncertain whether, under the statute, he was capable of making a will, and it is your duty to render a verdict for the contestants. And I will further add, to render a will invalid, because of unsoundness of mind of the testator, it is not necessary to show that, at the time of making the supposed will, he was demented or an imbecile, and wholly deprived of sense. It is sufficient if you are satisfied by a fair preponderance of the evidence that he was affected with an insane delusion or delusions, and that the provisions in his will were the product of such insane delusion or delusions." The proponents, in

their reasons of appeal, complain that this charge of the court, and especially the matter contained in the last quotation, (as well as in several other portions of the charge, which we have deemed it unnecessary to quote,) was confusing and contradictory. Confining our comments to the language quoted, we are constrained to say that it appears to us that there is some apparent foundation for this criticism. Taking the language used, strictly and without qualification, there would seem to be three conflicting rules, each distinctly stated: first, that the burden of proving that the will was the same act of the testator, by a fair preponderance of evidence, lies "in every case," and remains throughout the trial, upon the proponents of the instrument; second, that the burden on the proponents is not that of proof by a fair preponderance of evidence, but by such evidence as brings certainty upon the point to the minds of the triers; third, in order to defeat the probate of a will, on the ground of its being the product of an insane delusion or delusions, the jury should be satisfied, by a fair preponderance of evidence, of the existence and effect of such delusions.

If the last of these rules had stood alone, and had been so stated that the jury might be presumed to have understood it, and that it was their duty to be guided by it, the proponents' ground of complaint against the charge, which we are at present considering, could be dismissed. But, taking the language which we have quoted as a whole, (and there is nothing elsewhere in the charge which in any manner explains or modifies it,) it is not only possible to see how the jury may have been misled, but it is impossible to see how it could have been otherwise. The statement twice made in different portions of the charge—that "if, when the whole matter is before you, on the evidence given on both sides, it is left uncertain whether or not the testator was of sound mind, then it is left uncertain whether a person of sound mind, within the meaning of our statute, has made the will, and the will should not be sustained"—would, as it appears to us, be likely to impress the jury, and remain in their minds, as the salient feature of the charge. Such a principle, if correct, would have the advantage of being most easy to understand and to apply. The trouble is that it is manifestly incorrect, none the less because it appears to be a quotation from the language of the supreme court of Massachusetts in the case of *Crowninshield v. Crowninshield*, 2 Gray, 524, 584, and so much so that it would be injustice to the learned judge to believe that he intended it to be understood or believed that it would be understood by the jury literally, strictly, and without qualification, as by the word "equally" before "uncertain," or by the other language which immediately preceded and that which immediately followed it. As it seems to us, nevertheless, that it must have been, on this ground, therefore, it must be held (as further claimed by the proponents) that the charge of the court was erroneous.

But a question of more general interest and importance remains to be considered, in reference to the portion of the charge stating as

the rule that the burden of proof as to capacity, by a fair preponderance of evidence, remains in every case, and throughout, upon the proponents of the will. The inquiry is whether this is a correct statement of the law and practice in this state, or, rather, what the correct rule and principle is. In considering this question, an examination at length of the decisions in other jurisdictions would be of little practical utility, for the slightest inspection will disclose an irreconcilable conflict of views and opinions upon the subject. Thus, in 2 Greenleaf on Evidence, 15th ed. § 689, it is said in the text: "In regard to insanity or want of sufficient soundness of mind, we have heretofore seen that though in the probate of a will, as the real issue is whether there is a valid will or not, the executor is considered as holding the affirmative, and therefore may seem bound affirmatively to prove the sanity of the testator, yet we have also seen that the law itself presumes every man to be of sane mind until the contrary is shown. The burden of proving unsoundness or imbecility of mind in the testator is therefore on the party impeaching the will for this cause." While, in a note to the same section, authorities are first given in support of the doctrine stated in the text, then it is said: "It is not so held universally, and the better rule is that the burden of proof, both of the execution and the capacity of the testator, is upon him who attempts to set up the will." Authorities in support of that statement are then given, and the note then ends with these words: "Indeed, the question of the burden of proof in a plea of insanity is one which is variously decided,"—a statement which, satisfactory or not, is doubtless correct. We shall therefore, so far as a consideration of the authorities elsewhere is concerned, content ourselves with saying that while in some of the states the burden of proving want of capacity is held, as stated in the text of Greenleaf, to be, throughout, upon the contestants of a will, in others, and perhaps most, either by virtue of statutes or in accordance with the decisions of the courts of last resort, affirmative proof of sanity is required from the proponents; but that generally speaking, in such jurisdictions, notwithstanding such requirement of affirmative proof of capacity, the general presumption of sanity is held to continue, and that, if the evidence is balanced and so doubtful, such presumption should prevail, (*Trish v. Newell*, 63 Ill. 196; *Carpenter v. Calvert*, 88 Ill. 62; *Deafield v. Parish*, 25 N. Y. 9; *Hawkins v. Grimes*, 18 B. Mon. 257;) or, as it is held, that, on formal proof of capacity by the attesting witnesses, the burden of the proponents has been discharged, and thereafter rests upon the party alleging incapacity. *Sloan v. Macneil*, 8 N. J. Eq. 563; *Yoe v. McCord*, 74 Ill. 88; *Mayo v. Jones*, 78 N. C. 402; *Thompson v. Kyner*, 65 Pa. 368; *Egbert v. Egbert*, 78 Pa. 326; *Rich v. Bowker*, 25 Kan. 7; *Colo's Will*, 49 Wis. 179.

Important cases, illustrative of these views, are *Perkins v. Perkins*, 39 N. H. 168, and *Tuff v. Hoemer*, 14 Mich. 309. In the former

case the court said: "That every man is presumed to be sane is abundantly proved by the authorities. We think that although the subscribing witnesses, if they can be produced, must be examined in relation to the soundness of the testator's mind, yet the party propounding a will for probate is under no general duty to offer any evidence of the testator's sanity, but may safely rely upon the presumption of the law that all men are sane, until some evidence to the contrary is offered." And it was further said that though the burden of proof is upon the party who asserts the validity of the will, and this burden remains upon him until the close of the trial, he need introduce no proof upon this point until something appears to the contrary. In *Taff v. Hoerner, supra*, Cooley, J., delivering the opinion of the court, said: "The party assuming the burden of establishing a will has not supposed himself bound in his opening, to go further than to give evidence by the subscribing witnesses of these facts, which would make out, prima facie, a valid testamentary instrument, and has left all further evidence on the subject of mental capacity to be brought in by way of answer to that adduced by the contestant. The evidence at the opening has usually been of a formal character, and the proponent has confined himself to inquiries of a general nature respecting the signing and attestation, and whether at the time the party appeared to understand the business in which he was engaged. To prove that the decedent was not insane is to prove that an exceptional state of facts did not exist; in other words, it is to prove a negative, and, on general principles, very slight evidence only should be demanded of the party called upon to prove such a state of facts." See also *Banker v. Banker*, 63 N. Y. 409; *Dean v. Dean*, 27 Vt. 746; *Turner v. Cook*, 36 Ind. 129; *Herbert v. Berrier*, 81 Ind. 1; *Jenkins v. Tobin*, 31 Ark. 806; and *Stubbs v. Houston*, 33 Ala. 555.

The above language of Judge Cooley states very correctly, we think, the existing practice in this state, except, perhaps, as to the form of the inquiry put to attesting witnesses concerning the capacity of the testator; and the views expressed as to the character of evidence of the nonexistence of insanity, pertinent as they are, would be even more so when, as in the case before us, the issue raised was mainly as to the existence in the mind of the alleged testator of an insane delusion on one point only, consistent with general capacity to do business and to manage successfully a large estate, concerning which delusion the court, in its charge, at the request of the contestants, said to the jury: "When the mental disorder is a delusion upon one or a few particular subjects, the testimony of persons with whom he has not had occasion to speak on those subjects is of not so much weight as that of those with whom he had occasion to speak on those subjects,"—a statement the correctness of which, in point of law, counsel for the contestants, in their brief, justify, by saying that the court could have gone further, and charged the jury, in the language of Chief Justice

Denio, in *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 631, that, under such circumstances, "the testimony of persons with whom he has not had occasion to speak on those subjects is of no weight." It ought, we think, to be manifest that, if this be correct, the position of the proponents of a will attacked on the ground of an insane delusion on one or a few particular subjects, existing in the mind of the claimed testator, compelled to bear throughout, and unrelieved by any presumption of sanity, (even, as it would seem, by a presumption that, if the decedent were sane on subjects generally, he was so as to all, until the contrary appeared,) the burden of proving the nonexistence of any form, general or special, of incapacity, which could have affected the provisions of the instrument, (a burden which though negative in its nature, could only be discharged by positive evidence,—the evidence of those who had talked with the testator on subjects which the proponents of the will may claim never entered into his thoughts at all,) if this, we say, be a correct statement of the law, the position of the proponents of a will must be difficult in the extreme.

But it is time that we came to an examination of the Connecticut decisions, and the rule to be deduced from them. In *Comstock v. Hadlyme Eccl. Soc.*, 8 Conn. 254, it was held that, on an appeal from a decree of a court of probate establishing a will, the burden of proof as to the capacity of the testator rests upon the party claiming under such will, who is therefore entitled to go forward on the trial. This decision was approved and affirmed in *Knox's App.*, 26 Conn. 22, and followed in *Dale's App.*, 57 Conn. 182, and *Livingston's App.*, 63 Conn. 74. It is the settled and undoubted law of this state. But this statement does not decide; it is only preliminary to the real question before us: What is the nature, character, and extent of that burden? What does it demand of the proponents? It requires, in the first instance, that one or more of the subscribing witnesses, if alive and within reach of the process of the court, should be called and examined, in reference both to execution and capacity. It is the right of the party contesting the validity of the will to require that all the attesting witnesses so within reach of process should be called, but such right is waived where no demand is made therefor before the final closing of the evidence in the case. *Fyfe's App.*, 36 Conn. 277. The testimony thus adduced is by practice confined to the appearance, conduct, and surroundings of the testator at the time of the execution of the will, and the opinions of the witnesses, based thereon. If such opinions are favorable to the sanity of the testator, then, having thus introduced the subscribing witnesses to these points "by the practice in this state, the proponents rest, and the contestants go forward with their evidence, and the proponents then rebut." *Dale's App.* and *Livingston's App. supra*.

Waiving, for the present, the question as to what would be the case, if none of the subscribing witnesses could be procured, or

if those called expressed opinions unfavorable to the capacity of the decedent, and assuming the due testimony of such witnesses to capacity, as well as execution, what, then, becomes of the burden of proof, now that the prima facie case has been made out, and the proponents have rested? In the case of *Comstock v. Hadlyme Eccl. Soc.*, *supra*, *Brooks v. Barrett*, 7 Pick. 94, was referred to as authority. That case was indeed practically overruled in Massachusetts by *Crowninshield v. Crowninshield*, 2 Gray, 524. But, notwithstanding that fact, some years after the later decision, our court, in *Knox's App.*, *supra*, again referred with approval to *Brooks v. Barrett*, saying that it was there held "that, where a will is opposed on the ground of the testator's insanity when it was executed, those who insist on its probate have the burden of proof in the first instance, and, after they have proved the sanity of the testator by the subscribing witnesses, the burden will be shifted on the other party to prove insanity." And the court also cite *Gilley v. Gilley*, 84 Me. 162, and *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589, to the same effect. That this, in effect, however best expressed, is the law of Connecticut, has, we think, been the general understanding of the profession ever since *Knox's App.* As an illustration, it may be observed that in *Dale's App.*, *supra*, counsel for the contestants of Mrs. Munson's will (not the proponents) requested the court (see page 180, 57 Conn.) to charge the jury that "in ordinary cases, if the attesting witnesses to a will all agree in the opinion that the will was duly made and executed, it throws the burden of proving affirmatively the exercise of undue influence or want of testamentary capacity on the heirs who may contest the will," claiming, however, that the case then on trial was exceptional. The trial court, although not charging in the language requested, apparently had the same view, and expressed it by twice using the language quoted by this court in *Knox's App.*, *supra*, from *Brooks v. Barrett*, *supra*,—that the burden of proof was upon the proponents "in the first instance," and the charge was approved by this court. And the same view appears to be clearly held in *Livingston's App.*, 63 Conn. 75. Opposed to this form of expression, however, as to the shifting of the burden of proof during the trial of a case, are the dicta, in this state and elsewhere, that the burden of proof never shifts; that it remains on a party whose duty it primarily is to prove a fact in support of his case, and does not change in any aspect of his cause; that while the weight of evidence may shift from side to side, in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established, the burden continues where it was at the outset. The term "burden of proof" is, after all, and no matter how important it has become through universal adoption and use, a mere form or figure of speech. Accordingly, as one view or another of its significance has been held, one style or the other of these seemingly inconsistent expressions has been used to denote

entirely consistent meanings. What we are now concerned to do is to discover, if we can, and to express as clearly as we can, the true underlying principle and rule; that is to say, the law of this jurisdiction in relation to the matter in question.

Assuming, then, as the better form of statement, in accordance with modern phraseology, that the burden of proof does not shift, and that such burden is placed primarily, in reference to sanity, on the proponents of a will, what duty is thereby imposed? The statute provides that all persons of a certain age and of sound mind may make wills. It is therefore incumbent on the proponents to prove that the alleged testator was of sound mind. But the law presumes every person to be so until the contrary is shown, and this presumption is of probative force in favor of the proponents of the will. It would be sufficient, in the first instance, were it not that, for reasons clearly indicated in the opinions in *Knox's App.*, and *Field's App.*, *supra*, the practice has grown up and become law of requiring the presence in court of such of the attesting witnesses as are within reach of the process of the court, and evidence from some or all of them in reference to capacity. They are the persons who the law, in its wisdom, has provided should be placed about the testator at the time and place of the execution of the will, in order that they may have means and opportunity of judging of his capacity, and may protect both the testator and the heirs. It is for this reason, as this court explicitly said in *Field's App.*, *supra*, that the heirs have a right to insist that the triers shall have the benefit of the observation and opinions of all the witnesses, if practicable, and that the party seeking to establish the will shall, unless the requirement is waived, put them on the stand. The making of a will, said this court in *Knox's App.*, "is of so much importance, and it is so often, not to say, so generally, done under circumstances of great bodily debility, likely to produce more or less mental derangement, that the statute has very properly required three witnesses." Having required them, it is as natural to hold that they should be called, or their absence legally accounted for. Failure to do this would raise a natural inference against the validity of the will, which would properly go very far to overcome the presumption of law in its favor. So, also, it may be said, that if, when called, they fail, by their evidence, to support the capacity of the testator, so far as the facts related by them, as existing at the time, and their opinions based on those facts are concerned, it may well be claimed that they disprove the presumption of sanity and necessitate the production of other evidence of capacity before the proponents can rest as having established and made out a prima facie case. But when the evidence of the attesting witnesses has been produced, and is in favor of the proponents, and they have thereupon rested, what has been made out? What is embraced in the prima facie case thus presented? Two things, certainly, as it seems to us,—that the testator generally was of sound and disposing mind and mem-

ory, as established by the presumption of sanity; and that there was nothing in the surrounding circumstances, at the time of the execution of the instrument, suspicious in its character, or calculated to affect or weaken such presumption. In other words, the testator was to be presumed sane until the contrary appeared, and the contrary did not appear at the time of the execution of the instrument and to those who witnessed it. This would be the necessary force of the evidence. It would, perhaps, be all its force if the witnesses called in were strangers to the testator, and had no other opportunity than the brief act of signing afforded to judge of his condition or state of mind. It might, however, have an additional weight if the acquaintance or means of observation were greater or more extended. Whatever weight it had, the proponents would be entitled to upon the whole case, but the essential elements of the *prima facie* case would be as we have indicated. Now, the proponents having presented their *prima facie* case, and rested, the contestants, as was said in *Dale's App.*, *supra*, would go forward with their evidence, and the proponents then rebut. When the case was closed upon the evidence, what would be the situation of the parties? The burden of proof as to the capacity would remain upon the proponents. In their favor, in the discharge of that burden, would be the presumption of sanity, valid until overcome by opposing proof. Against it would be the evidence offered as to incapacity by the contestants. If it was evidence as to general incapacity, covering, perhaps, as this court said in *Dale's App.*, 57 Conn. 143, "long spaces of time in either direction," it would have been met with more or less success by counter evidence of the same character; if of delusions on one or more particular subjects, consistent with the general appearance of sanity and capacity, it would have been met, as such evidence alone could be met, either by disproving or discrediting the instances claimed, or by rendering their existence or influence upon the provisions of the will improbable, by other instances, circumstances, and conduct of an inconsistent character. In short, as was so clearly stated in the citation made from the opinion of Judge Cooley in *Taff v. Hoemer*, 14 Mich. 809, the evidence of the contestants would be offensive and affirmative in its character, and that of the proponents defensive and negative, and on the whole case the question would be whether the evidence of the contestants sufficiently preponderated over the rebuttal and special evidence of the proponents, including the evidence of the attesting witnesses, to overcome the presumption of sanity, which constituted the proponents' *prima facie* case. In other words, leaving the presumption of sanity out of the case, was there more evidence of insanity than of sanity, so that, putting it again into the case, there would still be as much? Then, and then only, would the scales of justice, to which the court below, in the case before us, referred, be so adjusted, according to law, that it would be correct to say: "Unless, at the close of the trial, the balance is with the advocates of the will,

they must fail. It is not sufficient that the scales stand evenly balanced." This consideration of the presumption of sanity in favor of the proponents' case the court below, while holding them to a strict discharge of the burden of proof, failed in any form to recognize, and therefore, in this particular also, we must hold that there was error in the charge.

In addition to the reasons of appeal based upon the charge of the court to the jury, there are other reasons which remain to be considered. It is claimed that the court erred in admitting a hypothetical question addressed to Dr. Stearns, an expert witness for the contestants, against the proponents' objection. The hypothetical question is contained in the record, covering three printed pages. Fortunately, we deem it unnecessary to quote it at length. It is only requisite to refer to some of the matters contained in it which appear to us improper elements to enter into such a question. Among the matters which the witness was asked to assume to be true were that many different persons, after conversing with the testator and observing his conduct, believed him to be insane. We do not think such a belief of many others, presumably not experts, and opposed, as it doubtless was, by the contrary belief of many others, constituted a legitimate element of the basis of the opinion of the witness. By deciding upon that ground, he would not only assume the function of the triers, but would go further, since they could only consider such opinions in connection with the facts on which they were based; while the witness had in reference to such opinions no facts, except that the many persons formed such opinions after conversing with the testator and observing his conduct. But there was no statement of the conversation or description of the conduct. Of course, we do not mean to intimate that, if these had been added, the fault would thereby have been obviated.

Again, another assumption was that "neighbors and friends, who observed his conduct, advised his wife that it was unsafe for her to remain there alone, and that she had better send for her father to come and stay with her; and she did so, and he remained over night," which is perhaps more clearly improper in such a question, if anything can be, than the other.

Again, "that he afterwards made a will, leaving his daughter, whom he named by name, such an inconsiderable amount of his property, although his estate was inventoried after his death at more than \$100,000, as to practically disinherit her, and making like provision in his will for his after-born children, which practically disinherited them." In reference to this last quotation, if what the contestants stated in the argument before us is correct,—that the clear estate of the testator would not amount to more than half its inventory value,—the statement of that, rather than the true value, was the substitution of an immaterial for a more material element, and it is to be noticed that the amount left to the child, and also the provision for after-born children, is not stated,

but the omission is supplied by the assumption and inference of the counsel propounding the question that they were "inconsiderable," and amounted to "practical disinheritation,"—very indefinite expressions, calculated to produce very definite impressions.

And, finally, after three pages of statements, assumed facts, and inferences, the question concludes thus: "That the jury find the evidence of the physician Dr. Whiton, which you have heard, to be true." Witness: "I heard that part of it." "Assuming that the testimony of Dr. Whiton, in connection with those other propositions and facts I have named, were true, and that the jury find them to be true, can you form an opinion whether the testator was of sound and disposing mind at the time of making his will?" Now, what the evidence of Dr. Whiton does not appear. Whether it would have been admissible to have asked Dr. Stearns simply if he had heard the testimony of Dr. Whiton, and if so, then, assuming it to be true, what was his opinion, we need not consider, except to say that if Dr. Whiton testified as an expert or as to matters of opinion, so that the question called for an opinion from Dr. Stearns, based on the opinion of Dr. Whiton, it clearly would not be. But, supposing the evidence of Dr. Whiton had been in regard to facts, as distinguished from opinions, even then, although the cases in other states are in considerable conflict, we think the weight of authority is that the assumed facts must be included in the question. Our own court, indeed, seems to sanction the idea of some discretion in the matter on the part of the presiding judge, in *Roraback v. Pennsylvania Co.*, 58 Conn. 292, but the language used clearly denotes that such discretion is limited, and must be sparingly employed. The court said: "But, as there may be cases in which no harm could be done by permitting questions which are to be answered by the opinion of the witness to be asked without such enunciation, we think it may fairly be left to the discretion of the presiding judge to prescribe the form in which such questions must be asked whenever it is necessary to do so." But where, as in the question before us, a very great number of particulars are "enunciated," many more than any witness of normal capacity could be presumed to remember and keep distinctly in mind, the putting into such a question, bodily, the evidence of another witness, to be considered "in connection with those other facts and propositions named," is clearly objectionable on its face, and receives no justification or excuse from any possible "necessity." It is impossible for those interested in the answer to know the result of the mental process by which the witness made the required connection, what portions of the evidence of Dr. Whiton he thus used, and in what way and to what extent it contributed to the result reached,—the answer given.

It is also a complaint of the proponents that the question, as a whole, was objectionable and misleading, because it "states the existence of certain conditions, and the happening of diverse incidents, (all for the purpose of determining the sanity of a man at a given moment,) without any statement as to their relation to one another, in point of time or otherwise; that is to say, without assuming any period of time for the happening of such incidents, and without giving, the witness any right to assume such a fact, leaving him to believe that he may base his opinion on their having happened contemporaneously or in close continuous succession." There is certainly some apparent ground for this criticism also, though the record does not enable us to determine how nearly the belief of the witness as to the "close connection" would accord with the evidence on which the contestants claimed to base their hypothetical question; and we think that all we are required to say in reference to this objection is that in this particular, as in all others, a question to an expert witness, testifying as to a person's mental condition, about which he has no personal knowledge, should contain such assumptions of facts, and such only, as counsel may fairly claim that the evidence in the case tends to justify, and that, while such a question may not be improper because it included only a part of the facts in evidence, it would be so if, by reason of omission, it manifestly failed to present facts which it did include in their just and true relation, and caused them to appear in one that was untrue and unjust.

It was claimed by the contestants that, even if the question was objectionable, this reason of appeal of the proponents could not be supported; and this on three grounds: First. That the objection taken was in these words: "I desire to object to the question, upon the ground that it does not state truly what the evidence in the case shows." That this was saying merely that the question did not state the facts as they existed, which was not required by the rule; citing *Cowley v. People*, 83 N. Y. 470, 88 Am. Rep. 464. Second. That, the court having permitted the witness, against the proponents' objection, to answer the question, the record does not show that any exception was taken to the ruling of the court. Third. That the answering the question, as framed, could have done the proponents no harm. That it was one thing to inquire of the doctor as to the sufficiency of the data for an opinion, and quite another to ask him for his opinion as to the testator's actual mental condition at a given time. Upon the facts and propositions contained in the question, it seems to us that it was the duty of the proponents to have pointed out in a more specific manner, to the court, the particulars in which the proposed hypothetical question was objectionable; and, under the circumstances, we do not think the court committed an error by admitting the question for which a new trial should be allowed. But, as such new trial must be granted for reasons before given, we have stated our views, for the guidance of the parties upon such trial, and for the information of all who may be interested or concerned in the question.

As explaining the basis of the three remaining reasons of appeal, we quote the following from the record: "The proponents

offered in evidence, for the purpose of showing the mental capacity of the testator, the diaries of the deceased from 1885 to 1891, inclusive, which were admitted and read in detail to the jury, consuming several days in such reading. Afterwards, during the trial, they further offered the entries in said diaries as memoranda and declarations of the testator, for the purpose of proving such entries to be true in fact. Upon objection of contestants' counsel, the court limited the diaries and entries therein to the purpose for which they were originally introduced and admitted, and proponents excepted. During the trial, proponents offered a letter book of the deceased, containing what were claimed to be copies of letters written by the deceased to various persons; and such letter book was read entire to the jury, occupying two or three days in reading it, for the purpose of showing the mental soundness of the testator. After the book had been offered in evidence and read to the jury, the proponents offered in evidence a large bundle of letters, claimed by them to have been found by Mr. Barber's executor, among his effects, after his death, and to have been written to Mr. Barber by one or more correspondents, and which, as claimed by proponents' counsel, were either answers to the letters, copies of which appeared in the letter book, or suggested the writing of the letters therein contained. Counsel for the proponents stated at the time of offering such bundle of letters that he did not propose to read them, but merely to put them in without any proof of the authenticity of the letters, or their having been received by the testator in the regular course of business, or presenting the authors of said letters in court for examination. Upon the envelopes containing the letters, and upon the outside of the letters not inclosed in the envelopes, were pencil memoranda, purporting to have been placed there by Mr. Barber, and which were identified as in his hand-writing, and purporting to be memoranda of the dates of the letters. To the admission of said letters, under the offer of the proponents, the contestants' counsel objected. The court thereupon allowed the memoranda upon the outside of the envelopes and letters made thereon by Mr. Barber to go to the jury, but ruled out the contents of the letters themselves. Contestants excepted to the ruling of the court. "The contestants introduced one Parker, who testified that the testator was, in his opinion, of unsound mind, and, among other things, testified to a business transaction with Mr. Barber, in which Mr. Parker sold the testator a quantity of tobacco stems, which the testator refused to pay for, for the reason that the wind had blown the tobacco stems off the land on which they had been placed for fertilizing, and they therefore had done him no good. To contradict Mr. Parker, the proponents offered a receipt for tobacco stems, signed by Mr. Parker, and found among Mr. Barber's effects, and also offered an account book purporting to have been kept by the testator, containing an entry of cash, purporting to have been paid to Mr. Parker for tobacco stems. Mr. Parker, having been called as a witness by the propo-

nents, and shown the receipt, denied that the receipt was for the stems which he had already testified to as having been sold by him to Mr. Barber, but related to another and entirely different transaction which had taken place at an entirely different time, the item in the account book corresponding with the item in the receipt. The receipt was admitted in evidence for what it was worth, but counsel for the contestants objected to the introduction of the account book for the purpose for which it was offered, to wit, to contradict Mr. Parker, and show that the account of the tobacco stems was in fact paid. The court sustained the objection, and the proponents excepted to the ruling."

That, as a matter of common law and unaffected by statute, the ruling of the court in reference to the diaries, admitting them for the purpose of showing the mental capacity of the testator, but not for the purpose of proving the entries to be true in fact, was correct, there can, we think, be no question whatever. The American cases on this subject are almost numberless, and, so far as we are aware, in entire accord in affirmance of this view. A large collection of such cases may be found in a note on page 156, 11 Am. & Eng. Encyclop. Law. But we need go no further for authority on this point than our own case of *Comstock v. Hadlyme Eccl. Soc.* 8 Conn. 254, 20 Am. Dec. 100. The real contention of the proponents, however, appears to be, that such entries are now admissible in this state as evidence of the truth of relevant matters therein contained, by virtue of the statute, (Gen. Stat. § 1094,) on the ground that an appeal from a probate decree, approving or disapproving an alleged will, is "an action by or against the representatives of a deceased person," within the meaning of that statute; and the case of *Pixley v. Eddy*, 56 Conn. 388, is cited as authority to that effect. In what case this court held that a distributee of the property of a deceased person is his "representative," within the meaning of section 1094, and without the aid of section 1095, in a suit involving title to property. But we fail to see how this case reflects any light upon the present question. In the present case there can be no doubt that the proponents of the will are "representatives" of the deceased. The inquiry turns upon whether such an appeal is an "action" by or against such representatives, within the meaning of that provision. That such appeal is an "action," within the intent of some statutory provisions, (Gen. Stat. § 794,) is certain. But this is not an ordinary case, and has never been treated as such in this state, but as a statutory and special proceeding." *Livingston's Appeal*, *supra*. In reference, then, to such a proceeding, was it the intention of the legislature, by the provisions of the statute in question, to change the existing common law in regard to the entries and memoranda of alleged testators? It seems to us not, and that the case of *Bissell v. Beckwith*, 32 Conn. 509, and the opinion of this court by Baldwin, J., in the recent and still unreported case of *Rowland v. Railroad Co.*, abundantly show—First, that the statute should be "construed according to the

apparent intention of the legislature, to be gathered from the entire language used, in connection with the subject and purpose of the law;" and second, that such construction will not bring such appeal as the present within its purview. There was no error, therefore, in the ruling of the court below on this point.

Whether any distinction is to be drawn between the diary entries and the entry in the account book of cash purporting to have been paid to Mr. Parker for tobacco stems, it is not necessary to decide; for, even granting such entry to have been admissible, its exclusion could have produced no possible injury to the proponents. The receipt admitted, signed by Mr. Parker, corresponded with the item in the account book, and furnished the best and fully conclusive evidence of payment, which payment was not denied; the claim of Mr. Parker being that it was a different transaction from the one concerning which he had previously testified. On this point, corroborating evidence of the admitted fact of payment would have been of no materiality.

So far as the letters are concerned, the only exception, as shown by the record, was taken, not by the proponents, but by the contestants. But even if we were to assume, as we have no right to do, but as was most earnestly asserted by the proponents, that an exception was also taken by them, we think the propo-

sition to lay these letters in as a mass, unread, for the jury "to examine or not, as they should feel inclined," was improper. *Billings' App.*, 49 Conn. 456, 459. We ought, however, perhaps, to add, in view of what may probably arise upon another trial of this case, that if (as the record affords us some warrant for believing) the court refused to admit these letters because unaccompanied with proof of authenticity or that they were received in the regular course of business, and because their authors were not produced for examination, such grounds of refusal, upon the facts stated, do not seem to us valid. The finding of the letters among the papers of Mr. Barber, by his executor, with pencil memoranda upon them of the dates, in Mr. Barber's hand-writing, would appear to be sufficient evidence, *prima facie*, that they were what they purported to be; especially where the question was not as to the truth of any matters stated therein, or as to the authenticity of the letters, but as to the evidence of capacity which the testator's replies afforded, which could best be apprehended by knowing the contents of the writings themselves, which the testator's letters purported to answer.

There was error in the charge of the court to the jury, as hereinbefore indicated, and for this reason a *new trial* is granted.

The other Judges concurred.

KANSAS SUPREME COURT.

Fannie E. MALLORY, *Plff. in Err.*,

v.

D. M. FERGUSON.

(50 Kan. 635.)

*1. It is no part of the official duty of a clerk of the district court to make

*Headnotes by ALLEN, J.

searches of the records in his office for judgments, liens, or suits pending, affecting the title to real property, and certify to the result of such search.

2. Where a clerk of the district court, who is neither a lawyer nor engaged in the business of making abstracts, signs a certificate appended to an abstract of the title to certain real estate, as follows: "I further certify that there are no judgments, me-

NOTE.—*Liability of officers for defects in abstract of title.*

A clerk of a court is liable to the party employing him for omissions or mistakes in an abstract furnished by him where he agrees to furnish an abstract, and the party procuring the same is damaged by reason of such omissions or mistakes. But he is liable only to such party, and in case the damages accrued from the imperfect abstract.

A prothonotary and his sureties in Pennsylvania are liable for damages incurred through a mistake in the certificate furnished to the purchaser of land by the prothonotary as to judgments, as it is part of his duty, incident to his office as keeper of the record, the fee bill giving him compensation for searches and certificates; and he is the only person that the common law of the state recognizes for that purpose, and the omission of his seal will not relieve his sureties. *Ziegler v. Com.* 12 Pa. 227.

So a recorder of deeds and his sureties on his official bond are liable to the party employing him for a certificate by him that there are no mortgages against property for which he charged and received a fee allowed by law, if there was a mortgage on record by which the party procuring the search

was damaged. *McCaraher v. Com.* 5 Watts & S. 21, 39 Am. Dec. 103.

But a recorder of deeds and his sureties in Pennsylvania are liable on a false certificate of search only to the party taking the certificate and not to a future purchaser. *Com. v. Harmer*, 6 Phila. 90.

The fact that the borrower knew of the existence of the omitted liens, and acted as the agent of the loaner in ordering the recorder to make the certificate, will not relieve the recorder in Pennsylvania from liability to a party loaning money for errors and omissions in a certificate of search. *Houseman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 256, 2 W. N. C. 573, 33 Phila. Leg. Int. 103.

So a recorder of deeds is liable to a building association for omitting from his certificate of title mention of a mortgage on the representation of the party applying for the abstract to be used by the building association that the mortgages should be satisfied, where the solicitor of the association allowed the applicant for the loan to procure the searches. *Peabody Bldg. & L. Asso. v. Houseman*, 89 Pa. 261, 33 Am. Rep. 757.

The court determines that it is the duty of the recorder as the law gives him a fee for the certifi-

chanties' liens, or foreign executions on file or of record in this county, or any attachments or other suits pending in said county, against said within-described lands nor against any of the grantors or grantees herein, nor against any other person through whom title herein is derived, except — D. M. Ferguson, Clerk District Court, Miami Co., Kansas. Dated this 8th day of April, 1885. [Seal.]"—and receives therefor twenty-five cents, which is the fee allowed by law for a certificate alone, it will not be presumed, in the absence of evidence, that such clerk agreed to make a careful search, and correctly certify as to the

condition of the title to such land, but the burden of showing an express agreement to do so rests on the plaintiff; and such clerk will not be held liable for any mere errors of judgment, or want of skill, in determining the legal effect of a suit pending in the court of which he is clerk. A party relying on the certificate of such clerk, in the absence of such agreement, must himself bear whatever loss ensues from want of skill or honest errors of judgment on the part of such clerk.

3. Whatever liability is incurred in any case by such clerk is to the person for whom the certificate is made, and not to his gran-

date and the condition of his bond was "shall and does well and truly and faithfully, in all things, execute and perform the duties of the said office."

Where the borrower of money furnished a certificate of search and the agent of the lender, being dissatisfied with it, went to the prothonotary and asked for a renewed search, and he reaffirmed its correctness, he is liable on his bond to the party loaning money for damages caused by judgments omitted from the abstract. *Siewers v. Com.* 87 Pa. 15.

Under Pennsylvania Act 1872, § 1 (Pub. Laws, 1140) the recorder of deeds, prothonotaries, clerks of courts, and other officers in the city of Philadelphia whose duty or custom it is or hereafter may be to make and certify searches, shall be liable on their bond to any person claiming under the party for whom the abstract was furnished for five years from the time of certificate of search.

The recorder and sureties are not liable for omitting a mortgage from his certificate of search if the mortgagor's name is not correctly given in the order for the search. *Com. v. Owen*, 2 W. N. C. 200.

A register of deeds is liable to the party employing him in damages for negligence in omitting from an abstract mention of an incumbrance, which omission caused expense to the plaintiff in perfecting the title. *Smith v. Holmes*, 54 Mich. 104.

This is on the ground that he entered into a contract to examine the records and report as to what mortgages were on the land and the law implied an undertaking from him that he possessed the required knowledge and skill; and that he would use due and ordinary care and if the plaintiff was damaged by failure she could recover.

A recorder in Illinois is not bound to examine and give information whether land is incumbered as it would frequently involve a question as to the legal effect of the conveyances of record, but he is bound to search and give information of the fact whether there are deeds, mortgages, or writings concerning the land. He is allowed for every search of record twelve and one half cents, under Gales' Ill. Stat., 299, and the fees and perquisites of office are sufficient considerations to charge the surety on his bond for breach of duty in giving incorrect information as to instruments on record. *Lusk v. Carlin*, 5 Ill. 395.

This supports the main case as to the province of an officer in respect to the legal effect of the conveyances of record; but it seems that the statutory fee for search implies a duty to search. This statutory provision is wanting in Kansas.

In an action against the clerk of the district court for damages for certificate of title, a demurrer to the petition should be sustained where it shows that the plaintiff was not damaged but had title before an alleged mechanics' lien was filed, which it was claimed was omitted from the abstract. *United States Wind Engine & P. Co. v. Linville*, 43 Kan. 455.

A petition against a clerk in the office of recorder, and deputy recorder of a county for damages in making an erroneous abstract of title which

plaintiff desired to purchase, and which abstract was incorrect, and plaintiff was required to pay off an undisclosed judgment, is bad on demurrer for failing to allege that plaintiff purchased the property. *Batty v. Fout*, 54 Ind. 432.

There is no statute making it the duty of the recorder in Indiana to search the records and certify to the condition of titles. "If, for a consideration, he undertakes to search the record and certify to titles, and whether certain real estate is incumbered or not, he would be liable upon such undertaking just as would any other person; he would be liable to the party who employed him, but not to such as might simply see and rely upon such certificate." *Mechanics Bldg. Asso. v. Whitacre*, 93 Ind. 547.

Under N. Y. Sess. Laws 1853, p. 265, providing that the county clerk shall cause search to be made in his office and shall be liable for all damages from errors, inaccuracies, or mistakes in his return, a county clerk who was employed by plaintiff to make an abstract so that plaintiff could procure a loan on land he already owned, but who omitted a judgment against a prior owner which afterwards cost plaintiff \$400 to settle, is not liable in damages since the loss did not occur from the error in the abstract. *Kimball v. Connolly*, 38 How. Pr. 247.

The defendant is liable for negligence where he was employed by an intended purchaser, to make a search for taxes and assessment and gave the plaintiff two returns one being a search for taxes certified to by him, and the other a search for assessments certified by some other party not employed by plaintiff and which omitted an assessment which had to be paid after the purchase, and the purchase was made relying on these certificates. *Morange v. Mix*, 44 N. Y. 315.

It does not appear whether the party employed to search was an officer or not. If the defendant intended that plaintiff should rely on the certificate made by the other party he is liable for the negligence of such other party as though he had made it himself.

A register of deeds who gave a false certificate that a title was unincumbered, when he knew there was an attachment thereon, was guilty of misconduct in office and could be removed from office, although it was not part of his official duty to certify as to titles. *State v. Leach*, 80 Me. 58, 11 Am. Rep. 172.

In connection with the main case it should be noticed, that under Taylor's Kan. Stat., 1147, an abstractor of titles must give good bond in the sum of \$5,000, and shall be liable thereon to any person for whom he may compile an abstract for any damage for incompleteness or errors, that the filing of the bond is a guaranty of good faith. This shows that the business is regarded by the legislature of that state as distinct from the duties of the clerk.

In this note the liability of attorneys and other private abstractors for opinion or certificate of title or abstracts furnished by them is omitted.

L. T.

tee; and, before the plaintiff can recover, he must show that he employed the defendant to perform the service.

4. The defendant in this case made, on an abstract of title, the certificate above mentioned, and received twenty-five cents therefor. There was a suit pending, affecting the title to the lands described in the abstract, which was prosecuted to judgment, and resulted in loss to the plaintiff. The defendant was not a lawyer, nor an abstractor, nor did he claim to have any skill in making searches of records, but erroneously supposed it was his duty to make such certificate. There is no claim that he acted in bad faith or corruptly, but, under the findings of the court, appears to have used such care and judgment as he was ordinarily capable of exercising. Held, that the defendant is not liable in this action.

(February 11, 1893.)

ERROR to the District Court for Miami County to review a judgment in favor of defendant in an action brought to recover damages for losses sustained by reason of defects in the abstract of title to certain land, which was certified by defendant and upon which plaintiff relied in purchasing the property. *Affirmed.*

The facts are stated in the opinion.

Mr. John C. Sheridan, for plaintiff in error:

Having engaged in the business of examining titles and furnishing abstracts thereof, for which he receives compensation, the defendant impliedly represents himself to the public as one competent to conduct it, and that he will at least use ordinary care and diligence in the discharge of it.

1 Am. & Eng. Encyclop. Law, 48; Martindale, Abstracts of Title, § 181; Story, Bailm. 431; Whart. Neg. 749; *Dundee Mortg. & T. Invest. Co. v. Hughes*, 20 Fed. Rep. 89; *Clark v. Marshall*, 34 Mo. 429; *Chase v. Heaney*, 70 Ill. 268; *Rankin v. Schaeffer*, 4 Mo. App. 108; *Gitman v. Honey*, 26 Mo. 280; *Stott v. Harrison*, 73 Ind. 17; 1 Lawson, Rights, Rem. & Pr. 128.

In some of the states it is the practice for the examiner after having ascertained the chain of title by inspection of the records, to direct written requisitions to the clerks of the various offices for searches for incumbrances or liens of record that may affect the property. In large cities this method is rendered necessary, or at least convenient, in order to avoid the throng of applicants which would otherwise crowd the offices, and also to prevent subjection of the records to the carelessness or fraudulent designs of the searchers. The liability of all such officers is either fixed by statute, or is established under the general law of negligence. They are also liable for the acts or omissions of those whom they delegate to do the work.

Martindale, Abstracts of Title, 188; Gerard, Titles of Real Estate, 757; *Kimball v. Connolly*, 83 How. Pr. 247; *Chase v. Heaney*, *supra*; *Shearm & Redf. Neg.* § 288; *Ziegler v. Com.* 12 Pa. 227. See also 15 Cent. L. J. 482; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; 16 Am. & Eng. Encyclop. Law, 389; *Lusk v. Carlin*, 5 Ill. 395.

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An abstractor who furnishes an abstract to a vendor is liable to a vendee who relied on it in purchase of the property at the time.

Dickie v. Nashville Abstract Co. 89 Tenn. 481. See also *Donaldson v. Haldane*, 7 Clark & F. 762; *Page v. Trutch*, 8 Chicago Leg. News, 885; *Peabody Bldg. & L. Asso. v. Houseman*, 89 Pa. 261, 83 Am. Rep. 757; 16 Am. & Eng. Encyclop. Law, 418, 419.

Mr. Selwyn Douglas, for defendant in error:

There was certainly no contract, and no privity of contract between defendant in error and Mr. Mallory or Mrs. Mallory. Without such contract and privity of contract, there can be no liability.

Dundee Mortg. & T. Invest. Co. v. Hughes, 20 Fed. Rep. 89, 18 Cent. L. J. 470; *Houseman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 250; *Roberts v. Leon Loan & A. Co.* 63 Iowa, 76; *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195, 25 L. ed. 621. See also *Chase v. Heaney*, 70 Ill. 268; Warvelle, Abstracts of Title, pp. 7, 8, 60, 66.

The clerk of the district court ought not to be held liable, if liable at all, to any one but his employer, Chandler.

Walker v. Stevens, 79 Ill. 198; *Read v. Patterson*, 11 Lea, 480; *Collins v. Griffin*, Barnes, 37.

The liability of abstractors of title in the performance of their work is the same, in degree, as that of attorneys at law.

An attorney is responsible for ordinary care, skill, and reasonable diligence; such skill and prudence only as is usually exercised by lawyers of average capacity and ability, and he is liable only for gross neglect.

Weeks, Attorneys at Law, §§ 284, 293; *Pitt v. Yalden*, 4 Burr. 2060; *O'Barry v. Alexander*, 87 Ga. 195; *Gilbert v. Williams*, 8 Mass. 51, 5 Am. Dec. 77; *Caverly v. M'Queen*, 123 Mass. 574; *Chase v. Heaney*, *supra*; *Morrill v. Graham*, 27 Tex. 646; *Eggleston v. Boardman*, 37 Mich. 14.

He will be presumed to have discharged his duty to his client, with ordinary care and skill, until the contrary is made to appear.

Bowman v. Tallman, 27 How. Pr. 212; *Pennington v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; Weeks, Attorneys at Law, § 288. See also *Almond v. Nugent*, 34 Iowa, 800, 11 Am. Rep. 147; *Ritchey v. West*, 23 Ill. 385; *Barnes v. Means*, 82 Ill. 379, 25 Am. Rep. 328; *O'Hara v. Wells*, 14 Neb. 403; *Smothers v. Hanks*, 34 Iowa, 286, 11 Am. Rep. 141; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Geisselman v. Scott*, 25 Ohio St. 86; *Graham v. Gautier*, 21 Tex. 111; *Branner v. Stormont*, 9 Kan. 51.

Allen, J., delivered the opinion of the court:

This action is brought by the plaintiff to recover from the defendant damages which she claims to have sustained by reason of the defendant having certified on the abstract title to a certain lot in Paola, as follows: "I hereby certify that there are no judgments, mechanics' liens, foreign executions, or suits pending on the records of this court against any of the above-named grantors or grantees affecting the title of the above-described real estate, except as above stated. Dated this 8th

day of April, 1885. D. M. Ferguson, Clerk of the District Court Miami Co., Kas." Plaintiff alleges, in substance, that, relying upon this certificate, she purchased the property described in the abstract, and paid therefor, in cash, the sum of \$5,000; that, in truth and in fact, there was a suit then pending in said district court wherein one Sutton S. Clover was plaintiff, and William G. Oakman, Hattie E. Oakman, and others were defendants, in which said Clover claimed to own an equitable interest in said lands, and sought to recover the same. Plaintiff further alleges that said suit last mentioned was tried in said district court, and that said Clover was by said court adjudged to be the owner of the undivided one fourth of said property; that plaintiff was compelled to pay \$1,000 to buy in the interests of said Clover, and that she paid attorney fees and expenses in defending said action to the amount of \$385; that she had demanded payment from the defendant, and that he refused. The defendant admits that he was clerk of the district court, and that he signed the certificate set up in the petition. The defendant denied that he was engaged in the business of making abstracts. The defendant alleges that said abstract was made by one C. W. Chandler, who was engaged in the business of making abstracts of title, and that said defendant signed the same as an accommodation to the said Chandler. He alleges that, before signing the certificate, he made a diligent, thorough, and careful examination of the records in his office, and, as a result of said search and examination, was satisfied of the truth of said certificate. He alleges that he examined all the records and papers in said suit of *Clover v. Oakman*, and was convinced that the title to said real estate was not involved in said suit of *Clover v. Oakman*. The defendant also alleges that the party for whom said abstract was made was unknown to him at the time he signed said certificate, and that he signed it for the sole advantage and profit of said C. W. Chandler. The undisputed evidence shows that the defendant was paid twenty-five cents for this certificate. It also shows that the title to the land mentioned in the abstract was in dispute in said suit of *Clover v. Oakman*; that Clover obtained judgment for a one-fourth interest therein; that the plaintiff bought in said interest, and paid \$1,000 for it; and that she paid attorneys' fees amounting to \$310 in defending against the claim of said Clover in that action, she having been made party defendant to the action subsequent to the purchase from Oakman and wife of the property described in the abstract. This case was tried before the court without a jury, and a general finding made in favor of the defendant, and judgment rendered against the plaintiff for costs.

There is no showing that Mrs. Mallory, the plaintiff, or her husband, C. H. Mallory, whom the evidence shows was her general agent in making the purchase of the property, had any conversation directly with the defendant. The evidence does show that Mallory employed said C. W. Chandler to make the abstract. It also shows that Mallory paid to Chandler fifty cents, in addition to 22 L. R. A.

Chandler's own charges, for the certificates of the clerk of the district court and the treasurer. The defendant claims that his understanding of the matter was that the abstract was made for Oakman, and upon this question the testimony is not entirely clear. On cross-examination C. H. Mallory was asked this question: "Question. You may state if you recognize that paper you examine there, (handing witness paper,) and didn't you answer, in reply to that question, this: 'That is the abstract that Mr. Oakman presented to us, made by Mr. Chandler?'" Answer. Well, that was part of the papers; yes, sir." C. W. Chandler, on cross-examination, testified as follows: "Q. What did Mr. Mallory say to you about what he wanted that abstract of title for? A. When he first came to the office he said he wanted it for Mr. Oakman,—that is, Mr. Oakman wanted the abstract—and he spoke to us for it. Q. You told him you would not make the abstract for Mr. Oakman unless Mr. Mallory would pay for it? A. Yes, sir. Q. Then he told you to go on and make it, and he would pay for it? A. Yes, sir; he said he would see it was paid for. Q. Then you went on and made it? A. I did." The defendant testified, among other things: "Q. Did Mr. Mallory ever say anything to you in connection with the matter? A. I don't recollect Mr. Mallory saying anything. Q. Did he ever have anything to say to you on the subject? A. No, sir. Q. You say you signed this certificate at the request of Mr. Chandler? A. Yes, sir; C. W. Chandler. I examined the record for Mr. Chandler, at his request. Q. What was Mr. Chandler's business at that time? A. He was in the loan business and the abstract business. Q. Before you signed that certificate at that time, you may state whether you made a careful examination of the records. A. I did make a careful examination of the records. Q. And you may state what, if any, conclusion you came to with reference to anything in that suit affecting the title to that property,—the property alleged to be described in that so-called abstract of title. A. My opinion, according to the best of my judgment, was that it did not affect the title. Of course, it was a complicated case. It was my understanding I was simply to exercise my judgment, as best I could." And again: "Q. Was there any talk in your office, at the time this certificate was certified to, as to who was the owner of this property, or as to whom this abstract was for? A. I understood Mr. Chandler to say he was making it for Mr. Oakman, through Mr. Mallory, at the request of Mr. Mallory; that Mr. Mallory was going to purchase the property. Q. There was something said about Mr. Mallory in connection with it? A. In the talk that Mr. Mallory was going to purchase."

The evidence shows that the defendant frequently made similar certificates on abstracts, for which he charged and received the uniform fee of twenty-five cents. He testifies, however, that he frequently made such certificates without receiving any fee therefor. There is no pretence on the part of the plaintiff that the defendant was either an attorney at law, or engaged in the business of

making abstracts of title, except so far as such certificates relate to an abstract. There was no special contract or agreement with reference to this particular certificate, but it was made by the defendant, as he claims, with the understanding on his part that it was his official duty to make such certificates, and that the law allowed him a fee of twenty-five cents therefor. It is important to determine—First, whether there was any undertaking on the part of the defendant to perform any services whatever for the plaintiff in this case; second, if there was such undertaking, what services did the plaintiff undertake to perform? There having been a general finding by the trial court in favor of the defendant, all doubts as to the weight of the evidence must be resolved in his favor.

We are not prepared to say that the uncontradicted evidence shows that the defendant was employed by Mrs. Mallory, through her agent, to make this certificate; and, if we were forced to decide this case on this point alone, we should have to hold that the general finding of the trial court in favor of the defendant included a finding that the defendant was not employed by the plaintiff to make the certificate. We do not, however, rest our decision on this point alone, but will consider the second proposition also. If the making of the certificate on the abstract was not done under an employment from the plaintiff, can she recover in this case? We think the great weight of authority is to the effect that the party making the examination and certificate is liable only to his employer, and never to a stranger or third party. *Hughes v. Dundee Mortg. & T. Invest. Co.* 21 Fed. Rep. 169. In the case of *Houssman v. Girard Mut. Bldg. & L. Asso.* 81 Pa. 262, *Mr. Justice Sharswood*, in delivering the opinion of the court, says: "It was decided by the present chief justice at *nisi prius*, in the case of *Com. v. Harmer*, 6 Phila. 90, that this liability is to the party who asks and pays for the search, and does not extend to his assignee or alienee." The decision in the case of *Peabody Bldg. & L. Asso. v. Houssman*, 89 Pa. 261, 83 Am. Rep. 757, seems to be somewhat in conflict with the doctrine as stated by *Justice Sharswood* in the case above cited. We think that the rule as stated is sustained both by the weight of reason and authority,—that there must be privity of contract to create liability. In the case of *National Sav. Bank of D. C. v. Ward*, 100 U. S. 195, 25 L. ed. 621, the Supreme Court of the United States holds: "Where A., an attorney at law employed and paid solely by B. to examine and report on the title of the latter to a certain lot of ground, gave, over his signature, this certificate, 'B's title to the lot [describing it] is good, and the property unincumbered,' C., with whom A. had no contract or communication, relied upon this certificate as true, and loaned money to B., upon the latter executing, by way of security therefor, a deed of trust for the lot; B., before employing A., had transferred the lot in fee by a duly recorded conveyance,—a fact which A., on examining the records, could have ascertained, had he exercised a reasonable degree of care; the money loaned was

not paid, and B. is insolvent,—held: First, that there being neither fraud, collusion, nor falsehood by A., nor privity of contract between him and C., he is not liable to the latter for any loss sustained by reason of the certificate; second, that usage cannot make a contract where none was made by the parties."

We think that the judgment of the district court might be upheld on the ground that there was evidence tending to show that the employment of the defendant was made in behalf of a person other than the plaintiff. We shall proceed, however, with the consideration of the more important question involved in the case,—whether, conceding the existence of such employment by the plaintiff, the nature of the employment renders the defendant liable in this action. The defendant was clerk of the district court of Miami county, Kan. He testifies that in making this certificate he supposed he was merely performing a duty imposed on him by law. It is nowhere made the duty of the clerk of the district court to search the records in his office for judgments, liens, and suits pending, nor does the statute provide any fee for any such service. It is not contended in this case that there was any special contract or agreement between the parties as to the particular service he was to perform; but it is contended on the part of the plaintiff that the defendant was in the habit of making such certificates for pay,—for the uniform fee of twenty-five cents,—and that because of such practice he was liable for any error in such certificate. The law does allow the clerk of the district court a fee of twenty-five cents for his certificate and seal. Can it be said that because the defendant was in the habit of making certificates of the character of this one, and charging therefor the sum of twenty-five cents, he is liable for any error or misstatement contained therein? Ordinarily the certificate of the clerk of the district court is attached to copies of records or to other written instruments, for which, if made by the clerk himself, he is also entitled to payment. If the defendant had been called upon to make a full transcript of all the records in the case of *Clover v. Oakman*, over his certificate of the correctness thereof, and had he made what purported to be such transcript, to the correctness of which he appended his certificate, we do not doubt that he would have been liable for any error or omission in the transcript, through which the party receiving and paying therefor was injured. In this case, however, the clerk certifies, not to the correctness of a transcript which he has made, but to the legal effect of the whole volume of all the records in his office on the title to this land.

Authorities are cited by counsel for the plaintiff in error, which, he contends, hold the defendant liable. These authorities must be considered with reference to the statutes which were construed by the courts in making their decisions. In the case of *Ziegler v. Com.*, the court says: "In Pennsylvania it has ever been a portion of the duty of the prothonotary to make searches. It is an incident of his office as a keeper of the records

of the county. The fee bill gives him compensation for his services and for his certificates." 13 Pa. 228. In the case of *Lusk v. Carlin*, 5 Ill. 895, which was an action on the official bond of the recorder of deeds, for failing to note a mortgage in his certificate of search, the court says: "It is contended that it is not a duty of the recorder to examine and give information whether land is incumbered, as it would frequently involve a question as to the legal effect of the conveyance of record. In this sense of examination, he is not bound to make it, but we are of the opinion that he is bound to search and give information of the fact whether there are deeds, mortgages, or writings concerning the land, and refer the party to them, so he may be enabled to judge for himself, and take counsel as to the manner in which the title is affected or the estate incumbered by them. The search should be diligent, and his information true, as for it he is entitled to compensation." The court refers to various provisions of the statutes of Illinois relating to the duty of the recorder, and says: "The whole scope and spirit of these provisions seem to me to point out this service as an official duty of the recorder; and I think the fees, perquisites, and emoluments of his office a good, continuing, and valuable consideration to charge the surety in the bond, within the principle laid down in the case of *United States v. Linn*, 40 U. S. 15 Pet. 811, 10 L. ed. 750.

In New York and other states it is made the duty of certain officials having the custody of public records to make searches, and certify the result thereof, and it is held that the officer is liable for any error or misstatement in such certificate. We have not been able, however, to find any case—nor has counsel called our attention to any—where the officer has been held liable on a certificate which the law did not require him to make, and where he received no compensation for making the search. In *Warvelle on Abstracts*, (page 66,) the author says: "It is frequently the custom of the examiner to append to an abstract of this character certificates of the officers having the custody of records examined, yet in the majority of cases the said certificates do not materially enhance the value of the examination as evidence, and, unless forming a part of their official duty, create no responsibility on the part of the certifying officer." This case is in itself a strong illustration of the hardship of a rule which should hold the clerk of the district court liable for any error in such a certificate for the sum of twenty-five cents, which he would be entitled to have for making any formal certificate whatever. Under the plaintiff's theory of this case, he would be held bound to examine every record in his office which in any wise affected the title to these lands, and to state, over his signature, correctly, the legal effect of every record which in any manner affected the title. There is nothing in this case tending to show that the defendant was called on to make any transcripts of any records in his possession. Had

the plaintiff obtained a transcript of the pleadings in the *Oakman Case*, in the exercise of ordinary business prudence she would have submitted such transcripts to a counselor learned in the law, for his opinion as to their effect on the title to this property, and as to the risks she would incur by purchasing the property pending such litigation.

Many authorities are cited by counsel as to the liability of attorneys, physicians, and other persons who fail to use care and skill in their employment.

These authorities cast but little light on this case. The general doctrine, we think, is correctly stated in *Story, Bailm. § 455*: "Where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it, then, if the bailor, with full notice, trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he possesses, or of the judgment which he can employ; and, if any loss ensues from his want of due skill, he is not chargeable." There is no evidence in this case tending to show that the defendant held himself out to the public as skilled in the examination of public records, or in determining their legal effect. He himself testifies that he used such care and judgment as he possessed, and that it was his opinion that the title to the property described in the abstract was not affected by the *Clover* suit. If the plaintiff employed the defendant at all to pass his opinion or to certify as to the effect of the records in that case, she certainly employed him for a very meager consideration. We are not prepared to say that any consideration whatever was paid in this case for a search. The defendant did not claim to be a lawyer, nor was there any evidence that he claimed to have skill. We think the plaintiff was not entitled to the benefit of any higher order of judgment than the defendant in fact possessed, and that in relying on such a certificate, so obtained, if loss occurs, she must herself bear it, under all the circumstances, as they are shown by the record in this case. Certainly there is a wide difference between the liability of a lawyer, or other person claiming to have especial qualifications for determining questions affecting the title to land, and that of a layman, who neither has nor professes to have any. We conclude, then, that the defendant is not liable for any error in judgment as to the condition of the title to the land described in the abstract, even though such error be a gross one; and it may well be doubted whether he would be liable, where he receives merely the fee allowed by law for a certificate, unless guilty of fraud or willful misstatement.

We think the judgment of the trial court was right, and it will be affirmed.

All the Justices concur.

Rehearing denied.

TEXAS SUPREME COURT.

CLARENDON LAND, INVESTMENT & AGENCY CO., Limited, *Plff. in Err.*,

McCLELLAND BROS.

(.....Tex.....)

The exceptionally small size of young cattle, such as calves and yearlings, on account of which they are able to pass through or under barbed wire fence, will not exonerate the owner of the fence for its insufficiency, where the statutes allow cattle to run at large, so as to give him a right of action for their trespass, although when the fence was built all cattle in the neighborhood were of a larger kind, against which the fence was sufficient.

(October 19, 1888.)

ERROR to the Court of Civil Appeals for the Second Supreme Judicial District to review a judgment affirming a judgment of the District Court for Donley County in favor of plaintiffs in an action brought to recover for injuries alleged to have been inflicted upon plaintiffs by defendant's negligence in permitting cattle to break into plaintiff's enclosure. *Reversed.*

The facts are stated in the opinion.

Messrs. Matlock & Peacock and W. R. Butler, for plaintiff in error:

The allegation of the scienter is a material and a necessary allegation and must be proved.

Appellee's original petition falls to allege any knowledge on the part of appellant that the cattle were infected with disease or were liable to communicate disease to appellee's cattle at the time they were placed in appellant's pasture.

Gibbs v. Coykendall, 89 Hun, 140; *Cooke v. Waring*, 2 Hurlst. & C. 331; *Fisher v. Clark*, 41 Barb. 329; *Weeks, Damnum Absque Injuria*, § 118, p. 237, note 1; *Hite v. Blandford*, 45 Ill. 9; *Fultz v. Wycoff*, 25 Ind. 324; *Kertschack v. Ludwig*, 28 Wis. 430; *Wormley v. Gregg*, 65 Ill. 251; *Lyke v. Van Leuven*, 4 Denio, 127; *Tift v. Tift*, Id. 175; *Sedgw. Damages*, 6th ed. 723, 728; 1 *Thomp. Neg.* 186, 189, 205, 206; *Cooley, Torts*, 343, and cases cited in note 2, Id. 844, and note 103; *Congress & E. Spring Co. v. Edgar*, 99 U. S. 645, 25 L. ed. 437; *Moss v. Partridge*, 9 Ill. App. 490; *Twigg v. Ryland*, 63 Md. 380, 50 Am. Rep. 226, 24 Am. L. Reg. N. S. 191; *Whittaker's Smith*, *Neg.* pp. 101, 102.

Simply turning one's cattle, having an infectious disease, into his own pasture adjoining the pasture of another occupied by cattle, is not unlawful, nor such an act or wrong or negligence as will give to the owner of the adjoining premises a cause of action for damages sustained in consequence of the disease being communicated to his cattle.

Fisher v. Clark, *supra*; *Mills v. New York & H. R. Co.*, 9 Robt. 326, 41 N. Y. 619; *Walker v. Herron*, 23 Tex. 55; *Scott v. Grocer*, 56 Vt.

NOTE.—*Sufficiency of fences.*
In general.

Where the common-law liability (requiring the owner of stock to restrain them at home) has been superseded by statute defining the fence that the owner of the crops must have to protect himself, and thus creating an entirely different relation from that at common-law, the statutory requirements as to the fence being "lawful" must be strictly pursued in order that the owner of stock may be liable for their intrusion.

A good and sufficient fence required where cattle are allowed to run at large is one that will turn hogs that are not breachy. *Headen v. Rust*, 39 Ill. 126; *Misner v. Lighthall*, 13 Ill. 609.

If a fence around a pasture is reasonably secure it is sufficient to relieve the owner from liability for damages caused by the escape of a bull, especially if caused by the aggrieved party. *Weide v. Thiel*, 9 Ill. App. 223.

The question as to whether a fence around a lot was sufficient to confine a vicious young stallion, is one for the jury, where the fence was such as was common among farmers and usually considered safe. *McIlvaine v. Lantz*, 100 Pa. 536, 45 Am. Rep. 400.

In an action for damages from cattle breaking into an enclosure it is immaterial whether any fences other than the outside ones were sufficient. *Crisman v. Masters*, 23 Ind. 819.

If cattle feeding on the commons trespass upon an enclosure, the owner thereof can only maintain his action therefor by showing that his fence is a statutory one, but if cattle of another break over a good and sufficient legal fence into one field, and from thence into another field of the same owner separated from the first by an insufficient fence, such owner may maintain trespass for damage 22 L. R. A.

done in the last field. *Herold v. Meyers*, 20 Iowa, 378.

But the owner of sheep is not liable for trespass by them where they pass through an insufficient fence which the adjoining owner was bound to repair, and then into a lot owned by the same party which is enclosed by a sufficient fence. *Page v. Olcott*, 13 N. H. 339.

Where cattle were held for trespassing and the owner sued in replevin and proved that the fence of the defendant was not a "lawful fence" as required by Indiana, 1 *Gavin & Hord Stat.*, 342, an offer to prove that it was such as was kept in that locality where fences were taken in during the winter, to avoid the spring freshets, was properly refused. *Blizzard v. Walker*, 32 Ind. 437.

In an action of damages for trespass of cattle the plaintiff need only show that his fence was a lawful fence at the place of breach. *Crane v. Ellis*, 31 Iowa, 310; *Rice v. Nagle*, 14 Kan. 493.

But it was held in Missouri, to the contrary, that, in order to recover for damages from trespassing animals under Mo. Rev. Stat., §§ 3661-3663, the field must be enclosed by a hedge or fence of specified dimensions and structure, and no recovery can be had if it is not lawful even though it may be where the animals entered. *Stovall v. Emerson*, 20 Mo. App. 322.

So under the Tennessee Act of 1807, chap. 2, providing that a fence must be at least five feet high, a plaintiff cannot recover for damages from trespassing cattle if his fence is not that high although the cattle entered over a place that was five feet in height. *Polk v. Lane*, 4 Yerg. 38.

This is on the ground that the stock may have been previously tempted by the low place in the fence and thus acquired bad habits.

To recover in Iowa for trespass from cattle the plaintiff must show "that his fence is such as would

499, 48 Am. Rep. 814; *Gibbs v. Coykendall*, *supra*.

When cattle are confined in one's own pasture, and they are such as are liable to infect cattle in an adjoining pasture, if permitted to mix and mingle with them, and this fact is known to a person who carelessly leaves his gates open or fences down, or who has an insufficient fence and permits such cattle to enter his pasture and communicate to his cattle an infectious disease, the owner thereof cannot recover any damages for loss or injury occasioned thereby.

Walker v. Herron, *supra*.

The appellant, in pursuance of its lawful business, placed its cattle upon its own premises, and if said cattle were such as might communicate disease to other stock in the adjoining pasture and appellant was ignorant of that fact, it would not be liable in damages in case disease was communicated by them to appellee's cattle in an adjoining pasture.

Cooke v. Waring, 2 Hurlst. & C. 332, 83 L. J. Exch. 262.

If an injury is caused by a person to the property of another in a place where such party has a right to be, the party complaining of such injury must show that he has used due diligence to protect his property against such injury.

Tyllett v. Ward, L. R. 10 Q. B. Div. 17, 22 Am. L. Reg. N. S. 245 and note; *Griffin v. Martin*, 7 Barb. 297; *White v. Scott*, 4 Barb. 56; 1 Thomp. Neg. 31.

Plaintiff cannot recover in this case even if defendant had known when it placed the cat-

tle in its pasture, in Donley county, that the same were liable to communicate disease to plaintiff's cattle, unless the evidence shows that defendant was guilty of culpable negligence and willfulness in the care and custody, management and handling of their cattle, and as a result of such culpability and willfulness plaintiff's cattle contracted the disease and died therefrom.

Walker v. Herron, *supra*; *Wolf v. St. Louis Independent Water Co.* 10 Cal. 544; *Shearm. & Redf. Neg.* §§ 5, 12; *Hoffman v. Tuolumne Water Co.* 10 Cal. 413; 1 Hillard, Torts, 67; *Sedgw. Damages*, 7th ed. 362, note.

If it appears from the evidence that plaintiffs were guilty of culpable negligence, or that their negligence contributed to the injury they suffered, whatever may be the degree of their negligence notwithstanding the defendant may have been guilty of negligence yet plaintiffs cannot recover.

Walker v. Herron, 22 Tex. 59; *Telfer v. Northern R. Co.* 80 N. J. L. 188, 3 Am. L. Reg. N. S. 665; *Wilkinson v. Fairrie*, 32 N. J. Exch. 78, 2 Am. L. Reg. N. S. 242; *Zoebsch v. Tarbell*, 10 Allen, 385, 87 Am. Dec. 660, 5 Am. L. Reg. N. S. 572; *Waters v. Wing*, 59 Pa. 211, 8 Am. L. Reg. N. S. 758; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30, 10 Am. L. Reg. N. S. 746; *Jacobs v. Duke*, 1 E. D. Smith, 271, 8 Am. L. Reg. 448; *O'Brien v. Philadelphia, W. & B. R. Co.* 3 Phila. 76, 6 Am. L. Reg. 361; *Freer v. Cameron*, 4 Rich. L. 228, 55 Am. Dec. 670, and note; 2 *Sedgw. Damages*, 7th ed. 347-349, note 1, 349, 350, note A., and 358; 1 *Sedgw. Damages*, pp. 164, 165, note A;

turn ordinary cattle." *Heath v. Coltenback*, 5 Iowa, 490.

Landowners in Connecticut are not obliged to fence against unruly cattle, and evidence that a horse jumped out of an enclosure over a lawful fence is evidence that he was unruly and could not be restrained by an ordinary fence "ordinary fences," mentioned in Conn. Gen. Stat., title 21, § 12, does not mean lawful fences but such fences as are common and sufficient to restrain orderly cattle. *Hine v. Wooding*, 37 Conn. 123.

A good, strong, substantial fence built of stone sufficient to turn stock, forming a perfect enclosure, is a lawful fence within the meaning of the statute, although it is not specifically described therein. *Meade v. Watson*, 67 Cal. 591.

The "suitable" fence required of a railroad company by Mass. Gen. Stat., chap. 63, § 43, need not necessarily be such as are required of landowners under Gen. Stat., chap. 26, § 1, and described as "legal and sufficient." *Bames v. Salem & L. R. Co.* 98 Mass. 590, 98 Am. Dec. 676.

As the custom in Colorado is for sheep always to be herded, a farmer is not required to fence against sheep there. *Willard v. Mathesus*, 7 Colo. 76.

The owners of lands having a fence sufficient to exclude ordinary stock may recover for damages to crops notwithstanding the fence is not a legal fence under the statute. *Finley v. Bradley* (Tex. Civ. App.) March 2, 1893.

To constitute a lawful partition fence it must be such as will turn stock. *Miner v. Bennett*, 45 Iowa, 435.

Indiana Rev. Stat., 222, as to sufficiency of fences does not apply to partition fences, but applies only to outside fences. *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624; *Cook v. Morea*, 38 Ind. 497; *Brady v. Ball*, 14 Ind. 317.

To support an action based on the statute for 22 L. R. A.

double damages for failing to maintain a division fence, the plaintiff must show that the fence when divided was a lawful statutory fence, under Mo. Rev. Stat. 1879, §§ 5556, 5561; *Mackler v. Cramer*, 43 Mo. App. 373, 32 Mo. App. 542.

Where the fence enclosing A's land is built on the land of B, and B's cattle trespass on A's land, a recovery may be had if the fence was of the required statutory character and dimensions and was treated as a partition fence. *Moore v. White*, 45 Mo. 203.

Description of fence required.

In Pennsylvania it was held that with such a fence as farmers of practical knowledge and experience consider sufficient to protect crops, although not made of logs, or rails or posts, or boards, and not "four and one half feet high and well-staked and ridged," an action may be maintained for injury from cattle. *Race v. Snyder*, 10 Phila. 533.

But the cases generally hold that an owner of land cannot maintain an action for damages caused by cattle breaking over a fence that is less than the height required by law, although it is a good ordinary fence. *Runyan v. Patterson*, 87 N. C. 843.

Damages for injury to growing crops cannot be maintained unless the fence enclosing the same is such as the Alabama Code (Rev. Code, §§ 1232, 1233) requires. *Pruitt v. Ellington*, 56 Ala. 454. The court refused to instruct that the fence must be five feet high and for this error the case was reversed.

Where a fence is not four and a half feet high as required by Missouri Wagner's Stat., chap. 71, p. 708, no recovery can be had for trespassing stock. *Mann v. Williamson*, 70 Mo. 661.

Under Taylor's Kan. Gen. Stat., par. 3061, providing that a lawful fence must be at least four feet high, an instruction that a fence averaging four feet, or about four feet high, would be sufficient

Bush v. Brainard, 1 Cow. 78, 18 Am. Dec. 513.

If it appears from the evidence that both plaintiff and defendant were negligent and that thereby injury ensued to plaintiff though it cannot be known whether the injury was caused at one time or another or at what place, or in what particular manner it was occasioned, plaintiff cannot recover, or if the fault was mutual they cannot recover.

Walker v. Heron, 23 Tex. 61; 2 Greenl. Ev. 13th ed. § 635a and cases cited; *Reeves v. Delaware, L. & W. R. Co.* 30 Pa. 454, 72 Am. Dec. 713, 6 Am. L. Reg. 565; *Brownell v. Flagler*, 5 Hill, 283, and cases cited.

Unless plaintiffs' premises were enclosed by a lawful fence, or such a one as the law requires, the defendant would not be liable in damages if its cattle trespassed therein.

Davis v. Davis, 70 Tex. 125; *Knight v. Abert*, 6 Pa. 473, 47 Am. Dec. 478; *Gregg v. Gregg*, 55 Pa. 227.

The common law of England in regard to the keeping of cattle on one's own premises is not the law in this state.

Morris v. Fraker, 5 Colo. 425; *Logan v. Gedney*, 38 Cal. 581; *Seeley v. Peters*, 10 Ill. 141; *Tonawanda R. Co. v. Munger*, 5 Denio, 255, 49 Am. Dec. 250, and cases cited; *Macon & W. R. Co. v. Lester*, 30 Ga. 914; *Kerwacker v. Cleveland, C. & O. R. Co.* 3 Ohio St. 182, 62 Am. Dec. 246.

The entry of one man's stock upon the lands of another is not a trespass, unless such lands are enclosed at the time by a lawful fence.

for a lawful fence, is erroneous. *Prather v. Reeve*, 28 Kan. 627.

Under the North Carolina Act of 1777, chap. 23, a sufficient fence is one five feet high. *Nelson v. Stewart*, 6 N. C. 238.

Where the electors required a fence to be 52 inches high and composed of good material under New York 1 Rev. Stat. § 340, § 5, subsec. 11, authorizing the electors of a town to determine the time and manner in which stock shall be permitted to go at large in the highways, a party having a fence less than that required cannot recover for trespasses from stock. *Hardenburgh v. Lockwood*, 25 Barb. 9.

Under Oregon Mts. Laws, title 1, chap. 15, providing that fields shall be enclosed with a fence sufficiently close, and four and one-half feet high, and that the owner of stock trespassing over the same is liable in damages, a complaint is defective if it fails to allege that the field of plaintiff was so fenced. *Campbell v. Bridwell*, 5 Or. 311.

Under the Illinois fence law the five-foot requirement applies only to partition fences, others need only be high enough to turn ordinary livestock; and where plaintiff's fence is good and sufficient regardless of height to turn ordinary stock he may recover for damages to his crops. *Scott v. Buck*, 55 Ill. 334; *Scott v. Wirsching*, 64 Ill. 103.

Under North Carolina 1 Rev. Stat., chap. 48, providing that a planter must make a fence five feet high around his ground under cultivation unless there is a watercourse that may be "deemed sufficient" instead of a fence, no fence, stream or watercourse that will not keep out stock can be "deemed sufficient." *State v. Lamb*, 30 N. C. 229.

A fence less in height than four feet six inches as required by Iowa Rev. § 1544, providing for such other construction or fence as may be of equal strength and security, is a lawful fence if it affords

Hoskins v. Hutin, 2 Tex. Ct. App. Civ. Cas. § 160; *Woodward v. Griffith*, Id. § 360; *Cook v. Horstman*, Id. § 771; *Mudgett v. Williams*, 2 Tex. Law Rev. 337.

Messrs. Browning & Madden, for defendants in error:

It is not necessary to allege or prove scienter in this case.

Davis v. Davis, 70 Tex. 128; 1 Thomp. Neg. 206, 209; 6 Wait, Act. & Def. 72; 1 Sutherland, Damages, 24; *Chunot v. Larson*, 43 Wis. 586, 28 Am. Rep. 567.

Davis v. Davis, 70 Tex. 134, decides the rights of the plaintiffs in the case at bar.

See also *Walker v. Heron*, 22 Tex. 55.

The object of the Act of April 18, 1879, was merely to prescribe such a fence as would enable landowners to enforce certain remedies against the owners of trespassing animals, and not to prohibit any other kind of fence.

Worthington v. Wade, 82 Tex. 28.

The court of appeals in the case of *Ohio Wool Growing Co. v. Bogel*, 3 Tex. Ct. App. Civ. Cas. § 273, held that an action would lie against defendant for entering upon the plaintiff's unenclosed lands with 5,000 sheep and herding same upon such land over the protests of the plaintiff.

Gaines, J., delivered the opinion of the court:

This suit was brought in the district court of Donley county by the defendants in error to recover of plaintiff in error damages for an alleged trespass of the latter's cattle upon the pasture of the former. It was claimed

equal strength and security. *Phillips v. Oystee*, 33 Iowa, 257.

In an instruction that the jury should find "whether plaintiff's fence was a lawful fence, four and a half feet high, with spaces sufficiently close; was the fence four and a half feet high, and such as is generally, in this country, recognized as a good fence?" This is a matter entirely in your discretion."—the word "discretion" does not refer to the statutory definition of a fence but implies judgment, and in this sense applies well enough to those qualities of a fence which are in their nature undefined, as when the statute describes it as of strong materials put up in a good and substantial manner, with sufficiently small spaces. *McManus v. Finan*, 4 Iowa, 283.

It is no defense that a fence is not the statutory height, when the defendant negligently left the fence down so that cattle entered and trespassed. *Crawford v. Maxwell*, 3 Humph. 476.

Where an order requiring a partition fence to be built did not fix its height, and it was built sufficient to answer the purpose, a recovery may be had for contribution, although not of the height which had been decided upon by the voters of the town for all fences. *Ketchum v. Stolp*, 15 Ill. 341.

Where parties have kept up a hog-tight fence between each other for sixteen years and one party replaces it when it becomes worn out, by building a lawful fence which is not hog tight, he can recover for damages to his crops from the hog of the other. *Panther v. Trauman* (Iowa) Oct. 7, 1893.

The Tennessee Code, § 1682, providing that "every planter" shall keep about his cleared land a fence five feet high, and hog tight three feet high, does not apply to lots in cities or towns. *Staub v. Fantz*, 11 Helsk. 706.

The partition fence in a borough in Pennsylvania

in the petition that the plaintiffs' cattle had died by reason of a disease communicated to them by those of the defendant. There was a judgment for the plaintiffs, which, upon appeal by the defendant, was affirmed in the court of civil appeals. It was shown upon the trial that the plaintiffs were the owners of a pasture embracing 2,000 acres, which was enclosed by a wire fence, and upon which they held about 100 head of cattle. This pasture was entirely surrounded by a much larger one, which was owned by the defendant corporation, and which was also enclosed by a fence of the same general character. The fence of plaintiffs, as they testified, was constructed of "posts about 80 feet apart, with four barbed wires, and three or four stays between each post." In 1889 the defendant company placed in its pasture a large number of East Texas cattle, which were less in size than the cattle of the Panhandle section. Some of these cattle passed through the plaintiffs' fence, and into their pasture, and there was evidence sufficient to justify a finding that they communicated a disease to some of plaintiffs' cattle, from which they died. The fence appears to have been passed through by the young cattle, presumably the calves and yearlings. One of the plaintiffs testified that "they [meaning the cattle] would crawl through the fence." The other also testified as follows: "They were small, and just walked through our fence."

The court charged the jury as follows: "Every entry of one's own cattle upon the lands or premises of another is a trespass, and the owner of such cattle will be liable for any damages sustained by the owner of such premises, if any, provided such lands or premises were at the time of such entry enclosed by a fence sufficient to exclude therefrom such cattle or animals as were accus-

tomed to be used in the country or the range around and about such enclosed premises, and provided, further, that such trespass is effected by a forcible entry through such fence or enclosure." This charge was assigned as error, upon the appeal to the court of civil appeals, and the assignment is insisted upon in this court. Neither the courts nor the legislature of this state have ever recognized the rule of the common law of England which requires every man to restrain his cattle either by tethering or by enclosure. *Davis v. Davis*, 70 Tex. 128. Hence, if the cattle of one person wander upon the unenclosed lands of another, or upon his lands imperfectly enclosed, they are not trespassers, and the owner is not liable for any damage that they may inflict. It follows that one who desires to secure his lands against the encroachments of livestock running at large, either upon the open range or in an adjoining field or pasture, must throw around it an enclosure sufficient to prevent the entry of all ordinary animals of the class intended to be excluded. If he does not, the owner of animals that may encroach upon it will not be held liable for any damage that may result from such encroachment. This is the necessary result of the right of the owners of domestic animals to permit them to run at large as recognized by the laws of this state. Since he does not owe the duty of confining his cattle, he is guilty of no negligence, and he does no wrong by allowing them to go unconfined, and is not responsible for their acts if, by reason of an insecure fence, they inflict damage upon the lands of a neighbor; in other words, their encroachment upon another's land is not a trespass. If, however, he drives his cattle upon the enclosed land of another, however imperfectly enclosed, he is guilty of a trespass, for which he is liable to answer

need not be a tight board fence if it is substantial. *Trego v. Pierce*, 119 Pa. 129.

Under Missouri Rev. Stat. 1845 (Inclosure Act, p. 575), one cannot justify killing trespassing hogs unless his fence is of statutory dimension, and an instruction that "if the defendant's fence owing to high water would not keep out the plaintiff's pigs whether the fence was legal or not they will find for the defendant," is error. *Early v. Fleming*, 16 Mo. 154.

The hog law in Missouri, Sess. Acts 1885, p. 166, required in such counties where swine were prohibited from running at large that the fence should be built of posts and boards with posts set firmly in the ground not more than eight feet apart, and boards substantially one inch thick and six inches wide securely fastened thereto and the upper board being at least four and one half feet high and the two remaining boards placed at proper distances below to resist horses, cattle, and like stock. *Crumley v. Kansas City, C. & S. R. Co.* 33 Mo. App. 505.

Where hogs are not permitted to run at large in Kansas in certain townships, a railroad company is only required to construct a fence prescribed by the statute, the bottom rail, board or plank of which is not more than two feet from the ground. *Leavenworth, T. & S. W. R. Co. v. Forbes*, 37 Kan. 450.

A railroad company is not required to build a hog-tight fence in Kansas. *Atchison, T. & S. F. R. Co. v. Yates*, 21 Kan. 613.

Indiana Act, March 2, 1891, made the word "cat-

tle" applicable to "hogs" where, under Ind. Rev. Stat. 1881, § 4848, a lawful partition fence was such as would restrain sheep unless it was agreed to build a fence to restrain horses, mules, or cattle. *Endere v. McDonald*, 5 Ind. App. 297.

A defect in a common fence through which hogs entered an enclosure from the outside, where the field is cultivated by several under a common fence, will not authorize the punishment of the owner of the stock for knowingly permitting them to go at large. It is not necessary that the enclosing fence should be a statutory fence though it should be substantial. In this case the owner of the crops was responsible for the condition of the fence. *Cole v. State*, 72 Ala. 216.

A person may recover contribution for building a hedge on a boundary line under Iowa Acts 1876, chap. 108, § 2, although there were short distances on the line where the hedge would not grow. *McKeever v. Jenks*, 59 Iowa. 300.

A party is not obliged to construct a fence which can resist a storm that unroofed houses. *Norling v. Allee*, 81 N. Y. S. R. 412.

The Iowa Revision, § 1544, providing for a lawful fence "or other construction or fence" "of equal strength and security to the enclosure" applies to a bluff, hedge, trench, wall, trestle, or the like. *Hilliard v. Chicago & N. W. R. Co.* 37 Iowa, 442.

Under N. C. Code, § 1062, providing a penalty for injuring a fence surrounding or about a yard, field, or pasture, posts nine feet apart, on which near the tops were nailed slats placed alongside of

in damages. *Davis v. Davis, supra.* Tested by the rule we have announced, the charge under consideration cannot be sustained. Abstractly considered, it admits of a holding that if only sheep "were accustomed to be used in the country or in the range around and about the enclosed premises," and the owner of the land had a fence sufficient to exclude such animals, one who should bring in neat cattle, and leave them unconfined upon adjacent lands, would be held to respond in damages for any loss that might ensue by reason of their encroaching upon the enclosed premises. It is clear that such is not the law. It is but just, however, to the learned judge who tried the case, to say that it is apparent from the entire charge, in the light of the testimony, that he did not intend to lay down so broad a doctrine. He referred solely to neat cattle. But the possible construction we have suggested serves to illustrate what we conceive to be an error in the instruction, when applied, as doubtless intended, to the latter class of animals only. We do not hold that for no breach of his fence, and invasion of his pasture by domestic animals, could a landowner recover under our laws. It may be admitted that, if his enclosure be sufficient to exclude all cattle of an ordinary disposition, he would have the right to recover for the trespass of such as were peculiarly vicious and prone to break fences. The owner of a dog may, as a general rule, permit him with impunity to run at large; but if he know him to be vicious, and does not restrain him, he is liable for any injury he may inflict upon person or property; and it would seem that the same principle should apply to the owner of any domestic animal known to him as being accustomed to break through an ordinarily good and sufficient fence. But upon what prin-

ciple are we to draw a distinction between small cattle and large? If the fact that all the cattle in the neighborhood of his pasture were of large breeds when his fence was constructed would relieve the owner of the necessity of making his fence sufficiently close to keep out small cattle that might be brought into the country, why should he be not relieved of the necessity of fencing against hogs, provided there were no hogs within reach when he made his enclosure? The owner of the little "dogies," (as the witness calls them,) such as crawled or walked so freely under the wires of plaintiffs' fence, had precisely the same right to permit them to go at large as his neighbors had who owned Herefords or Shorthorns; and it could make no difference who came first with his cattle in the neighborhood. It is equally unimportant whether others in the same section or neighborhood kept the same kind of cattle or not. It is the right of every owner of domestic animals in this state, not known to be diseased, vicious, or "breachy," to allow them to run at large, and this without reference to the size or class of such animals kept by others in the same neighborhood. For these reasons we think there was error in the charge complained of, for which the judgment must be reversed.

We are of the opinion that the Act of March 26, 1879, (2 Sayles' Civ. Stat. art. 4609a,) applies only to counties and subdivisions of counties in which the provisions of chapter 4 of title 93 of the Revised Statutes have been put in force by an election. So, also, title 43, in relation to fences, applies only to lands in cultivation, and not to pasture lands. They have no bearing upon this case, except in so far as they evince a recognition by the legislature of the general rule that owners of domestic animals have

a road, but which did not connect with any fence, is not such a fence as is protected. *State v. Roberts*, 101 N. C. 744.

Contracts.

Holding cattle under Miss. Code, § 1922, providing for taking cattle damage feasant, can only be justified where there is a lawful fence, and cannot be maintained because such party violates his agreement to keep his part of a division fence in repair. *Dent v. Roes*, 52 Miss. 188.

The kind of a partition fence to be maintained by the adjoining owners, may be modified by agreement. *Bruner v. Palmer*, 108 Ind. 397.

Where A and B exchanged lands and A agreed to make the fences and maintain them, and B's cattle break through into A's ground, the agreement is no bar to trespass by A, though the agreement is by deed; but his remedy is by an action of case on the promise if without deed, or on covenant, if by deed. *Mich. 41 & 42 Eliz. B. R.; Nowel v. Smith*, Cro. Eliz. 709.

Where adjoining proprietors are required by statute each to keep up the whole of a partition fence, and they agree that each shall keep up one half, an action of trespass will not lie for failure but the remedy is for breach of contract. *Moore v. Levert*, 24 Ala. 310.

Where under the statutes of Alabama (Clay Dig. 241) each adjoining proprietor is bound to keep the entire division fence in repair, neither can maintain an action of trespass against the other for damages consequent upon an insufficient fence, 22 L. R. A.

and if each contracts to keep up half and fails, an action of trespass cannot be maintained. *Walker v. Watrous*, 8 Ala. 493, 43 Am. Dec. 645.

But when parties contract to keep a division fence in repair and to arbitrate damages, on the failure of one party to recognize the contract, an action lies for trespass of stock. *Berry v. Carter*, 19 Kan. 135.

A petition for damages from trespassing stock, for failure of contract to keep fence in repair may be good at common law although it fails to state a good cause of action under the statute. *Kneale v. Price*, 21 Mo. App. 236.

Where the lessee for five years agreed to plant and grow a good and substantial hedge by the close of his term, this does not mean a hedge that would turn stock but only that he would plant and faithfully cultivate the same. *Gilchrist v. Gilchrist*, 78 Ill. 281.

Under a contract to maintain a hedge "until the same shall be sufficient to turn ordinary stock and such as is contemplated by the laws of Kansas relating to hedge fences," "ordinary stock" means such as is permitted by law to run at large. *Usher v. Hiatt*, 21 Kan. 543.

This note is confined to one subject of "sufficiency of fences" and does not touch the kindred questions as to duty to maintain fences either for division fences, outside fences, or railroad fences.

As to the duty to fence against cattle of others, see note to *Bulph v. Matthews*, ante, 55.

the right in this state to permit them to run at large.

In order to obviate any misconception of the scope of this opinion, we call attention to the radical distinction between this case and that of *Davis v. Davis, supra*. In that case the defendant drove his cattle upon the plaintiffs' enclosed land. That made him a willful trespasser. In this the defendant corporation merely put its cattle upon its own pasture, and they passed the plaintiffs' fence of their own volition. If the agents

of the defendant corporation knew that their cattle could pass through the plaintiffs' enclosure, and that they were likely to communicate disease to the latter's cattle, it was negligence on its part not to confine them, and for the consequences of that negligence it would be liable.

The judgments of the District Court and of the Court of Civil Appeals are reversed, and the cause remanded.

Rehearing denied.

NEBRASKA SUPREME COURT.

Leonard K. SCROGGIN, *Plff. in Err.*,

v.

John W. McCLELLAND.

(.....Neb.....)

*1. The statute of limitations begins to run in favor of the drawer of a check at

*Headnotes by IRVING, C.

the latest after the lapse of a reasonable time from the presentment of the check.

2. The courts of this state will not take judicial notice of the laws of other states, and in the absence of proof such laws will be presumed to be the same as our own.

(September 20, 1893.)

ERROR to the District Court for Nuckolls County to review a judgment in favor of

NOTE.—*Statutes of limitation as applicable to bank checks.*

So far as we can find, the above case stands alone in declaring that the statute of limitations begins to run on a check at the expiration of a reasonable time for presentment, although surprisingly few cases which have in any way decided the point are discoverable.

Indeed Grant on Banking, § 53, published in 1857, said: "Whether the plea of the statute of limitations would be a good answer to an action by the payee against the drawer has never been decided, but it seems that such defense, in case of a check, presented more than six years after delivery to the payee, might perhaps be taken under the plea of the statute." But since that time a few cases have been decided.

In *First Nat. Bank of Newton v. Needham*, 29 Iowa, 249, it is said that a check is not due within the meaning of the statute of limitations or for other purposes until demand of payment, but this was by way of argument only as the statute of limitations was not involved in the case.

Again in *Cowling v. Altman*, 71 N. Y. 435, 27 Am. Rep. 70, it is said that the statute of limitations on a check runs from demand of payment, but this was entirely obiter and made in discussing the question of the dishonor of the check.

So in *Bull v. First Nat. Bank of Kasson*, 128 U. S. 105, 31 L. ed. 97, in deciding that a bank check was not overdue so as to subject it to equities, it was said, quoting from *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008, "that it is not due until payment is demanded, and the statute of limitations runs only from that time." But in neither of these cases was the statute of limitations involved.

But in *Re Boyse*, L. R. 38 Ch. Div. 612, 56 L. J. Ch. 126, it is directly decided that the statute of limitations does not run upon a check until presentment as there is no liability on the part of the drawer until that time.

On the other hand, where a check was remitted by mail in March, 1878, the drawer expecting to negotiate a loan to meet it and then to inform the holder, but as he died shortly afterwards the check never was presented and would not have been paid if presented, it was held that the statute of limitations began to run when a letter was received stating that the loan would not be completed. *Re Bethell*, L. R. 34 Ch. Div. 561, 56 L. J. Ch. 334.

The court makes a distinction between those cases where time runs from presentment on the ground that here there was no obligation to present the check. The Act, 45 & 46 Vict. chap. 61, although not governing this case, is accepted as declaratory of the prior law—providing that presentment must be in a reasonable time but presentment may be dispensed with where the drawee is not bound as between himself and drawer to accept or pay the bill, and the drawer has no reason to believe the bill will be paid.

The same distinction is supported, but not pointed out, in *Brush v. Barrett*, 82 N. Y. 400, 37 Am. Rep. 559, affirmed, *Brush v. Barrett*, 16 Hun, 400, which decides that where the drawer of a check has no funds in bank to meet the same, the statute of limitations runs from the date of the check, even if the check was not presented, as such a check is due immediately and suit may be maintained against the drawer without demand of the bank. Six years will defeat the action in New York.

In *Culver v. Marks*, 7 L. R. A. 489, 122 Ind. 554, the doctrine is recognized that the payee may at once bring suit on a check if the drawer has no funds on deposit to meet the check. But the case is peculiarly unsatisfactory on the question of limitations, merely holding that the check is not barred by the statute, although the facts were that it was drawn in 1869 or 1870 and claim filed thereon in 1885 against the estate of the maker who died in 1884. We understand that the statute applicable to checks made the limitation period ten years with eighteen months addition in case of the debtor's death, so that it is not easy to see the ground of the decision. The doctrine recognized in the case that the payee might sue at once if no funds were on deposit, would seem to set the statute in motion from that date, and if so the checks would seem to have been barred. But there was in the case the additional facts of the maker's promise to pay the check without presentment and the payee's promise not to present it. What effect these facts may have on the question of limitations is not stated, but they are discussed only as excusing presentment. How these facts can be regarded as taking the case out of the rule that makes the check due at once if funds are not ready to meet it and

plaintiff in an action upon a check. *Reversed.*
The facts are stated in the commissioner's opinion.

Meers, John M. Ragan, Robert Ryan,
and *S. A. Searle* for plaintiff in error.

Mr. H. W. Short for defendant in error.

Irvine, C., filed the following opinion:
The defendant in error sued the plaintiff in error in the district court of Nuckolls county upon a check drawn by plaintiff in error to the order of defendant in error for \$746.22, upon Scroggin & Son, bankers, Mt. Pulaski, Ill., and dated November 10, 1882. He alleged presentment and dishonor of the check November 14, 1888. The suit was begun February 20, 1889. The plaintiff in error in answer pleaded—First, the statute of limitations; second, that the check was presented and paid at or about the day of its date; third, matter claimed to operate in estoppel, which it will not be necessary here to notice. The reply amounts to a general denial. The case was tried to the court, a jury being waived, and there was a general finding and judgment for the defendant in error.

One of the errors assigned, and the only one which we shall notice, is that the court erred in not finding that the action was barred by the statute of limitations. This assignment

raises the question as to when the statute begins to run upon a bank check in an action against the drawer of the check. A check is in some respects analogous to a bill of exchange, or a note payable on demand. On notes payable on demand the statute of limitations has been held to run from the date of the note. *Little v. Blunt*, 9 Pick. 488; *Wenman v. Mohawk Ins. Co.* 13 Wend. 267. Where a drawer of a check had no funds to meet it, it was held that the statute began to run from the date of the check. *Brush v. Barrett*, 82 N. Y. 400, 37 Am. Rep. 569. It is true that the last case was decided upon the theory that, inasmuch as the drawer had no funds in the bank to meet the check, presentment immediately would have been unavailing, and a cause of action, therefore, arose in favor of the payee as soon as the check was given. We can see, too, that there is a distinction between a note payable on demand and a check, as an action lies at once against the maker of a demand note without actual prior demand. *Norton v. Ellam*, 2 Mees. & W. 461; *Burnham v. Allen*, 1 Gray, 496; *New Hope Delaware Bridge Co. v. Perry*, 11 Ill. 467, 52 Am. Dec. 443. Nevertheless a check is not designed for circulation, but for immediate presentment. *First Nat. Bank of Wyomere v. Miller* (Neb.) 55 N. W. Rep. 1064.

make a demand necessary on the maker before a right of action accrued, we do not clearly see as they would seem to be merely a waiver of presentment which was in this case already waived by lack of funds on deposit making the check due at once. It is likely, however, that some facts of importance are not stated in the opinion. The finding shows that interest was allowed from 1878, and if there was some fact which made that the date from which the statute would begin to run the decision would be perfectly clear.

In *Rogers v. Durant*, 140 U. S. 206, 85 L. ed. 461, it was held that a bank check is a bill of exchange within the terms of Ill. Stat. 1870, 8d ed. p. 430, § 17, 18, prescribing the term of five years after the cause of action accrues, and not thereafter, as the time within which an action thereon must be commenced.

In this case it does not appear whether the cause of action accrued from the date of the instrument or demand, but the question was whether a check was controlled by the statute of limitations as to bills of exchange.

Where the original check by a New Orleans bank on a Pennsylvania bank was lost, but a duplicate was protested for nonpayment eight years after date, it is held that "checks of this kind are used for purposes of immediate circulation; but the law is well settled that they must be presented for payment within a reasonable time," and that the action was also barred under La. Civ. Code, § 3502, in five years from the time when the check was payable. *Harman v. Claiborne*, 1 La. Ann. 842.

Where plaintiff loaned the defendant money and gave him check for the amount, which check was not paid by the plaintiff's bankers until several days after, but defendant had obtained credit for the same at his bank, the statute of limitation in an action by plaintiff against the defendant for that amount, only ran from the time of the payment of the check by plaintiff's bankers, and not from the date of the check. *Garden v. Bruce*, L. R. 3 C. P. 380.

This is not a case based on the check but on the receipt of the money.

2? L. R. A.

Although mere laches in presentation of a check is not within the subject of this note, it will be noticed that in cases of laches it is often said that no delay less than the statutory period will be a bar unless by insolvency or other change of circumstances the situation of the parties has been changed.

In *First Nat. Bank of Tamaqua v. Shoemaker*, 117 Pa. 94, an amendment to change a suit by the payee on a check to one by the drawer for the payee's use was denied after the statute had run against the drawer although the suit was begun by the payee before the statute had run.

Where a bank check or bill of exchange was dated March 8, 1882, protested 1885, presentment to drawers for payment excused by condition of country from war, judgment in 1890 was given against the drawer on the ground that a holder of a check need not present the same after insolvency of the drawee. The statute of limitation does not appear to have been pleaded. *Jackson Ins. Co. v. Sturges*, 12 Helsk. 339.

Certified check.

The holder of a check marked "good" stands in the same position towards the bank as the original depositor, and the statute of limitation in favor of the bank does not run until payment has been actually demanded at the banking house and refused. *Girard Bank v. Bank of Pennsylvania Twp.* 99 Pa. 92, 30 Am. Dec. 507.

In this case the bank had acknowledged that money was on deposit by paying a duplicate check and taking a bond of indemnity against this check outstanding, which was construed to suspend the statute. The check had been mislaid and suit was sustained although demand was made more than seven years from date.

The same doctrine that a certified check cannot be dishonored by lapse of time alone is declared in *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 320, although the case there actually presented was in respect to a certificate of deposit.

L. T.

The time within which presentment must be made is quite limited. Ordinarily, when the payee of a check and the bank upon which it is drawn are in the same town, a check must be presented before the close of banking hours the day after it is received (see cases cited in *note to Holmes v. Briggs*, 17 Am. St. Rep. 804); otherwise it should be forwarded for presentment the day after it is received by the payee, and presented the day after it is received by the agent for collection. Special circumstances may excuse a greater delay, but no excuse is pleaded or proved for the delay in this case. We think that the statute should be deemed to have begun to run at the latest upon the expiration of a reasonable time for presenting the check, and that a delay for over six years would complete the bar of the statute beyond all question.

It is claimed by defendant in error that delay in presenting the check does not release the drawer unless he has been injured. This is the rule where suit is brought within the period of limitation, but the statute in all cases bars relief. The statute runs in favor of the drawer as well as others.

It is also claimed that the drawer has during the whole period resided in Illinois, and that the statutory period there is ten years. This may be true, but it is neither pleaded nor proved. The court cannot take judicial notice of the law of another state, but, in the absence of proof, it will be presumed to be like that of our own. *Lord v. State*, 17 Neb. 526; *Bailey v. State* (Neb.) 55 N. W. Rep. 241. Presuming the law of Illinois to be the same as our own, the action had been barred by the laws of that state at the time it was commenced here, and was therefore barred here. Code Civ. Proc. § 18; *Howe v. Aultman*, 27 Neb. 251. Aside from the failure of proof upon this point, the pleadings entirely failed to present the issue. Upon the face of the petition the action was barred, and a demurrer would have lain.

Reversed and remanded.

Ryan, C., concurs.

Ragan, C., having been of counsel in the case, took no part in its consideration or decision.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ATTORNEY-GENERAL

OLD COLONY R. CO.

ATTORNEY-GENERAL

BOSTON & ALBANY R. CO.

(.....Mass.....)

1. The attorney-general can properly institute proceedings, under Stat. 1892, chap. 389, to require a railroad company to issue mileage tickets and receive those of other companies since it is not a proceeding in equity, but rather a petition for a writ of mandamus in a matter concerning the public.

2. A statute requiring railroad companies to issue mileage tickets and to receive those of other roads in payment of fare, without providing any fund for their redemption, or making them a lien on any tangible property, or putting any limit on the number of them which may be issued, or the time within which they must be used, is unconstitutional, as an appropriation of individual property to public use without the owner's consent, and without legal provision for a reasonable compensation therefor.

(November 3, 1893.)

REPORT by the Supreme Judicial Court for Suffolk County for the opinion of the full court of petitions by the attorney-general

NOTE.—The great practical importance of the above case and the difficulty of the questions involved render it of unusual interest. The questions are so fully discussed in the opinions of the judges that no attempt to annotate them will be made.

22 L. R. A.

against the defendant railroad companies to compel them to comply with the Statute of 1892, chap. 389, requiring them to issue mileage tickets and to receive those of other roads in payment of fare. *Dismissed.*

The following shows the form of the petition:

"Albert E. Pillsbury, attorney-general, in behalf of the commonwealth, informs the court that the Old Colony Railroad Company is a railroad corporation established under the laws of the commonwealth, and operating a railroad therein; and that it is required by a law of the commonwealth, being chapter 389 of the Acts of the year 1892, to provide and have on sale for twenty dollars, and to sell to all persons applying therefor, mileage tickets for passenger transportation representing one thousand miles; and to redeem all such tickets, or any part thereof, upon presentation by any other railroad corporation; and to accept and receive from all persons for fare and passage over its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, as therein prescribed. The defendant, though duly demanded, willfully and wrongfully neglects and refuses to comply in any particular with the requirements of the law as herein above set forth, which willful and wrongful neglect and refusal has continued from the taking effect of the law until the present time, and declares its purpose and determination not to comply therewith; which conduct is a violation of the law, and of the public right thereunder, for which there is no adequate remedy except by this proceeding. Wherefore the informant prays that the defendant be required and compelled, by writ of mandamus or other appropriate process, to

provide and sell such mileage tickets to all persons applying therefor, and to redeem all such tickets, or any part thereof, on presentation by any other railroad corporation, and to accept and receive from all persons for fare and passage upon all its own lines all such tickets issued by any other railroad corporation operating within the commonwealth, and in all particulars to comply with the requirements of the law as therein set forth, and for such other orders in the premises as justice may require."

Mr. A. E. Pillsbury, Atty-Gen., for petitioner:

This statute is constitutional, either (1) as a regulation of the public business in which the defendants are engaged under a public franchise, by virtue of Pub. Stat., chap. 112, § 180, or in the exercise of the general powers of the legislature; or (2) as a condition imposed upon the further exercise of the franchise, which is subject to amendment or repeal at the will of the legislature under the reservation of Pub. Stat., chap. 105, § 8, originally Stat. 1880, chap. 81; or (3) as an amendment of the charter under this reserved power.

The power of the legislature to regulate railroad tariffs within reasonable limits is settled.

Pub. Stat. chap. 112, § 180; *Boston & W. R. Corp. v. Western R. Corp.* 14 Gray, 258; *Parker v. Metropolitan R. Co.* 109 Mass. 506. See also *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560, 21 L. ed. 710; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77 *et seq.*; *Stone v. Farmers Loan & T. Co.* 116 U. S. 807, 29 L. ed. 636, and cases cited; *Dow v. Beidelman*, 125 U. S. 680, 690, 31 L. ed. 841, 844; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 889, 36 L. ed. 176, and cases cited; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247; *Cooley, Const. Lim.* 6th ed. 788, note 3; *People v. Boston & A. R. Co.* 70 N. Y. 569.

The only limitation upon this power is that it shall not require service without reward, or amount to the taking or destruction of property without compensation.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 877, and cases cited.

It is possible that the operation of the act may require the defendant to transport a passenger on presentation of a ticket which the corporation issuing it will not redeem on demand. This, however, is not to be assumed, and the constitutionality of the statute is not necessarily to be tested by the most extreme case which can possibly arise under it.

Com. v. Plaisted, 2 L. R. A. 142, 148 Mass. 375.

The court will presume that the legislature made proper inquiry into the circumstances, and that the act is capable of operating without any such consequences; and this presumption stands unless and until the contrary appears.

See *Dow v. Beidelman*, *supra*; *Cooley, Const. Lim.* 6th ed. 220.

The act provides a sufficient compensation for the defendant for all transportation which it performs on tickets of other roads. The statute need not put the money into the defendant's hands. Even in the taking of prop-

erty by eminent domain, the legislature need not go so far as that.

Fitchburg R. Co. v. Grand Junction R. & D. Co. 4 Allen, 198; *Metropolitan R. Co. v. Quincy R. Co.* 12 Allen, 262; *Boston & W. R. Corp. v. Western R. Corp.* *supra*; *Lexington & W. C. R. Co. v. Fitchburg R. Co.* 14 Gray, 286; *Worcester v. Norwich & W. R. Co.* 109 Mass. 108; *Metropolitan R. Co. v. Highland Street R. Co.* 118 Mass. 290; *Worcester & N. R. Co. v. Railroad Comrs.* Id. 561, 568; *Cambridge R. Co. v. Charles River Street R. Co.* 139 Mass. 454.

There is no interference with the defendants' right to acquire, possess, and protect property. This act does not amount to a taking or destruction of the defendants' property. And even as to this, the legislature has a larger power over this artificial creature of its own than over the private citizen.

Cooley, Const. Lim. 646, 647, and cases cited in note; *Callender v. Marsh*, 1 Pick. 418, 490; *Fitchburg R. Co. v. Grand Junction R. & D. Co. supra*; *Com. v. Eastern R. Co.* 108 Mass. 254, 4 Am. Rep. 555; *Cambridge v. Railroad Comrs.* 153 Mass. 161, and cases cited.

There is no constitutional or other legal objection against "class legislation." The legislature is constantly legislating for and upon classes, and rightfully.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 32 L. ed. 595, and cases cited; *Hevitt v. Charier*, 16 Pick. 353; *Davis v. State*, 3 Lea, 878; *Missouri Pac. R. Co. v. Mackey*, 38 Kan. 298; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 888, 848; *Cooley, Const. Lim.* 479, 480.

The legislature is not required to deal with all railroad corporations alike, and they cannot complain of legislative discrimination among them.

Re Northampton, 158 Mass. 299, and cases cited; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Dow v. Beidelman*, 125 U. S. 680, 691, 31 L. ed. 841, 844; *State v. Indiana & I. S. R. Co.* 18 L. R. A. 502, 183 Ind. 69.

If the act is to be regarded as an amendment of the defendants' charters, it is within the power of the legislature, without the consent or other action of the stockholders. And if it is, in any view, within the power of the legislature, it does not depend upon the consent of the stockholders. Their consent would be of no more effect, if of any, than the consent of the corporation, and this is unnecessary.

Worcester v. Norwich & W. R. Co. supra.

This statute is not in conflict with the legal tender clause of the Constitution of the United States. This act does not attempt, and has no effect to establish a legal tender currency.

2 Story, *Const.* §§ 1854-1872; 5 Madison Papers, *Constitutional Debates*, pp. 181, 881, 484, 561; 1 Elliott, *Constitutional Debates*, pp. 270, 271; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 214, 266, 6 L. ed. 606, 624; *Briscoe v. Bank of Kentucky*, 36 U. S. 11 Pet. 811, 9 L. ed. 780; *Darrington v. Branch Bank of Alabama*, 54 U. S. 18 How. 12, 14 L. ed. 30; *Virginia Coupon Cases*, 114 U. S. 270, 288, 29 L. ed. 185, 190.

The statute does not impair or affect the obligation of contracts. The only contract to be affected, if any, is the defendant's charter;

and it is settled that such legislation is not within this constitutional prohibition.

Fitchburg R. Co. v. Grand Junction R. & D. Co. and Com. v. Eastern R. Co. supra; *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 454, 21 L. ed. 204; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812; *Spring Valley Water Works v. Schottler*, 110 U. S. 847, 28 L. ed. 178; *Stone v. Farmers Loan & T. Co.* 116 U. S. 807, 825, 331, 29 L. ed. 686, 642, 644; *Blake v. Winona & St. P. R. Co.* 19 Minn. 418, 18 Am. Rep. 845; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 84 L. ed. 898; *Louisville Water Co. v. Clark*, 148 U. S. 14, 36 L. ed. 58, and cases cited.

The act is not, in intention, operation, or effect, a regulation of interstate commerce.

Stone v. Farmers Loan & T. Co. supra; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244; *Dow v. Beidelman*, 125 U. S. 689, 81 L. ed. 848; *Hardy v. Atchison, T. & S. F. R. Co.* 32 Kan. 698; *Stanley v. Wabash, St. L. & P. R. Co.* 8 L. R. A. 549, 3 Inters. Com. Rep. 176, 100 Mo. 435; *Budd v. New York*, 148 U. S. 517, 545, 36 L. ed. 247, 256; *Com. v. Housatonic R. Co.* 148 Mass. 264; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. 17 Wall. 580, 21 L. ed. 710; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77 *et seq.*; *Louisville, N. O. & T. R. Co. v. Mississippi*, 138 U. S. 587, 591, 33 L. ed. 784, 785; Interstate Commerce Act, § 1, 24 U. S. Stat. at L. chap. 104, p. 879.

If the regulation of local rates, etc., does affect interstate transportation, this does not necessarily amount to the regulation of interstate commerce, in the constitutional sense. State legislation may affect interstate commerce in various ways without amounting to unconstitutional regulation of commerce.

Sherlock v. Alling, 98 U. S. 99, 103, 23 L. ed. 819, 820; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 492, 493, 30 L. ed. 694-696; *Crutcher v. Kentucky*, 141 U. S. 61, 35 L. ed. 654, and cases cited.

The act does not work a deprivation of property without due process of law.

Munn v. Illinois, supra; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 619; *Stone v. Farmers Loan & T. Co. supra*; *Dow v. Beidelman*, 125 U. S. 689, 81 L. ed. 841; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, and cases cited; *Budd v. New York, supra*.

The legislature having power over the rates, it does not matter whether a change of rates within the power reduces the rates or the earnings or not.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 345 36 L. ed. 176, 179.

There is no provision of the Old Colony Company's charter, or of the general laws, which stands in the way of this requirement, or confines the legislature to any particular method of revising or altering its rates. The whole subject is within the legislative control, under the reserved power to alter and amend charters.

Parker v. Metropolitan R. Co. 109 Mass. 506, and cases cited at p. 503; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 182, 32 L. ed. 377, 381.

All its charters were granted after the passing of Stat. 1830, chap. 81 (March 11, 1831), reserving to the legislature a power to amend, 22 L. R. A.

alter, or repeal at pleasure all acts of incorporation which should be afterwards passed, as if each contained an express provision to that effect.

Roadbury v. Boston & P. R. Corp. 6 Cush. 424. See also *Com. v. Eastern R. Co.* 103 Mass. 257; *Metropolitan R. Co. v. Highland Street R. Co.* 118 Mass. 298; *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 133; *Sinking Fund Cases*, 99 U. S. 720, 25 L. ed. 501; *Louisville Water Co. v. Clark*, 148 U. S. 18, 36 L. ed. 58; *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 539, 25 L. ed. 914; *Close v. Glenwood Cemetery*, 107 U. S. 476, 27 L. ed. 412.

The act fixes the rate; and it seems that in such a case the reasonableness of the rate is not a judicial question and is not open to revision by the court.

Budd v. New York, supra.

Mr. J. H. Benton, Jr., for defendant the Old Colony R. Co.:

This act contains no provision giving the court equity jurisdiction to enforce its provisions, as is usually the case in statutes requiring action by railroad corporations.

See Pub. Stat. chap. 112, §§ 136, 162; Laws 1890, chap. 428, § 8.

This act assumes:

1. To reduce the fares and tolls of the respondent for passenger transportation and its earnings therefrom "contrary to the provisions of its charter."

2. To reduce the fares and tolls of the respondent for passenger service and its earnings therefrom, and to fix an arbitrary rate at which it shall perform such service and also to exclude any inquiry in the courts, *i. e.* by due process of law as to whether such rate is reasonable compensation for the service required to be performed.

3. To require the respondent to perform such service at the rate fixed by the act and to receive in payment of the debts thereby incurred by the persons served, the contracts of other companies to perform similar service upon their lines, *i. e.* to perform such service not for money but upon the credit of all other companies in the commonwealth whether responsible or irresponsible.

4. To substantially affect the rates for and the conduct of interstate transportation on the respondent's road which is a connecting and continuous line of interstate transportation and travel.

5. To require the respondent and such other railroad companies operating in the state as the railroad commissioners may not exclude or exempt from the provision of the act and no others to obey it.

The act impairs the obligation of the contract as to fares and tolls contained in the charters of the respondents, and is therefore in conflict with the Constitution of the United States.

The legislature put into the charter a specific provision that it would not reduce the tolls below a certain point and in a certain manner.

What was that but an agreement by the legislature that notwithstanding the existence of the general power to alter, amend, or repeal, it would exercise that power in respect to the right or franchise to take tolls only in a certain way, and within a certain limit?

"It did not mean that the legislature will not alter or reduce the tolls so as to produce less than ten per cent per annum upon the cost of making the road, unless it shall hereafter choose to do so."

Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140.

The franchise to take tolls has always been treated as property in this commonwealth.

Ingalls v. Baker, 18 Allen, 449; *East Boston Freight R. Co. v. Hubbard*, 10 Allen, 459, note. See also *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *New York v. Second Ave. R. Co.* 32 N. Y. 261; *People v. Brooklyn, F. & C. I. R. Co.* 89 N. Y. 75; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244; *Memphis & I. R. R. Co. v. Berry*, 112 U. S. 609, 619, 28 L. ed. 837, 841; *Mumma v. Potomac Co.* 33 U. S. 8 Pet. 281, 8 L. ed. 945; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 135, 3 L. ed. 162, 177; *Conway v. Taylor*, 66 U. S. 1 Black, 603, 632, 17 L. ed. 191, 202; *Sinking Fund Cases*, 99 U. S. 700, 748, 25 L. ed. 496, 512; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140.

In *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray, 1, the provision in the charter of the plaintiff corporation that the legislature would not for twenty years authorize another railroad between Boston and Lowell was held by this court to be property.

Why is not the provision of the respondent that its tolls shall not be reduced below ten per cent as much property?

That this provision of the charters and the general law was understood to secure to railroad corporations the power of regulating their own tolls, subject only to the condition expressed in the charter, that the legislature might reduce and regulate them within the limits of a 10 per cent income, appears from *Vermont & M. R. Co. v. Fitchburg R. Co.* 9 Cush. 369.

See also *Fitchburg R. Co. v. Gage*, 12 Gray, 893.

The question is simply whether the legislature, under a prior reserved right to amend, can take away from the corporation that which by the subsequent grant it expressly agreed it would not.

No case has ever held the affirmative.

See *Roxbury v. Boston & P. R. Corp.* 6 Cush. 424; *Com. v. Essex Co.* 13 Gray, 239; *Fitchburg R. Co. v. Grand Junction R. & D. Co.* 4 Allen, 198; *Com. v. Eastern R. Co.* 103 Mass. 254; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Worcester v. Norwich & W. R. Co.* 109 Mass. 108; *Parker v. Metropolitan R. Co.* 109 Mass. 506; *Metropolitan R. Co. v. Highland Street R. Co.* 118 Mass. 290; *Thornton v. Marginal Freight R. Co.* 123 Mass. 32.

As by the acts of the corporation under the charter the contract of the commonwealth that it would not revise or reduce tolls except as in the charter specifically provided had become executed, the right of the corporation to take toll as in the charter provided had become vested, and it could not be and was not intended to be taken away by the Act of 1874, which did not assume to repeal the charter or to make 22 L. R. A.

compensation for taking away the grant of tolls therein contained.

Watuppa Reservoir Co. v. Fall River, 1 L. R. A. 466, 147 Mass. 548.

There is no difference between an act which applies to all persons except those who may be excluded from its operation, and an act which applies only to such persons as may be included within its operation. In either case the act is not, when it leaves the legislature, a completed act as to all persons to whom it applies, which is necessary to make it a valid exercise of the legislative power.

Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425.

This act is special as much as an act applicable only to the respondent corporation alone, or to it, and to a portion of the other railroad corporations.

The act is in violation of the 14th Amendment of the Constitution of the United States and also of the constitution of the commonwealth.

It assumes to deprive the respondent of its property without compensation and without due process of law.

If the rate fixed by the legislature is not a reasonable rate, or if the question whether it is a reasonable rate cannot under the act of the legislature be inquired into, the act violates these provisions of the constitution.

An act which deprives a carrier of a reasonable rate of compensation for service performed takes its property as much as one which deprives it of its real estate.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176; *Stone v. Farmers Loan & T. Co.* 116 U. S. 807, 29 L. ed. 636.

If, therefore, the Act of 1892 excludes inquiry as to whether the rate fixed by it for passenger transportation is a reduction of the rates fixed by the directors and of the earnings of the respondent therefrom, *i. e.*, an inquiry as to whether the rate fixed by it is a reasonable rate, the act is plainly invalid.

Mercantile Trust Co. v. Texas & P. R. Co. 51 Fed. Rep. 529.

The act is not valid in this aspect as an exercise of the reserved power to alter, amend, or repeal the respondents' charter.

The reserved power to amend charters does not authorize any act which deprives the company of its property.

Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140.

The right to own and operate a railroad necessarily implies the right to charge a reasonable compensation for its use or for services performed by its use. No special grant of that right is necessary. Such a right would be implied from the rest of the charter if it was not specifically given.

Railroad Commission Cases, 116 U. S. 301, 329, 29 L. ed. 636, 643.

The act is invalid as a regulation of interstate commerce.

Hall v. De Cuir, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Louisville, N. O. & T. R. Co. v. Mississippi*, 138 U. S. 587, 33 L. ed. 784.

There is no case where a state statute, the requirements of which substantially affect the

rates upon and the conduct of interstate transportation over the same line, has been sustained.

Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352; *Fiskien v. Shelby County Tax. Dist.*, 145 U. S. 1, 36 L. ed. 601.

The act is in violation of the provision of the United States constitution that "no state shall make anything but gold and silver coin a tender in payment of debts."

It makes the obligation of one carrier a tender to another in payment of the debt due to it from a passenger for transportation.

The performance of transportation by a carrier creates a debt from the person transported to the carrier, and it is not competent for the legislature to provide that that debt can be discharged by the tender of the obligation of another carrier to perform similar service.

The legislature has just as much power to require that the cars and engines of the railroad itself shall be absolutely given for a promise or obligation to pay, as it has to require that the use of them, or the service performed by such use shall be given for such a promise or obligation.

It is only the use of the cars and engines which makes them valuable. The right to use and to receive compensation for use of anything is all that really makes it property.

Wynehamer v. People, 18 N. Y. 378; 2 Austin, Jurisprudence, 8d ed. 817, 818; *Eaton v. Boston, C. & M. R. 51 N. H.* 504, 12 Am. Rep. 147; *Thompson v. Androscoggin River Imp. Co.* 54 N. H. 545.

The act is invalid as an absolute delegation of legislative power to the railroad commissioners.

Cooley, Const. Lim. 6th ed. p. 187, and citations.

"It may be that what the Legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city, but the principle violated is the fundamental principle that underlies all property, and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that regardless of temporary and special inconveniences."

Detroit v. Detroit & H. Pl. Road Co. 43 Mich. 140, 149.

Field, Ch. J., delivered the opinion of the court:

The brief for the Old Colony Railroad Company raises the questions whether the attorney-general has any right to bring the informations, and whether the court has any jurisdiction over the proceedings. It is said that Stat. 1892, chap. 389, does not give the court equity jurisdiction to enforce its provisions, but we do not regard these informations as informations in equity. They are rather petitions for a writ of mandamus. See Pub. Stat. chap. 186, § 18. It concerns the public, or an indefinite portion of the public, whether railroad corporations not exempted or excluded by the railroad commissioners shall obey Stat. 1892, chap. 389, and therefore we think that the attorney-general as rep-

resenting the public can properly institute these proceedings. *Atty. Gen. v. Boston*, 123 Mass. 460.

At the hearing of the petition against the Old Colony Railroad Company the presiding justice excluded evidence against its objection "tending to prove the allegation of fact in the third, seventh, and eighth paragraphs of its answer." These paragraphs are as follows: "Third. The railroads thus operated by it [the defendant] are in the states of Massachusetts and Rhode Island, and form connecting and continuous lines of interstate transportation and travel, and the regulation of the rates for and the conduct of passenger transportation thereon in this state substantially affect the rates for and the conduct of said interstate transportation thereon." "Seventh. It says that there are railroad corporations operating railroads in the commonwealth that are not pecuniarily responsible for the redemption and payment of tickets which may be issued by them under chapter 389 of the Acts of the year 1892. Eighth. It says that chapter 389 of the Acts of the year 1892, referred to in said information, is a reduction of its fares and tolls for passenger transportation established by its directors, and of its earnings therefrom, contrary to the provisions of its charter, and is not a revision or alteration of its fares and tolls in the manner prescribed thereby, or by the general law relating to railroad corporations."

Stat. 1892, chap. 389, can, we think, be construed as relating only to fares for the transportation of passengers from one point to another within the commonwealth; and if, under the existing regulations of the railroad company, there may be some difficulty in applying the law when a passenger intends to proceed from or to a point within the commonwealth to or from a point outside of the commonwealth, we do not see that this difficulty is inherent in the subject, or that by proper regulations the fares of passengers for transportation within the commonwealth cannot be paid for by mileage tickets, although the passengers are traveling to or from a place beyond the limits of the commonwealth. It is no sufficient objection to the statute that it may incidentally affect commerce between the states, if it does not attempt to regulate such commerce. See *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784.

The averments of the seventh paragraph relate to a possibility, rather than a fact, because it is not alleged that any railroad corporations which are not pecuniarily responsible have issued any mileage tickets under Stat. 1892, chap. 389, or that all such corporations have not been excluded from the provisions of the statute by the railroad commissioners. It is, in effect, an argument by way of an example of what might happen if one railroad company is required to transport passengers on the credit of another. The constitutionality of the statute cannot depend upon the solvency or insolvency of any particular railroad company at any particular time.

The averments of the eighth paragraph are not to the effect that Stat. 1892, chap. 389,

will, if carried into effect, operate to reduce the fares for passenger transportation below what is reasonable, but only that the statute will cause a reduction contrary to the provisions of the charter of the defendant. The Old Colony Railroad Company is a corporation in this commonwealth and in the state of Rhode Island, formed by the union of various railroad corporations chartered by this commonwealth or by the state of Rhode Island, and is also the lessee of the Boston & Providence Railroad Corporation and of other railroad corporations. The earliest charter of any of the railroads leased is that of the Boston & Providence Railroad Corporation, which was approved June 23, 1831. The earliest charter of any of the railroads which make up this defendant corporation is that of the Taunton Branch Railroad Corporation, which was approved April 7, 1835, being Stat. 1835, chap. 181. The fourth section of this last-named statute contains the provision 'that the legislature shall not at any time so reduce the tolls and their profits as to produce less than 10 per cent per annum upon the capital stock paid as aforesaid without the consent of said corporation.' The charters of other railroads which have been united to form the Old Colony Railroad Company contain similar provisions. These charters also grant to the corporations the right to take tolls at such rates as may be established by the directors. Similar provisions were enacted in the Revised Statutes (Rev. Stat. chap. 39, § 88), and in the General Statutes, Gen. Stat. chap. 63, § 112. Stat. 1870, chap. 825, § 1, repealed Gen. Stat. chap. 63, § 112, and provided as follows: "Any railroad corporation may establish for its sole benefit, fares, tolls, and charges, upon all passengers and property, conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road: provided, that such rates of fares, tolls and charges, and regulations shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad corporation to the contrary notwithstanding." Stat. 1874, chap. 372, § 4, is as follows: "Railroad corporations heretofore established in this commonwealth, whether by special act or in conformity with the provisions of the general law passed in the year one thousand eight hundred and seventy-two shall have the powers and privileges and be subject to the duties, liabilities, restrictions, and other provisions contained in this act; which, so far as inconsistent with charters granted since the eleventh day of March, one thousand eight hundred and thirty-one shall be deemed and taken to be in alteration and amendment thereof: provided, that nothing herein contained shall be construed to impair the validity of any special power heretofore conferred by charter or other special act upon any particular railroad corporation which has already exercised such power or to prevent the continued exercise thereof, conformably, so far as may be, to the provisions of this act; 22 L. R. A.

nor shall anything herein contained affect any act done or any right accruing, accrued or established, or any proceedings, doings, or acts ratified or confirmed, or any suit or proceeding had or commenced in any case before the act takes effect," etc. Section 179 of this Statute is as follows: "Any railroad corporation may establish for its sole benefit, fares, tolls, and charges upon all passengers and property, conveyed or transported on its railroad," at such rates as may be determined by the directors thereof, and may from time to time by its directors regulate the use of its road: provided, that such rates of fares, tolls, and charges, and regulations, shall at all times be subject to revision and alteration by the legislature, or such officers or persons as the legislature may appoint for the purpose, anything in the charter of any such railroad to the contrary notwithstanding." These provisions were re-enacted in Pub. Stat., chap. 112, §§ 2, 180. All the charters involved in these proceedings were granted subsequently to the passage of Stat. 1831, chap. 81, approved March 11, 1831, which provided "that the acts of incorporation which shall be passed after the passage of this act shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the legislature, and in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation as to the duration of the same." Rev. Stat. chap. 44, § 28; Pub. Stat. chap. 105, § 3.

It is evident that the legislature, in the year 1870, and since, has attempted to repeal the special provisions of the early charters of railroads which purported to limit its right to reduce fares or tolls below 10 per cent of the cost of the roads. An examination of the statutes will show that since the year 1870 the Old Colony Railroad Company has accepted the benefit of legislation "subject to all general laws which now are or hereafter may be in force relating to railroad corporations." One instance mentioned in the brief of this company is the union of the company with the Boston, Clinton, Fitchburg & New Bedford Railroad Company, pursuant to Stat. 1882, chap. 80. The Boston, Clinton, Fitchburg & New Bedford Railroad Company was formed by the union of the other railroads. The Agricultural Branch Railroad Company was incorporated by Stat. 1847, chap. 269, and was subject "to all the duties, liabilities, and restrictions set forth in the forty-fourth chapter of the Revised Statutes, and in that part of the thirty-ninth chapter of the Revised Statutes relating to railroad corporations, and in the public statutes which have been or may be passed, relating to railroad corporations." The name of this railroad company was by chapter 153, Stat. 1867, changed to the Boston, Clinton & Fitchburg Railroad Company. The New Bedford Railroad Company was incorporated by Stat. 1873, chap. 20, "subject to all the restrictions, duties, and liabilities set forth in all the general laws which now are, or hereafter may be, in force relating to railroad corporations;" and this company, after it had pur-

chased or united with the Taunton Branch Railroad Company, was authorized to unite "with the corporation that may be formed by the union of the Mansfield & Framingham Railroad Company with the Boston, Clinton & Fitchburg Railroad Company." None of these charters contains any provision that the tolls should not be reduced by the legislature below 10 per cent of the cost of the roads, or any provisions on the subject. It may at some time deserve consideration "whether, when a railroad voluntarily unites with other railroads, and there are special provisions concerning tolls in some of the charters and none in others, and the union is effected under a statute which provides that the corporation thus formed shall be subject to all general laws which now are or hereafter may be in force relating to railroad corporations, these special provisions continue in force, and are applicable to the consolidated corporation. In view of the many changes in the charters of nearly all the railroad corporations of the commonwealth occurring since 1870, which have been accepted by the corporations, it may well raise a doubt whether these corporations have not consented to be subject to any laws which the legislature under its general powers may constitutionally enact concerning fares or tolls. But whether these special provisions can be regarded as still in force, and, if so, whether they could be repealed by the legislature without the consent of the corporation, under the power reserved to amend, alter, or repeal the charters, we have not found it necessary to determine in the present cases. It is argued by both defendants that the statute is in violation of the provision of the Constitution of the United States, article 1, § 10, that "no state shall . . . make anything but gold and silver coin a tender in payment of debts." The meaning of the statute is, we think, that the delivery of a mileage ticket shall discharge the passenger from liability to the railroad for his transportation, but that the railroad issuing the ticket shall be liable to pay to the railroad transporting him, in lawful money, the statutory price of the ticket or part of a ticket which the passenger has surrendered. The intention is that the railroad performing the service shall ultimately be paid the statutory fare in lawful money, not that the ticket of itself shall be a legal tender. If the legislature cannot constitutionally require a railroad company to transport a passenger unless the fare is paid in advance, we have no doubt that the delivery of a mileage ticket issued by another corporation is not of itself a payment of the fare. We assume, however, in favor of the commonwealth, without deciding or expressing any opinion upon it, that it is not absolutely necessary that the fare of a passenger on a railroad be paid in advance in money.

There remain to be considered the objections of both defendants that the statute establishes a uniform rate per mile and requires one railroad company to transport a passenger upon the credit of another; that the conditions affecting the transportation imposed by the road which issues the tickets must be performed by any other road to which the ticket

is presented unless the road is exempted or excluded from the provisions of the statute; and that authority is given to the railroad commissioners to exempt or exclude from the provisions of the statute any railroad if, in their judgment, the public welfare or the financial condition of the road requires or demands it. The legislature has prescribed the rate of fare per mile, but has not undertaken to prescribe in other respects the form of contract which each railroad may make for the transportation of passengers. It has not adopted a standard form of contract, as it has done, for example, with reference to fire insurance policies. Pub. Stat. chap. 119, § 139. One company may permit no baggage of any kind to be carried with the passenger on a mileage ticket, and another company may permit personal baggage or any baggage to an amount not exceeding 100 or 1,000 pounds in weight; and according to the terms of the first section of the statute one railroad must, on the presentation of a mileage ticket issued by another, perform the conditions of the contract as issued by the other. The power of the legislature of a state to prescribe the charge or the maximum charge to be made for the use of property "affected with the public interest" was first elaborately considered by the Supreme Court of the United States in what are called the "*Granger Cases*." *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102. Whatever difference of opinion there may have been among the justices of that court concerning the tests which determine whether property is affected "with a public interest, there is no doubt that the property of railroad corporations which have been invested by the legislature with the right of eminent domain, and are common carriers of persons or merchandise, is property "devoted to a public use." See *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, and *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247. The justices of the Supreme Court of the United States perhaps differ in opinion whether there can be any judicial interference with the rates for railroad transportation established by the legislature of a state on the ground that they are not reasonable, but they agree that the property of railroads is property devoted to a public use, and that the legislature may establish rates, or reasonable rates, unless there is an express provision in the charter which forbids it. See *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, and *Budd v. New York*, *supra*. In the railroad commission cases (*Stone v. Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Stone v. Illinois Cent. R. Co.* 116 U. S. 347, 29 L. ed. 650; *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 356, 29 L. ed. 652), a majority of the Supreme Court of the United States decided that a grant to a railroad company in its charter of the right to fix and regulate the tolls and charges, substantially such as are

contained in the charters of the defendants in the present cases, does not deprive a state of its power to regulate rates. The court says: "It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." The court held that a general power given to the corporation to establish rates is not such a contract as restrained the legislature from establishing what it deemed reasonable rates. See *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267. It was also said that, "under pretence of regulating fares and freights, the state cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in the law amounts to a taking of private property for public use without just compensation, or without due process of law." See *Georgia R. & Bkg. Co. v. Smith*, 123 U. S. 174, 32 L. ed. 377; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812.

In *Parker v. Metropolitan R. Co.*, 109 Mass. 506, the authority of the legislature of this commonwealth was maintained to fix the rate of toll to be paid by a street-railway company to the East Boston Ferry Company for the carriage of passengers in cars over the ferry. There was a provision in the charter of the ferry company that the company be allowed to collect and receive such tolls as the mayor and aldermen of Boston should determine, provided that "the rates of ferriage shall never be reduced so much as to reduce the yearly dividends of said company to an amount less than 8 per cent on the amount of the capital stock actually invested." The decision is put upon the ground that the statute fixing the rates is an amendment of the charter. The court says: "The power of regulating tolls upon ferries, barges, and turnpikes has been constantly exercised by the legislature. The great object of such corporations is the accommodation of public travel; and most, if not all, of the charters creating them contain provisions for the regulation of the tolls they are entitled to charge the public. The charter of the East Boston Ferry Company contains such provisions. The legislation in question is not upon a subject foreign to the provisions of the charter or the subject of the grant. It is strictly in alteration or amendment of such provisions, and it is designed to promote the chief object of the grant." It appears from the original papers in this case that the mayor and aldermen of Boston had fixed rates of toll over the ferry for foot passengers and for vehicles, but none expressly for horse cars, and that the rates fixed for foot passengers were twice or three times as much as those fixed in the statute for passengers in the horse cars. It also appeared that the established rates of toll were not sufficient to enable the company to pay "any dividends on the capital stock actually invested." The court did not, however, expressly consider whether the provision of the charter that the tolls should not be re-

duced "to an amount less than 8 per cent on the amount of capital stock actually invested" constituted a contract which could not be avoided except by a repeal of the charter. The statute there considered affected only the rates of toll for passengers in horse cars, leaving untouched all other rates. See *Roxbury v. Boston & P. R. Corp.* 6 Cush. 424; *Massachusetts General Hospital v. State Mut. L. Assur. Co.* 4 Gray, 227; *Fitchburg R. Co. v. Grand Junction R. & D. Co.* 4 Allen, 198; *Com. v. Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Worcester v. Norwich & W. R. Co.* 109 Mass. 108; *Re Northampton*, 158 Mass. 299.

It is conceded in the present cases, as we understand, that the legislature of a state, unless prevented by some contract, can constitutionally establish reasonable rates of fare for railroad companies within the state, and we regard it as settled that the legislature of a state having a constitution like that of Massachusetts can establish rates of fare for the transportation within the state of passengers and merchandise by railroad companies which are common carriers, unless the state is prevented by some contract with the railroad company; but it is not, however, yet settled what the limitations of this power are,—whether it is limited to such rates as a court may deem reasonable, or only to such rates as shall not operate to deprive the railroad companies of their property without just compensation, or without due process of law. It becomes, however, unnecessary at the present time to determine the limitations of this power, because it has not been contended in the present cases that the rates established by the statute are unreasonable. The legislature, if it sees fit, may establish rates for each railroad separately, and, as different railroads may reasonably require different rates, we see no objection to the statute on the ground that certain railroads may be exempted or excluded from its provisions. The subject is one upon which legislation need not be uniform, and the statute cannot be avoided by one railroad company because it is not applied to another. *Re Northampton, supra*. We think that the intention of the statute is that it shall apply to every railroad corporation operating a railroad for the common carriage of passengers within the commonwealth, unless the board of railroad commissioners shall determine on petition, after due hearing, that there is something exceptional in the financial condition of a particular railroad, or in the character of the service it renders to the public, which reasonably requires that railroad to be exempted or excluded from the provisions of the statute, leaving such a railroad to be specially dealt with by the legislature, if it should deem it necessary. We are not satisfied that the statute is unconstitutional on the ground that it contains a delegation of legislative power to the board of railroad commissioners.

The most formidable objections are that the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another. We have been referred to no judicial decision

where any such legislation has been considered. The law governing the taking of private property for public uses affords some analogies which we think are applicable to the present cases. The decisions of this court perhaps go as far as any in permitting an entry upon land and an occupation of it for the purpose of taking it for public uses before reasonable compensation has been actually made, and in not requiring that an adequate fund for compensation be set apart before the entry and occupation. Still there must be an adequate provision for compensation, and a provision that the land should be paid for out of the earnings of a railroad which was owned by the commonwealth was held not to be adequate, although it was probable that such earnings would be sufficient. *Connecticut River R. Co. v. Franklin County Comrs.* 127 Mass. 50, 84 Am. Rep. 888. But in the case of land, if the landowner takes proper measures to have the compensation determined, and it is not ultimately paid, a court of equity would enjoin the company taking it from the further use of the land, and the owner could retake the land, or enforce his lien upon it. "The power to take and the obligation to indemnify for the taking are inseparable." *Brickett v. Haverhill Aqueduct Co.* 142 Mass. 894; *Drury v. Midland R. Co.* 127 Mass. 571; *Oushman v. Smith*, 84 Me. 247; *Richie v. Bar Harbor Water Co.* 75 Me. 91. The statute authorizing the taking must contain some provision for obtaining adequate indemnity. It is not enough to leave the owner to his action at law for damages. "The duty of paying an adequate compensation for private property taken is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount. Payment need not precede the seizure, but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay." *Haverhill Bridge Proprs. v. Essex County Comrs.* 108 Mass. 120, 4 Am. Rep. 518; *Thacher v. Dartmouth Bridge Co.* 18 Pick. 501. If this is true when the property taken is land, much more is it true when the property taken is consumed in the use, so that, if compensation is not ultimately paid, the owner has no remedy by taking back the property. When property is taken for a public use, and is consumed in the use, the provision for adequate compensation certainly ought to be more than a mere right of action against a private person or corporation with the risk of never obtaining satisfaction; and the compensation, when it is made, must be made in money. *Com. v. Peters*, 2 Mass. 125; *State v. Beackmo*, 8 Blackf. 246; *State v. Ravine Road Sewer Comrs.* 89 N. J. L. 665; *Vanhorne v. Dorrance*, 2 U. S. 2 Dall. 804, 1 L. ed. 391; Cooley, Const. Lim. 6th ed. pp. 691, 694; Lewis, Em. Dom. § 460.

Under the statutes of this commonwealth the compensation assessed for the taking of land by a railroad ultimately assumes the form of a judgment at law which must be satisfied in money, and it is provided that a "warrant of distress or execution may issue

to compel the payment thereof with costs and interest, and all its right and authority to enter upon and use the land or property, except for making surveys, shall be suspended until such warrant or execution is satisfied." Pub. Stat. chap. 112, § 101. At common law a common carrier of passengers could demand prepayment of the fare before he could be compelled to receive and transport passengers. The fare demanded must be reasonable, and when it is established by statute this is a legislative determination of what is reasonable. A carrier can have no lien on the passenger to secure the payment of the fare, and must of necessity collect the fare in advance, or trust to the credit of the passenger or of some other person. See *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *McDuffee v. Portland & R. R. Co.* 53 N. H. 430, 18 Am. Rep. 72; *Spofford v. Boston & M. R.* 128 Mass. 826. Although, by reason of the public nature of the employment, the legislature can establish the rates of fare to be demanded by common carriers of passengers, we do not see that they can be compelled ultimately to take in payment anything which any other person could not be compelled to take in payment of a service rendered or in discharge of a debt. If a debt had been once incurred it could not be discharged except by a payment in money, or by the satisfaction of an execution by a levy upon tangible property. Although there may be little or no practical difficulty between solvent railroads if they choose to obey the statute, yet in theory each ticket or part of a ticket surrendered by a passenger for transportation represents a separate cause of action against the railroad issuing it. There is no fund provided for the redemption of the ticket, and no tangible property on which there is a lien. The statute puts no limit upon the number of mileage tickets which any railroad may issue, or upon the time within which they must be used. It does not prohibit a railroad from selling them for less than \$20 each, although it must redeem them at that price. It is possible that a railroad in need of money might resort to enormous sales of such tickets as a mode of raising money, and that these tickets might remain outstanding, to be used on other roads indefinitely, and that many of them might be presented for redemption at some remote time in the future, when the railroad company issuing them might be unable to redeem them. If it be assumed that under the power to regulate the fares of common carriers of passengers the legislature can require the passengers to be carried before the fares have been actually paid in money, the security for the ultimate payment of the fares in money ought, we think, to be as certain as that required when private property is taken for public uses, and we are of opinion that this statute does not provide adequate security. The objection that the statute authorizes one railroad to make conditions concerning the transportation of passengers which must be performed by other railroads also seems to us valid. The objection is not that the legislature has itself attempted to declare the rights of passengers who have purchased mileage tickets. The legislature, by this statute, has

not determined the conditions which shall be incident to the carriage of passengers under these tickets; nor has it left them to be determined by the railroad company transporting the passengers. One railroad is, in effect, authorized to make a contract for another, but the railroads are not in fact the agents of each other in issuing these tickets. It has been often said that the legislature cannot make a contract between two or more persons which they do not choose to make, although it may sometimes impose duties which can be enforced as if they arose from contract. Without denying the power of the legislature to determine the form of the contracts which common carriers of persons or merchandise must make concerning transportation, and without considering the authority of the legislature to delegate this power to a board of public officers, we are of opinion that this power cannot be delegated to private persons or corporations.

It is not necessary or practicable to attempt in these cases to determine just how far the legislature may go by way of regulating the business of railroad companies within the commonwealth, nor just where the limits of its power end, nor whether certain provisions of the statute, if taken alone, would be valid. The statute must be considered as a whole. The statute requires a railroad company to transport passengers, and to receive therefor tickets or coupons which merely give separate causes of action against another railroad company, and no security is provided that these tickets or coupons will be redeemed in money by the railroad company issuing them when presented for redemption, and they may be used for transportation long after they are issued. The company issuing tickets may impose upon other railroads duties and responsibilities in the carriage of passengers different from those it assumes towards passengers who purchase tickets of itself, and the tickets may be used indiscriminately upon all railroads within the commonwealth not excluded or exempted from the provisions of the statute, and are not confined to railroad companies engaged in transporting passengers in connection with the company issuing the tickets. The railroad commissioners may exercise their power of excluding a railroad company from the provisions of the statute in season to prevent loss from a failure of the company to redeem the tickets issued, or they may not. The rights of railroad companies ultimately to receive in money the fares of passengers ought not to depend upon the discretion of the railroad commissioners, and, if the statute would be invalid but for this discretion, this provision would not make it valid.

Mr. Justice Lathrop and *Mr. Justice Barker* agree that the informations are rightfully brought by the attorney-general, and that the court has jurisdiction, and are of opinion that the necessary effect of the statute is to apply and appropriate individual property to the public use, without the owner's consent, and without legal provision for a reasonable compensation therefor; and for this reason they agree that the statute is void without expressing an opinion upon the other matters

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discussed in this opinion. A majority of the court are of opinion that *the petitions should be dismissed.*

Knowlton, J., dissenting:

I concur in everything contained in the opinion of the chief justice, except the discussion of the two points on which the decision is made to turn, but I do not agree with him in that, and I do not think the statute unconstitutional. In the opinion the question whether the statute is void as impairing the obligation of contracts contained in the several charters under which the railroads were organized was somewhat considered, but not decided. In the view which I take of other parts of the case, it becomes necessary to consider this question further. I need not go over the ground traversed by the chief justice. It is obvious that the object of the Statutes of 1831, chap. 81 (Rev. Stat. chap. 44, § 23), was to prevent charters afterwards granted by the legislature from being held to be contracts; and all subsequent charters must be deemed to have been granted subject to that general law, except in cases where the legislature saw fit plainly to abrogate it. If a charter was afterwards granted which expressly professes to bind the commonwealth by a contract, doubtless the commonwealth is bound; but in interpreting subsequent charters this general law must be given effect so far as it can be without coming in direct conflict with express contracts, plainly intended as such by the legislature. If we assume that in some of the charters of railroad corporations now included in the Old Colony Railroad Company there was an express contract that the legislature should not reduce the fares and charges so as to leave an income of less than 10 per cent on the cost of the railroad, and that the general law above cited does not apply to these contracts so far as they have been executed on either side, it must still be held that the legislature could at any time amend or repeal these provisions of the charters so as to prevent future action on the faith of them, leaving them in effect only so far as rights had accrued by the execution of them. It would be very unreasonable to hold that by such a provision the legislature was bound for all time to allow rates and charges which would produce an income of 10 per cent, not only on the cost of the railroad as first built and completed under the charter, but also on every extension, enlargement, or improvement of it after it had been completed according to the original plan. By the Statutes of 1870 (chap. 325, § 1), re-enacted in the Statutes of 1874 (chap. 372, §§ 4, 174), which last sections are still in force, the legislature terminated the right of these railroad corporations to go on expending money and increasing the cost of their railroads under a contract which permitted them, without the possibility of legislative interference, to charge fares which would give them an income of 10 per cent on the cost of the road, if such a right had previously existed. As I understand the report, the Old Colony Railroad Company did not contend at the hearing that the statute under consideration would reduce its income

below 10 per cent on the cost of the road at the time its right to build a road or to increase the cost of it under the provisions of the original charters was terminated by the Statutes of 1870. Moreover, I am of opinion that the Old Colony Railroad Company, by accepting the benefit of legislation, subject to general laws which gave the legislature the right to revise its fares, rates, and charges, has lost the right, if it ever had it, to interpose the provisions of the original charters against a statute which assumes in a reasonable way to regulate or reduce its fares. In the suit against the Boston & Albany Railroad Company nothing appears in the record which opens this defense, or requires considerations of the numerous statutes under which the corporation is acting. I am therefore of opinion that the petitions should not be dismissed on the ground that the statute impairs the obligation of contracts securing to the respondent immunity from reduction of fares.

The only grounds on which the statute is held unconstitutional by the majority of the court are: First, that it seeks to compel the transportation of passengers by one railroad on the credit of another, to which the money for payment of the fare has been advanced by the purchaser of a mileage ticket; and, secondly, that a mileage ticket is to be "accepted and received for fare and passage" upon other railroads "under like conditions as upon the line or lines of the corporation issuing such ticket." The property of railroad corporations is devoted to a public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the state. If the state grants franchises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way. It may do this in the exercise of the police power, which is a power inherent in every well-ordered system of government. It is the power which is granted in terms to our legislature by article 4, chap. 1, of the Constitution of Massachusetts, which gives the general court full power and authority "from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and order thereof and the subjects of the same, and for the necessary support and defense of the government thereof," etc. Moreover, most of the charters of railroad corporations have been granted and accepted subject to a reserved right in the legislature to alter or repeal them. It is settled that this right to regulate the business of railroad corporations extends so far as to authorize the legislature to fix the rates and charges for the transportation of passengers and freight. The principle is

established by decisions, not only of this court, and of the Supreme Court of the United States, but of courts in most of the other states. *Parker v. Metropolitan R. Co.* 109 Mass. 506; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 84; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812; *Chicago, & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247; *People v. Boston & A. R. Co.* 70 N. Y. 589; *People v. Budd*, 117 N. Y. 1, 5 L. R. A. 559; *Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co.* 66 Md. 399-414, 59 Am. Rep. 167; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Hockett v. State*, 105 Ind. 250-258; *Central U. Teleph. Co. v. State*, 106 Ind. 1; *Central U. Teleph. Co. v. State*, 118 Ind. 194-207; *Baker v. State*, 54 Wis. 368-378; *Nash v. Page*, 80 Ky. 539-545, 44 Am. Rep. 490; *Mobile v. Yuille*, 8 Ala. 140, 36 Am. Dec. 441; *Stone v. Yuzoo & M. V. R. Co.* 62 Miss. 607-639, 52 Am. Rep. 198. A minority of the justices of the Supreme Court of the United States dissent from decisions of the majority extending the doctrine to the regulation of charges for the use of grain elevators (*Munn v. Illinois*, *supra*; *Budd v. New York*, 143 U. S. 517-549, 36 L. ed. 247, 257), making a distinction between what they consider a public use of property and a public interest in the use of property. But they agree with the majority that railroad corporations are subject to regulation. *Mr. Justice Field*, one of this minority, in giving the opinion of the court in *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174-179, 32 L. ed. 877-880, says: "The incorporation of the company, by which numerous parties are permitted to act as a single body for the purposes of its creation, or, as *Chief Justice Marshall* expresses it, 'by which the character and properties of individuality' are bestowed 'on a collective and changing body of men' (*Providence Bank v. Billings*, 29 U. S. 4 Pet. 514-562, 7 L. ed. 939-956), the grant to it of special privileges to carry out the object of its incorporation, particularly the authority to exercise the state's right of eminent domain, that it may appropriate needed property,—a right which can be exercised only for public purposes,—and the obligation assumed by the acceptance of its charter to transport all persons and merchandise upon like conditions and upon reasonable rates, affected the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use is continuous, the power to regulate remains, and the regulation may extend not merely to provisions for the security of passengers and freight and against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges, and favoritism by unjust discrimination. This is not a new doctrine, but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government the better to secure the purposes to which the property is

dedicated or devoted, affected with a public use." In *Budd v. New York*, *supra*, Mr. Justice Brewer, another of this minority, says: "The use is public, because the public may create it, and the individual creating it is doing thereby, *pro tanto*, the work of the state. The creation of all highways is a public duty. Railroads are highways. The state may build them. If an individual does that work, he is *pro tanto* doing the work of the state. He devotes his property to a public use. It does not lose the right to fix the price because an individual voluntarily undertakes to do the work." This is equivalent to saying—that is undoubtedly the law—that it does not lose the right to make any reasonable regulation for the benefit of the public in regard to the transaction of any or of all the railroad business in the state.

The legislature's determination of what is reasonable is also conclusive, subject only to the limitations that its enactment shall not conflict with any expressed or implied provisions of the constitution, either of the state or of the United States. I am not aware of anything in either constitution which forbids the state in regulating the public business of transporting passengers within its borders, when the business is carried on by its own creatures, whose financial ability it is supposed to know, from requiring these corporations to issue tickets which, when paid for, shall be received for transportation on a line of railroad other than that issuing it, and which shall entitle the carrying railroad to receive its pay from the railroad which issued and sold the ticket. It seems to me plain that this is not within the express provision of our state constitution which forbids the taking of private property without compensation, or for other than a public use. I think it is not a taking of property without due process of law, within the meaning of that language in the constitution of the United States, nor an interference with the right "of acquiring, possessing, and protecting property" which is secured by the declaration of rights in the constitution of Massachusetts. It is merely a regulation of public business which the legislature has a right to regulate. Its apparent object is to promote the convenience of persons having occasion to travel on different railroads, and to reduce for them the cost of transportation.

The risk of pecuniary loss to a corporation from carrying a passenger on the credit of another corporation to which the money has been advanced for carriage, instead of having payment at the time, is almost infinitesimal. In the first place, all railroad corporations are required to make annual reports to the commonwealth (Pub. Stat. chap. 112, § 81), and the legislature is presumed to know that all, or nearly all, of them are of ample financial ability, and that their obligation to pay a small debt is as good as that of any city or town in the state; secondly, if there are any now, or if hereafter there should be, any which are not financially sound, it would be the duty of the railroad commissioners, on application, to relieve all other corporations from the obligation to take their tickets. In the natural course of business there would be

frequent settlements of accounts between the different railroads, as there are now, and the most that any railroad could owe another under this statute would be the difference between the cost of the other's mileage tickets held by itself and the cost of its own tickets held by the other, which would ordinarily be but a trifling sum. It would be impossible for any railroad to harm its neighbors by issuing and selling a large number of mileage tickets in the anticipation of becoming insolvent, for, if it were possible to sell them, the railroad commissioners, at any time, on application, would exclude it from the provision of the act, and other railroads could not afterwards be required to accept its mileage tickets; and the loss, if any, would fall on the purchasers of the tickets, whose contracts would be with it alone. The risk of loss from inability of one railroad to collect of another under mileage tickets taken from passengers seems to me too small to be seriously considered, and I regard the objections to the statute in this particular as theoretical and speculative, rather than substantial or practical. It is a matter of common knowledge that every railroad does business on the credit of other railroads to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional. The question is rather whether there is a probability of losses so large as to make such a requirement plainly unjust and unreasonable as an interference with "the right of acquiring, possessing, and protecting property." I think nobody can contend that there is such a probability. Moreover, the very idea of the exercise of the police power necessarily implies a greater or less interference with the acquisition, use, and enjoyment of property. *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116. Every statute affecting property, enacted in the exercise of this power, illustrates the proposition. The reduction by the legislature of fares upon railroads is an illustration which, in my opinion, touches much more closely the acquisition, possession, and protection of property than does a requirement that railroads shall trust each other during short intervals for the payment of fares for which interchangeable tickets have been taken. In determining whether the statute is so unreasonable as to be against common right, real conditions and probable results, and not remote possibilities, are to be considered. It will hardly be contended that every statute enacted for the regulation of the railroad business of the commonwealth which contemplates the giving of a short credit by one railroad company to another in the convenient transaction of their business is, for that reason, unconstitutional. There are many general and special laws which require railroads to render services, to furnish station accommodations, and permit the use of tracks and the like to another corporation for a reasonable compensation, to be agreed upon, or, in the absence of agreement, to be fixed by the railroad commissioners. In many

cases it would be difficult, if not impracticable, to provide for these payments in advance, and some, at least, of the statutes seem to contemplate that payments will be made upon short credits, as the practice is, after the services are rendered or the benefits received. Pub. Stat. chap. 113, §§ 216-218; Stat. 1866, chap. 126; Stat. 1872, chap. 180; Stat. 1871, chap. 348. Some of these statutes require the payment of rent for the use of a station built and owned by one railroad and used by others. The rent must either be paid in advance, or there must be some credit for it; it could hardly be paid daily. A requirement that the rent should be paid in advance would be quite as objectionable on constitutional grounds as a provision for a reasonable credit. The building might be destroyed, and the company that had paid rent in advance might get no equivalent for its payment. It seems to me that a regulation which may require a short credit for trifling sums, arising in the regular course of business between great corporations, most of which have property amounting to many millions of dollars in value, is not for that reason unconstitutional.

Similar considerations apply to the objection that the tickets are to be received by the different railroads in the state under like conditions. It may be that in favor of the constitutionality of the law this language might be construed to mean something less than that the provisions of a contract in regard to the amount of baggage which may be carried, and the like, made by the railroad issuing the ticket, are to be applicable when the ticket is used on the railroad of another company; but if we assume in favor of the respondents that this is the meaning of the language, the difficulty does not seem to me to be great. In the first place, it is a familiar fact that upon railroads generally there is no such difference in their contracts as to create any practical difficulty in issuing tickets to be used over many different lines of connecting railroads. Everybody knows that one may buy, at any important railroad station in the state, a ticket to go thousands of miles over numerous railroads, whose owners will all receive the ticket under like terms and conditions. The reasonableness and constitutionality of the statute are to be determined in view of the

existing facts in the management of railroad business, and not in view of the legal possibility that some corporation would insert in its mileage ticket an unusual or absurd provision. If such an unexpected event should occur, that would be a reason for the intervention of the railroad commissioners under the statute, to relieve other corporations by excluding or exempting the railroad from the provisions of the act, and it would be in the power of the legislature at the earliest opportunity to compel it to issue mileage tickets with reasonable provisions in regard to the transportation of baggage and other similar matters. No material harm could come to any person or corporation in the mean time. In view of the way in which railroad corporations do their business, which must be presumed to have been known to the legislature, and which must be considered in passing upon the statute, this objection, like the other, seems to me speculative and theoretical, rather than real. The statute in these two particulars, which are now made the ground of objection to it, conforms to the well-known voluntary practice of railroad corporations in the transaction of similar business. These objections would seem to be removable by a provision that each corporation shall deposit with the state treasurer, or with some other responsible officer, a sufficient fund to guarantee the redemption of all mileage tickets issued by it, and by a requirement that all mileage tickets shall be in a form prescribed by the legislature; but, if the statute contained such provisions, is it probable that the people of the commonwealth or the railroad corporations would think it more reasonable, or better for practical operation, or more conducive to the best interests of the community? I am of opinion that the statute is a regulation of the business of the railroad corporations of the commonwealth, which does not involve such probable loss from carrying passengers on credit, or such practical difficulty from the terms and conditions on which tickets would be issued, as to be an interference with the rights of those who undertake to do this public business, and I therefore think the statute constitutional. I am authorized to say that *Mr. Justice Holmes* concurs in this opinion.

FLORIDA SUPREME COURT.*

STATE of Florida, *ex rel.* William B. LAMAR, Attorney-General, *Piff.*,

v.

Benjamin F. DILLON *et al.*

(.....Fla.....)

*1. The right to vote is not an inherent

*Headnotes by MABRY, J.

or absolute right generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the Federal Constitution such right is under the control of the sovereign power of the state, and where the constitution has conferred the right and prescribed the qualifications of electors, the legislature cannot change or add to them in any way; but where the constitution does not confer the right to vote or

NOTE.—The control of the legislature over municipal elections which, in one phase of it as touching the right of women to vote, is discussed in the recent case of *Coffin v. Thompson* (Mich.) 21 L. R. 22 L. R. A.

A. 662, and *note*, is in the present case very extensively discussed in its whole scope, and the elaborate opinion and briefs very fully present the law on that subject.

prescribe the qualifications of voters, it is competent for the legislature, as the representative of the law-making power of the state, to do so.

2. Section 1 of Article 6 of the Constitution of 1885, prescribing the qualifications of electors at all elections under it, does not apply to elections for municipal officers in this state, but such elections are subject to statutory regulation, and it is competent for the legislature to prescribe the qualifications of voters at the same.

3. The provision in the third section of chapter 4301 of the Laws of 1893 (being "An Act to Fix the Number and Provide for the Election of the Municipal Officers of the City of Jacksonville, a Municipal Corporation Existing in Duval County, Florida, and to Prescribe Their Terms of Office, and Regulate Their Compensation,") that those persons who, at the time of the holding of any city election, are residents of the city, and who, at the time of the general state election held next preceding, were qualified electors of any of the election districts within said city, shall constitute the qualified electors of said city authorized to vote at such city election, is not in conflict with the general provisions of the criminal law disqualifying persons convicted of certain crimes from voting at any election, and the two can and must be construed in harmony with each other.

4. The Legislature having the right to prescribe the qualifications of voters at municipal elections, may provide the means of ascertaining the persons who possess the qualifications prescribed, and although the action of a ministerial board in ascertaining the qualifications of those given the right to vote may not be given a conclusive effect on the voter's right to cast his ballot, yet an election held under a statute with a provision making the action of such a board, in this respect, conclusive, will not, on this account alone, be set aside, in the absence of any showing that voters were deprived by the action of such board of any rights conferred by the statute.

5. The provision in section 6 of Article 6 of the Constitution, that in all elections by the people the vote shall be by ballot, applies to municipal elections.

6. It is competent for the legislature to prescribe an official ballot, and prohibit the use of any other, and it may also provide for printing the names of candidates regularly nominated by a convention or mass-meeting, or who run as independents, but it cannot restrict the elector to voting for some one of the candidates whose names are printed upon the official ballot. The constitution guarantees to him the right to vote for whom he pleases.

7. The provisions in reference to voting, in the municipal act *supra*,—*Held*, to restrict the voter at municipal elections in the city of Jacksonville for municipal officers, to vote for some one of the candidates whose names are printed upon the official ballot, and to this extent the act is unconstitutional.

8. Where unconstitutional provisions in a statute can be separated from the valid portions, and the legislative purpose expressed in so much as is good can be accomplished independently of the void part, and considering the entire act, the good and the bad features are not so essentially and inseparably connected in substance, or so interdependent as that it cannot be said that the legislature would not have passed

the one without enacting the other, it is the duty of the court to give effect to so much as is good.

9. In the application of the foregoing rule it was held that the rejection of the feature of the municipal act in question restricting the voter to some one of the candidates whose names were printed on the official ballot, did not affect the valid portions of the act, and that an election authorized by it will not be set aside on an attack solely on the ground of the unconstitutionality of the act, and in the absence of affirmative showing that the result would have been different had the illegal portion not existed.

10. The provision in the 3d section of the Act, *supra*, "that prior to the holding of the first city election as provided herein, there shall be given to each person who was entitled to qualify himself as an elector at the last state election by registration and the payment of his poll taxes for the years 1890 and 1891, and failed to do so, an opportunity to qualify by registering and himself paying his own poll taxes for such years," did not deprive the voter of his right to pay his said poll taxes through an authorized agent, and a payment made through such agent would be a valid payment under the principle, *qui facit per alium facit per se*.

11. The provisions of the act relating to paying the poll taxes mentioned had reference to the poll taxes due under the General Revenue Law for the years 1890 and 1891, and if no poll taxes were due for said years as required by that law, none were required under the municipal act in question as a prerequisite to the right to vote in the city election held in July, 1893.

12. The legislature has the power under the constitution to make the payment of a capitation tax, not exceeding one dollar a year, a prerequisite for voting, and there is no constitutional limitation against the right to require the payment in any one year of delinquent capitation taxes as a prerequisite to the right to vote, provided such taxes do not amount to more than one dollar for each year.

13. The reasonableness or justice of a deliberate act of the legislature, so long as it does not contravene some portion of the organic law, is a matter for legislative consideration, and not subject to judicial control.

14. The election commissioners named in the fifth section of the act, *supra*, to prepare for, hold, and declare the result of the municipal election held in July, 1893, are not officers within the meaning of section 27 of Article 3 of the Constitution of 1885, nor are they officers in any sense, but constituted a temporary board for the performance of certain duties in reference to the holding of an election, and their appointment or designation was not necessarily or essentially executive in its nature.

(December 13, 1893.)

ON DEMURRER to an information in the nature of a quo warranto to ascertain by what right defendants claimed the office of councilmen of the City of Jacksonville. *Sustained*.

Statement by Mabry, J.:

An information in the nature of a quo warranto was filed by the attorney-general,

on behalf of the people of the state of Florida, in this court on the 17th day of October, A. D. 1893, against the defendants, Benjamin F. Dillon and twelve others, alleging in effect that they, without right or legal warrant, have usurped and still do usurp the offices of councilmen of the city of Jacksonville. It is alleged in the information that Thomas W. Roby and sixteen others named were duly appointed by the governor of the state of Florida to be councilmen for the various wards of said city, under and by virtue of the Act of the legislature approved May 16, 1889, entitled "An Act to Amend an Act Entitled an Act to Establish the Municipality of Jacksonville, Provide for Its Government and Prescribe Its Jurisdiction and Powers, Approved May 31, 1887," and that they qualified by taking the oath of office prescribed by law, were duly commissioned as such councilmen, and thereupon entered upon and performed the duties of said offices and exercised the rights, benefits, and privileges thereof, until the same were usurped by the defendants.

Thomas W. Roby and the sixteen persons named, it is alleged, constitute the city council of said city, and are still entitled to use, exercise, and enjoy the offices of councilmen of said city.

It is further related that the defendants, Dillon and the twelve others mentioned, for the space of eighty days last past, and more, without legal warrant, grant, or right whatever, have used and exercised, and still do use and exercise, the offices of councilmen of said city, and that they have claimed and still do claim to be councilmen of said city, and to have the right to use and enjoy all the liberties, privileges, and franchises belonging and appertaining to said offices of city councilmen, but that said offices, liberties, and franchises, during the whole of said time, have been and still are usurped by them, against the people of the state of Florida.

The information proceeds with the allegations that the claims of the said defendants to the offices in question are based upon the pretense that they were elected to the same at an election for municipal officers pretended to be held in and for the said city of Jacksonville on the 18th day of July, 1893, by virtue of an Act of the legislature of Florida, approved May 16, 1893, being chapter 4301, Laws of Florida. This election, and the act under which it was held, are alleged to be invalid, void, and in violation of the constitution of the state of Florida, in this, that at said election, by the terms of the act, a considerable number of the inhabitants and citizens of said city, to whom the constitution guaranteed the right of suffrage at the time of said election, were denied the right to vote and participate therein, the excluded classes under said act being enumerated under the following heads: First, all male persons residents of said city at the time of said city election possessing the constitutional qualifications of electors, but who at the time of the general state election held next preceding said city election were not qualified electors by reason only of not having attained

the age of twenty-one years; second, all male persons residents of said city at the time of said city election possessing all the qualifications of electors, but who at the time of the general state election held next preceding said city election, were not qualified electors by reason only of not having resided and had their domicile, home, and place of permanent abode in the state of Florida for one year at the time limited for registration for such election; third, all male persons residents of said city at the time of said city election possessing all the constitutional qualifications of electors, but who at the time of the general state election held next preceding the said city election, were not qualified electors by reason only of not having resided and had their habitation, domicile, home, and place of permanent abode in the county of their then residence for six months, at the time limited for registration for said election; fourth, all male persons residents of said city at the time of said election who at the time of the general state election held next preceding said city election, and at the time of said city election, possessed all the constitutional qualifications of electors, but were not electors of any of the election districts of said city at the time of said state election.

It is further alleged that the act under which said election was held is unconstitutional for the reason that by its terms only those persons were allowed to vote whose names appear on the registration lists, after the same had been revised by the persons named in the act as election commissioners, without regard to registration in fact, and that by the terms of said act persons were allowed to vote at said city election who were qualified electors at the general state election held next prior thereto, but who had afterwards lost their domicile in the state, and county of Duval, and had not regained the same in time to become an elector at the time of said city election under the provisions of the constitution; and also that at said election by the terms of said act the qualified electors of said city of Jacksonville were not permitted to vote for whom they pleased, but were restricted in the right of suffrage to vote for such person or persons whose names were placed upon an "official ballot" by the election commissioners named in the act.

The foregoing are the grounds specially alleged in the information impeaching the validity of the Act of 1893, chapter 4301, under which the election was held.

The defendants, other than Walter F. Coachman, moved to quash the writ of quo warranto, and this motion has been treated here as a demurrer to the information. Among the grounds of this motion are the following: That said information shows upon its face that the defendants have not exercised, and are not now exercising, the offices of councilmen of the city of Jacksonville, in the county of Duval, state of Florida, without legal warrant, grant, or right; that said writ shows upon its face that defendants use and exercise the office of councilmen of the city of Jacksonville under and

by virtue of an election held on the 18th day of July, A. D. 1898, under the provisions of an act of the legislature passed in accordance with the provisions of the constitution, and approved by the governor on May 16, 1898, at which said election they received a majority of all the votes cast; that the constitution of the state of Florida does not guarantee the right of suffrage to any inhabitant or citizen of the city of Jacksonville, or any other city, at a municipal election; that section 1 of article 6 of the Constitution of Florida does not fix the qualifications of voters in municipal elections, but is limited by its express terms to elections for state and county officers provided for in the constitution; and that the constitution of the state of Florida does not prohibit, either in express terms, or by necessary implication, the legislature from restricting the voters in any municipal election to voting for such person or persons as had procured their names to be placed upon an official ballot, as provided in chapter 4801 of the Laws of Florida. There are other grounds of the motion that need not be set out here, as the above present the controlling questions in the case for our decision.

Mr. H. Bisbee, for relator:

Registration is not one of the qualifications of an elector.

It is a mode of proving to the election officers the qualifications of the elector, but it is not the only mode of proving it.

Section 2, article 6, of the Constitution commands the Legislature to provide for registration of "all the legally qualified voters in each county."

It must follow that the legislature when it legislates upon the subject of registration, must provide ample facilities for registration for every qualified voter.

The act in question, to the extent that it makes registration a prerequisite for voting at the city election held in July last, and then excludes certain classes of persons from the right to register, and from the right to vote at such election, is unconstitutional.

(a) Because the act discriminates, without any reason, in that it allows the exercise of the elective franchise to certain classes of citizens and takes it away from other classes.

Capen v. Foster, 12 Pick. 488, 28 Am. Dec. 632; *Daggett v. Hudson*, 48 Ohio St. 548, 54 Am. Rep. 882; *Monroe v. Collins*, 17 Ohio St. 686; *State v. Jefferson County Comrs.* 17 Fla. 719; *Cooley, Const. Lim.* 6th ed. p. 758; *Yick Wo v. Hopkins*, 118 U. S. 370, 371, 80 L. ed. 226; *State v. Butts*, 81 Kan. 554; *Dells v. Kennedy*, 49 Wis. 558, 85 Am. Rep. 786; *Madison County Ct. v. People*, 58 Ill. 456; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105; *People v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465; *Gooding v. Brown*, 22 Fla. 487.

All persons who had become of age subsequent to the close of the registration in 1892, and who had acquired the necessary residence subsequent to that time, and who possessed every other legal and constitutional qualification as an elector, were expressly excluded from the right to register and vote.

Kilham v. Ward, 2 Mass. 286; *Bridge v. Lincoln*, 14 Mass. 367; *Humphrey v. Kingman*, 5 22 L. R. A.

Met. 162; *McCrary. Elections*, § 8; *State v. Williams*, 5 Wis. 308; *Rison v. Furr*, 24 Ark. 167, 87 Am. Dec. 53; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754.

A statute which increased the period of residence above the constitutional period, as a qualification for a voter at a municipal election, is unconstitutional and void.

People v. Canaday, supra; *Perry v. Whitaker*, 71 N. C. 475; *Zeiler v. Chapman*, 54 Mo. 502; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 39 Mo. 485; *State v. Lean*, 9 Wis. 279; *Cooley, Const. Lim.* 6th ed. p. 753; 6 Am. & Eng. Encyclop. Law, pp. 263, 283; *Atty-Gen. v. Detroit*, 7 L. R. A. 99, 78 Mich. 545; *State v. Findlay*, 20 Nev. 198; *Rison v. Furr, supra*.

The constitutionality of a statute depends upon its operation and effect and not upon the form it may be made to assume.

State v. Hipp, 38 Ohio St. 199.

It is one of the peculiar characteristics of our free institutions, that every citizen is permitted to enjoy certain rights and privileges which place him upon an equality with his neighbors. Any law which takes away or abridges these rights or suspends their exercise, is not only an infringement upon this enjoyment, but an actual punishment.

Green v. Shumway, 39 N. Y. 421.

(b) It is unconstitutional because it charges and adds to the qualifications of an elector prescribed by the constitution.

The fundamental and all-pervading idea of election is that the question to be voted upon shall be submitted to the body of electors without discrimination.

Madison County Ct. v. People, 58 Ill. 456.

When the legislature confers upon a city the right of self government and of electing its officers, it must conform to other provisions of the constitution and preserve the rule of equality before the law, and not discriminate in the exercise of the elective franchise or any other constitutional right.

State v. Constantine, 42 Ohio St. 487, 51 Am. Rep. 888; *Atty-Gen. v. Detroit*, 58 Mich. 216, 55 Am. Rep. 675.

The intention of the framers of the constitution was to prescribe the qualifications for all voters in the state, and that these qualifications should apply to all elections, as well as to the election of officers created by the constitution as to the election of officers, state, county, and municipal, created by an act of the legislature.

The election of a municipal officer created by the legislature is as much an election under the constitution as the election of any officer for a county created by a statute or an officer created by the constitution.

State v. Constantine, supra; *People v. English*, 15 L. R. A. 181, 189 Ill. 622.

Constitutional qualifications for electors apply to city and town elections and elections other than for state and county officers.

State v. Constantine and People v. Canaday, supra; *State v. Williams*, 5 Wis. 308; *State v. Lean*, 9 Wis. 282; *St. Joseph & D. C. R. Co. v. Buchanan County Ct. and Atty-Gen. v. Detroit*, 7 L. R. A. 99, 78 Mich. 545; *State v. Tuttle*, 58 Wis. 45; *Quinn v. State, supra*; *Re Charter of Newport*, 14 R. I. 655; *Gooding v. Brown and Atty-Gen. v. Detroit*, 58 Mich. 216, 55 Am. Rep. 675; *Com. v. McClelland*, 88 Ky. 686.

The provision in section 3, where it requires registration and payment of poll tax in person for the years 1890 and 1891, and that this should be done more than two weeks before the said first city election, is also unconstitutional and void.

McCrary, Elections, § 28.

The requirement of registration for more than two weeks before the election was calculated to subvert, injuriously, unreasonably, and unnecessarily restrain, impair, and impede the right to vote.

Daggett v. Hudson, 48 Ohio St. 548, 54 Am. Rep. 832; *Dells v. Kennedy*, 49 Wis. 555, 85 Am. Rep. 786; *White v. Multnomah County Comrs.* 18 Or. 817, 54 Am. Rep. 843, note; *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105.

It was unreasonable to require the payment of any poll tax two weeks before the election.

It was unreasonable to require the voter to pay poll taxes for the years 1890 and 1891.

The act is unconstitutional because it imposes the payment of two capitation taxes as a prerequisite for voting.

The law prohibits the receiving of a vote from any person whose name does not appear on the list of electors, for the ward in which he offers to vote.

The Legislature cannot legally pass such a law. There should have been a provision in the statute by which a voter could prove his qualifications and that he has been registered and his name improperly omitted.

State v. Adams, 2 Stew. (Ala.) 288; *State v. Jefferson County Comrs.* 17 Fla. 715; *Dells v. Kennedy*, 49 Wis. 555, 85 Am. Rep. 786; *White v. Multnomah County Comrs.* supra; *State v. Staten*, 6 Coldw. 284.

That feature of the statute which compels an elector to vote for some candidate placed before the people in the manner prescribed by the statute; or in case of such candidate's death or resignation, for such candidate as a committee may substitute, cannot be upheld.

State v. Anderson, 26 Fla. 259; *Cooley*, Const. Lim. 6th ed. p. 762, note 2, p. 771; *State v. Black*, 16 L. R. A. 769, 54 N. J. L. 456; *DeWalt v. Bartley*, 15 L. R. A. 771, 146 Pa. 543; *Bowers v. Smith*, 16 L. R. A. 754, 111 Mo. 52; *Detroit v. Rush*, 10 L. R. A. 171, 82 Mich. 532.

The law permits the right to vote on the part of persons who are not qualified voters under the constitution of the state.

Residence in the city at the time of the last state election and not residence at the time of the said city election, qualifies one to vote in respect to residence. Description of those entitled excludes all others.

Washington v. State, 75 Ala. 582, 51 Am. Rep. 479; *McCafferty v. Guyer*, 59 Pa. 109; *Brightly*, Election Cases, 47.

Authorizing persons to vote by this form of legislation, who do not possess the constitutional qualifications of electors is repugnant to sections 4 and 5 of article 6 of the Constitution.

Cooley, Const. Lim. 6th ed. p. 218.

Any law prohibiting a portion of qualified electors from voting at a given election, as well as the conduct of the constituted authorities conducting the election, that deprives a por-

tion of the voters of the power to vote, makes the election void.

Fort Dodge City School Dist. v. Wauhkanse Dist. Twp. 17 Iowa, 85; *Barry v. Lauck*, 5 Coldw. 588; *State v. Williams*, 5 Wis. 308; *Cooley*, Const. Lim. p. 75; *People v. Salomon*, 46 Ill. 415; *Madison County Ct. v. People*, 58 Ill. 456; *Zeiler v. Chapman*, 54 Mo. 502; *Perry v. Whitaker*, 71 N. C. 475; *People v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465; *State v. Constantine*, 42 Ohio St. 437, 51 Am. Rep. 888; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 39 Mo. 489; *Atty-Gen. v. Detroit*, 7 L. R. A. 99, 78 Mich. 545; *Cooley*, Const. Lim. 6th ed. p. 775.

In 1892 there was no law authorizing any citizen to vote for municipal officers in the city of Jacksonville, and consequently no law requiring him to pay poll taxes as a prerequisite for voting at any such city election. Therefore the Act of 1893 imposing a penalty upon a citizen of Jacksonville because he did not register in 1892 is unequal, obnoxious, and unconstitutional.

Lyman v. Martin, 2 Utah, 186.

The act appointing election commissioners is void. It is an executive act.

Evansville v. State, 4 L. R. A. 93, 118 Ind. 427; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449.

Mr. F. P. Fleming, also for relator:

The information being filed by the attorney general, it is only necessary to aver that the defendants hold office without authority of the law.

Enterprise v. State, 29 Fla. 128; *State v. Philips*, 30 Fla. 579.

Whether quo warranto is brought by one claiming the office or not the burden is on the respondent to show that he holds office rightfully.

State v. Gleason, 12 Fla. 190; *State v. Day*, 14 Fla. 9; *State v. Sazon*, 25 Fla. 342; *State v. Anderson*, 26 Fla. 241.

The right of claimants to the office is sufficiently alleged in the information.

State v. Peelle, 121 Ind. 495; *State v. McDiarmid*, 27 Ark. 176; *State v. Sherman*, 43 Mo. 210; *State v. Philips*, supra.

The legislature cannot add to the constitutional qualifications of electors.

Cooley, Const. Lim. 5th ed. 78, note 3, p. 753; *Throop*, Pub. Off. 125.

The foregoing rule restricts the legislature in the matter of providing for municipal elections.

People v. Canaday, 73 N. C. 198, 21 Am. Rep. 465; *Atty-Gen. v. Detroit*, 7 L. R. A. 99, 78 Mich. 546; *Com. v. McClelland*, 83 Ky. 586; *State v. Tuttle*, 53 Wis. 45; *Re Charter of Newport*, 14 R. I. 655; *Quinn v. State*, 35 Ind. 485, 9 Am. Rep. 754; *Coffin v. Thompson* (Mich.) 21 L. R. A. 662; *State v. Williams*, 5 Wis. 308; *St. Joseph & D. C. R. Co. v. Buchanan County Ct.* 39 Mo. 485; *People v. English*, 15 L. R. A. 131, 189 Ill. 680; *State v. Anderson*, supra.

Mr. William B. Lamar, *Atty-Gen.*, also for relator.

Messrs. Young & Barra, for defendant:

There is no natural right to vote.

United States v. Cruikshank, 92 U. S. 543, 23 L. ed. 598; *Frissleben v. Shallockross* (Del. Err. & App.) 8 L. R. A. 337.

The constitution of a state is a limitation upon and not a grant of power to, the legislature, and the question as to who shall have the right of suffrage and the time, place, and manner of exercising it when not expressly prohibited by the terms of the constitution, are within the power of the legislature.

State v. Black, 16 L. R. A. 769, 54 N. J. L. 456; *Morrison v. Springer*, 15 Iowa, 804; *Ex parte Wells*, 21 Fla. 318.

It is thus the duty of the legislature to regulate the exercise of the elective franchise, and the constitutionality of such legislation cannot be denied so long as it merely regulates and does not deny the franchise itself.

De Walt v. Bartley, 15 L. R. A. 771, 146 Pa. 529; *Detroit v. Rush*, 10 L. R. A. 171, 82 Mich. 532.

The legislature must determine for each municipality the power it should exercise and the capacities it should possess, and what restriction should be placed upon it. Limitations upon the power of the state over municipal corporations do not exist unless found in the constitution of the state.

Dillon, Mun. Corp. § 66; *Ex parte Wells*, *supra*.

Messrs. A. W. Cockrell & Son, also for defendant:

To justify the courts in pronouncing a statute void, it must be violative of some constitutional provision, state or federal, or must be an attempted exercise of power not legislative in character or of power committed to some other department of the government.

Darman v. State, 34 Ala. 216; *Winter v. Montgomery*, 65 Ala. 408.

It is only at elections which the constitution itself requires to be held, or which the legislature under the mandate of the constitution makes provision for, that persons having the qualifications set forth in said section 1 of article 6 are by the constitution declared to be qualified electors and guaranteed the right of suffrage.

The constitution is silent upon the subject of the election of municipal officers.

Nowhere in our constitution are the governments of municipalities or their officials either created or established as any part of our state government, but their very creation, together with all provisions for their government, are reserved to the legislative branch of the state government as erected by the constitution.

Atty-Gen. v. Connors, 27 Fla. 334.

No fact was more prominent in the history of the time during which the question of calling the convention that framed this Constitution (1885) was agitated than the inconvenience which the people of many municipalities had suffered from the restraint placed by the Constitution of 1868, of which it is a revision, upon special legislation as to cities and towns, and the action of the convention in excepting them from the requirements of the proviso discussed, was a natural response to the sentiment which had prevailed in favor of an untrammelled power of legislation as to municipalities.

State v. Dural County Comrs. 23 Fla. 492.

Whenever the legislature provided for the election of municipal officers under the authority imposed by the Constitution of 1868, such election became an election "under this Con- 23 L. R. A.

stitution," and the right to vote at such elections was by section 1 of article 14 conferred upon and guaranteed to certain persons having the qualifications therein mentioned and a reasonable opportunity for registration.

Gooding v. Brown, 22 Fla. 437.

The legislature is absolutely untrammelled by the constitution in regard to its creation, or modes of selecting or electing municipal officers; the persons who are to vote for such officers, if the legislature prescribes voting as the means of selection, are to be designated by the legislature without reference to the qualifications the constitution prescribes for voters, as to state and county officers.

State v. Burbridge, 24 Fla. 186.

The legislature may, as the law-making power, when not restrained by the constitution, provide for the exercise of the power of appointing or electing to office by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose.

People v. Freeman, 80 Cal. 233; *Fox v. McDonald* (Ala.) 21 L. R. A. 529; *State v. Covington*, 29 Ohio St. 102.

The right of suffrage is not an absolute right. No such right exists unless specifically conferred by a constitution or a statute.

State v. Black, 16 L. R. A. 769, 54 N. J. L. 456.

Mabry, J., delivered the opinion of the court:

I. It is apparent from the foregoing statement that the invalidity of the municipal election held in the city of Jacksonville on the 18th day of July, 1893, is dependent upon the constitutionality of the act of the legislature under which it was held. Where usurpation of a public office, or franchise, is alleged by the state, and an information in the nature of a quo warranto is filed by the attorney-general to test the right to hold such office, or enjoy such franchise, it is only necessary ordinarily to allege, generally, that the person holding the office, or enjoying the franchise, does so without lawful authority, and in such case, as against the state, it devolves upon such person to show a complete legal right to hold the office or enjoy the privilege in question; but if the information states the facts upon which the charge of usurpation is based and the facts alleged show a clear right in the defendant, it will be held insufficient on demurrer. *Enterprise v. State*, 29 Fla. 128, and authorities cited. The information filed in the case now before us charges usurpation of certain municipal offices, but it is also shown that the defendants hold the offices by virtue of the election held on the 18th day of July, 1893, and their claim to the same is challenged on the ground that the legislative act under which said election was held is unconstitutional and void. No other grounds for annulling this election are alleged, and hence the constitutionality of the act is the question presented for our determination.

It is contended that the act in question, by its terms, discriminates against certain classes of persons residing in the city of Jacksonville and possessing the constitu-

tional qualifications of electors; and that they are thereby excluded from the right to vote in the city elections, in violation of a constitutional right to do so. The 3d section of the Act under consideration reads as follows: "Those persons who at the time of the holding of any city election, are residents of the city, and who, at the time of the general state election held next preceding, were qualified electors of any of the election districts within said city, shall constitute the qualified electors of said city, authorized to vote at such city election. Each such elector shall vote only in the election district wherein he was at the time of such state election a qualified voter; provided, however, that prior to the holding of the first city election as provided herein, there shall be given to each person who was entitled to qualify himself as an elector at the last state election by registration and the payment of his poll taxes for the years 1890 and 1891, and failed to do so, an opportunity to qualify by registering and himself paying his own poll taxes for such years, more than two weeks before said first city election." Provisions are then made for the tax collector of Duval county to open his books and receive the poll taxes, and for the election commissioners, named in the Act, to arrange for the registration of those persons who were entitled to qualify themselves to vote at the last general state election by registration and the payment of their poll taxes for the years 1890 and 1891, but failed to do so. More specific reference to these provisions need not be made in this connection.

According to the plain terms of this Act, only those persons were authorized to vote in the municipal election of July 18, 1893, who were residents of the city, and who, at the time of the general state election held next preceding said municipal election, were qualified electors of some one of the election districts within the city; or who were entitled to qualify themselves as electors at said state election by registration and the payment of their poll taxes due for the years 1890 and 1891, but failed to do so. The Act fixes July 18, 1893, as the date for holding the first municipal election, and we take judicial knowledge of the fact that the general state election held next preceding this election was on the Tuesday succeeding the first Monday in October, A. D. 1892. The legislature, then, by the terms of the Act in question, confined the municipal election to persons residing in the city and who possessed the constitutional qualifications of electors more than eleven months prior to the date of said city election. No provision is made whereby those who had acquired the requisite age, citizenship, and residence as prescribed for voting in the general state and county elections, since the last general state election, could vote in the municipal election. This, it is contended, independent of the provisions in reference to other matters, renders the Act void. This contention is based upon the theory that section 1 of article 6 of the Constitution of 1885 applies to municipal elections as well as to all other elections in this state, and is a limitation upon

the powers of the legislature. Section 1 of article 6 of the Constitution provides that "every male person of the age of twenty-one years and upwards, that shall, at the time of registration, be a citizen of the United States, or that shall have declared his intention to become such, in conformity to the laws of the United States, and that shall have resided and had his habitation, domicile, home, and place of permanent abode in Florida for one year, and in the county for six months, shall in such county be deemed a qualified elector at all elections under this constitution." Here, it is claimed, is the fountain source of the right to exercise the elective franchise in all elections by the people, municipal as well as state and county, and that it is not within the power of the legislature to curtail or in any way abridge this right. Registration of the qualified electors may be provided for by the legislature, of course, but counsel for the state insist that registration is not one of the qualifications of an elector and that the legislature under the power to provide for registration of qualified electors must enact laws that are "reasonable, uniform, and impartial, and must be calculated to facilitate and secure, rather than subvert or impede, the exercise of the right to vote." The language quoted was employed by Chief Justice Shaw, in the noted case of *Copen v. Foster*, 12 Pick. 488, 28 Am. Dec. 632, in discussing the right of the legislature to regulate by registration the exercise of the elective franchise secured by constitutional provision. The authorities are uniform and abundant in support of the position that where the constitution has prescribed the qualifications of electors it is not in the power of the legislature to take from or add to such qualifications, or to injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right of suffrage thus guaranteed by the constitution. And this constitutional guarantee against unreasonable and unnecessary restraint by legislative enactment extends to all elections provided for by the constitution, whether state, county, or municipal. In *People v. Canaday*, 78 N. C. 198, 21 Am. Rep. 465, it was decided that cities and towns, like counties and townships, were parts and parcels of the state, organized for the convenience of local self government, and that under the constitution of North Carolina the qualifications of voters in municipal elections, were the same as in state and county elections, and that it was not competent for the general assembly in any way to change the qualifications of voters as fixed by the constitution. The constitution of Massachusetts provided as to residence and citizenship that "every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote six calendar months next preceding any election of governor, lieutenant-governor, senators, or representatives, and who shall have paid" certain taxes mentioned or be exempt therefrom and possessing all other required qualifications,

shall have the right to vote in such elections. It was held that an act of the legislature providing that no person thereafter naturalized in any court shall be entitled to be registered as a voter within thirty days of such naturalization, was void and in conflict with the constitutional provision mentioned. By naturalization the person became a citizen and it was not competent for the legislature to add to or diminish the qualifications of a voter which had been prescribed by the constitution. *Kinneen v. Wells*, 144 Mass. 497, 59 Am. Rep. 105. It was decided in Ohio (*Daggett v. Hudson*, 43 Ohio St. 548, 54 Am. Rep. 832), that an act requiring registration in all cases as a condition to the right of suffrage, and allowing the voters only seven specified days within the year in which to register, and which contained no provision for registration after the seven days (though five days thereafter intervened before election day) and no regulation whereby those constitutionally qualified may, upon proof of qualification, and a reasonable excuse for not registering in time, be allowed to vote, and where no means were provided whereby persons necessarily absent at the time fixed for registration may have their names registered, was unreasonable and had a direct tendency to impair the right of suffrage, and as it might disfranchise a large class of persons without fault on their part, it was unconstitutional and void. The following are among many decisions sustaining the same view: *State v. Corner*, 22 Neb. 265; *Della v. Kennedy*, 49 Wis. 555, 35 Am. Rep. 786; *State v. Baker*, 38 Wis. 71; *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Monroe v. Collins*, 17 Ohio St. 665; *State v. Butts*, 31 Kan. 537; *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *Cooley*, Const. Lim. p. 758.

If section 1 of article 6 of the present Constitution, the one prescribing the qualifications of voters and declaring who shall "be deemed a qualified elector at all elections under this constitution," applies to municipal elections in this state, there cannot be a doubt as to the fate of the act of the legislature now under consideration. That it does exclude, by its terms, from voting at municipal elections in the city of Jacksonville, persons who may have the qualifications of electors for state and county elections, as prescribed by the section of the constitution referred to, is beyond question. It plainly excluded all of those residents of said city who may have acquired the qualifications of voters under the constitution for state and county elections during a period of over eleven months prior to the first city election, and for longer periods at subsequent elections as they are required to be held biennially after the election in 1893, on the fourth Tuesday in May, and occurring during years in which no general state election will be held. It is then made necessary and unavoidable that we determine whether or not section 1 of article 6 of the present Constitution has prescribed the qualifications of voters at elections in municipalities created by the legislature. This question has not been determined by any decision of this court, and no language used in prior decisions made here

in reference to municipal corporations had any reference to the precise question now presented. In *Atty-Gen. v. Connors*, 27 Fla. 329, that part of section 15 of article 16 of the Constitution providing that "no person shall hold or perform the functions of more than one office under the government of this state at the same time," was under consideration, and it was held that a municipal government created by the legislature formed no part of the framework of the state government as constructed by the constitution. That the structure of the state government in all of its departments was provided for by the constitution, and the organization of municipal governments was expressly delegated to the legislature, but what was said in that case had no reference to the qualifications of electors authorized to vote in municipal governments to be created by the legislature.

The case of *State v. Duval County Comrs.*, 23 Fla. 483, was a proceeding by mandamus to compel defendants to perform certain duties preparatory to holding an election in the city of Jacksonville under the provisions of acts passed by the legislature in 1887. The defenses interposed were that said acts were special and local, and no notice was given of the intention to apply for their enactment as provided in section 21 of article 3 of the Constitution; that the lieutenant-governor elected under the old Constitution of 1868 presided over the senate and signed said acts; that the title to the same was insufficient under the constitution; and that in consequence of the omission of certain provisions in sections of the original act in an amendatory act defendants were under no duty to perform them. The conclusion reached upon a consideration of the various provisions of the constitution, having any bearing on the subject, was that the proviso in section 21 of article 3 of the Constitution in reference to notice for special legislation had no application to legislation in reference to municipalities. The views expressed in the opinion on this subject are correct, but they had reference to the constitutional requirements as to notice for special legislation, and the case is not an authority on the question of prescribing the qualifications of voters at municipal elections. None of the cases in this court discussing the law bearing upon municipal governments under the present Constitution had reference to the question now presented.

Before examining the provisions of our constitution that are necessary to be considered in disposing of the question, it will be well to fix in mind the legal status of the right of suffrage as exercised under our forms of government. The right to vote is not an inherent or absolute right found among those generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the Federal Constitution the elective franchise is under the control of the sovereign power of the states expressed in constitutions or statutes properly enacted. Where a constitution has conferred the right and prescribed the qualifications of electors it, of course, is paramount until amended

and the legislature cannot change or add to them in any way, but where the constitution does not fix the right of suffrage or prescribe the qualifications of voters it is competent for the legislature as the representative of the law-making power of the state to do so. These principles are well recognized and fully established by authority in this country. In *Kinneen v. Wells*, *supra*, it is said "the qualifications of voters are fixed by state legislation. The requisitions as to ownership of property, citizenship, sex, and residence, in connection with the right of voting, vary with the constitution or laws of the several states. However unwise, unjust, or even tyrannical its regulations may be or seem to be in this regard, the right of each state to define the qualifications of its voters is complete and perfect, except so far as it is controlled by the 15th article of the Amendments of the Constitution of the United States, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.'" On this subject *Judge Cooley* says, in *Constitutional Limitations*, p. 752: "In another place we have said that, though the sovereignty is in the people, as a practical fact it resides in those persons who by the constitution of the state are permitted to exercise the elective franchise. The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national constitution to the several states, except as it is provided by that instrument that the electors for representatives in congress shall have the qualifications requisite for electors of the most numerous branch of the state legislature, and as the Fifteenth Amendment forbids denying to citizens the right to vote on account of race, color, or previous condition of servitude. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy; the prevailing view being that it should be as general as possible consistent with the public safety." *State v. Black*, 54 N. J. L. 446, 16 L. R. A. 769; *Huber v. Reily*, 53 Pa. 112; *Anderson v. Baker*, 23 Md. 531.

Guided by the principles announced, we must determine whether or not our constitution has, in the section prescribing the right of suffrage at all elections under it fixed the qualifications of voters in municipal elections, or left it with the legislature. Reference to various provisions of the constitution will become necessary, and in considering them we are to be mindful of the fact that the present constitution is a revision of the former one of 1868, and not the establishment of an entirely new and independent instrument. This court has several times recognized this fact in construing clauses in the present constitution. The 11th section of the Bill of Rights in the Constitution of 1868 provided that "all laws of a general nature shall have a uniform operation." This is omitted in the present instrument. The 17th section of the legislative article in the old constitution provided that "the leg-

islature shall not pass special or local laws in any of the following enumerated cases, that is to say, regulating the jurisdiction and duties of any class of officers, or for the punishment of crime or misdemeanors; regulating the practices of courts of justice; providing for changing venue of civil and criminal cases; granting divorces; changing the names of persons; vacating roads, town plats, streets, alleys, and public squares; summoning and impanneling grand and petit juries, and providing for their compensation; regulating county, township, and municipal business; regulating the election of county, township, and municipal officers; for the assessment and collection of taxes, for state, county, and municipal purposes; providing for opening and conducting elections for state, county, and municipal officers, and designating the places of voting; providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities; regulating the fees of officers." By comparing section 20 of article 8 of the present Constitution, which corresponds with the 17th section of the legislative article in the old, it will be seen that everything relating to municipal organizations has been entirely eliminated, and no reference is there made to them except after the provisions regulating the jurisdiction and duties of any class of officers, and regulating the practice of courts of justice the words "except municipal officers," and "except municipal courts," are added. The old constitution provided that "the legislature shall establish a uniform system of county, township, and municipal government." The corresponding provision in the new is that "the legislature shall establish a uniform system of county and municipal government which shall be applicable, except in cases where local or special laws are provided by the legislature that may be inconsistent therewith." Sec. 24, art. 3. The old instrument enacted that the legislature shall provide by general law for incorporating such municipal, educational, agricultural, mechanical, mining, and other useful companies or associations as may be deemed necessary. The same provision is incorporated in the revised constitution with the word "municipal" left out. Sec. 25, art. 3. The following provision was in the former constitution, viz.: "The legislature may establish courts for municipal purposes only, in incorporated towns and cities. All laws for the organization or government of municipal courts shall be general in their provisions, and be equally applicable to the municipal courts of all incorporated towns and cities." The corresponding section in the present instrument is that "the legislature may establish in incorporated towns and cities, courts for the punishment of offenses against municipal ordinances." Sec. 84, art. 5. The changes made in the revised constitution as shown by the provisions here referred to, it may correctly be said, cannot be construed to go any farther than to release legislative regulations of municipal corporations from the limitations in the old constitution in reference to the enactment of general laws on this subject, and to authorize

the legislature now to pass special laws relating to such matters when deemed necessary to do so. Conceding that such was the main purpose of the revisers in making the changes referred to, it is apparent that they eliminated by the changes mentioned all provisions in the old constitution referring to and recognizing municipal officers as a part of the machinery of government established by that instrument. The old constitution expressly referred to municipal officers as being embraced within the elective or appointive system under it. This is shown by clauses in the 17th section above quoted, such as "regulating the election of county, township, and municipal officers," providing for "opening and conducting elections for state, county, and municipal officers." The entire elimination of such clauses from the provisions referred to leaves no room for any contention so far as the provisions in lieu of them extend, that municipal elections are included in those embraced within the constitution.

The 27th section of article 4 of the old Constitution reads as follows: "The legislature shall provide for the election by the people, or appointment by the governor, of all state, county, or municipal officers not otherwise provided for by this constitution, and fix by law their duties and compensation." Provision was also made that all elections by the people shall be by ballot. The suffrage section in the old instrument, after prescribing age, citizenship, and residence at the time of offering to vote as qualifications of an elector, declared that any person mentioned possessing the qualifications prescribed "shall in such county be deemed a qualified elector at all elections under this constitution." Municipal officers, as is apparent, were recognized under the old instrument, but they were not therein designated, nor was the manner of their selection provided for. The legislature then was compelled by the terms of the constitution to resort to one of two methods in filling municipal offices. It had to be done either by election by the people or appointment by the governor, and if an election by the people was provided for, it had to be by the qualified electors as prescribed in the suffrage clause of that constitution. It was held by this court before the revision of the constitution that in the creation of municipal governments by general law of uniform operation the legislature might under the 27th section of article 4, provide for the filling of the offices either by appointment by the governor, or election by the people. *Ex parte Wells*, 21 Fla. 280. In revising the old constitution very little material change was made in the suffrage clause. An alteration appears in providing that the person should be twenty-one years old at the time of registration, instead of at the time of offering to vote, but the portion declaring at what elections the voter shall be deemed a qualified elector, is the same. A very material change, however, is made in the 27th section of article 4 of the old Constitution. Municipal officers are entirely eliminated, and the corresponding section in the new is that "the legislature shall provide for the election by the people or appointment by the governor of all state

and county offices not otherwise provided by this constitution, and fix by law their duties and compensation." Sec. 27, art. 3. Certain state and county offices were created and designated by the constitution, but municipal offices were left to legislative control. In addition to the state and county offices designated it was within the contemplation of the framers of the constitution that other state or county offices than those designated might become necessary and have to be created, and hence provision was made that the legislature should provide for election by the people or appointment by the governor of all state and county officers not otherwise provided by the constitution. This was the completion of the method provided by the constitution for filling all state and county offices created, or that should be created under the constitution, and where the elective system for these offices applies or is made applicable, the persons possessing the qualifications under the suffrage clause in section 1 of article 6 are the electors. They are made qualified electors at all elections under this constitution. But it was certain that municipal offices were to be created by the legislature and they were not designated or otherwise provided for in the constitution, but express authority was granted to the legislature, in section 8 of article 8, to establish and abolish municipalities, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. The limitation being added that "when any municipality shall be abolished, provision shall be made for the protection of its creditors." If the provision in reference to filling offices, in section 27 of article 3, had been made applicable to municipal offices, no doubt could exist about the suffrage clause in section 1 of article 6 applying to election to fill such offices, but the revisers designedly, we must conclude, released municipal elections from the operation of section 27 of article 3, and thereby qualified the application of the suffrage clause so far as municipal elections are concerned. They are not elections under the constitution, within the meaning of the suffrage section of article 6, but have been expressly exempted therefrom. Municipal offices are undoubtedly statutory offices, and in the absence of constitutional restrictions are under the control of the legislature. Under the constitution of Illinois it was made the duty of the general assembly to provide for a thorough and efficient system of free schools, where all the children of the state could receive a good common school education. The mode of organizing and administering the system was left to the general assembly without any constitutional regulations further than the mandate to provide for the system. The only school officers provided for by the constitution of that state were a county superintendent in each county, and a state superintendent of public instruction. As to the county superintendent the constitution provided that his "qualifications, powers, duties, compensation, and the time and manner of election, and term of office shall be prescribed by law." The general assembly of that state enacted that "any woman of the age of twenty-

one year and upwards, belonging to either of the classes mentioned in article 7 of the Constitution of the state of Illinois, who shall have resided in this state one year, in the county ninety days, and in the election district thirty days preceding any election held for the purpose of choosing any officer of schools under the general or special school laws of this state, shall be entitled to vote at such election in the school district of which she shall at the time have been for thirty days a resident; provided, any woman so desirous of voting at any such election shall have been registered in the same manner as is provided for the registration of male voters." In *People v. English*, 139 Ill. 632, 15 L. R. A. 181, the question arose as to the right of women to vote for county superintendent of schools, and it was held that, as he was a constitutional officer, the qualifications of electors as prescribed by the constitution applied to all persons authorized to vote for him, and as the qualified electors under the constitution were confined to male persons possessing certain qualifications, women were not authorized to participate in such an election. In the later case of *Plummer v. Post*, 144 Ill. 68, 19 L. R. A. 110, it was held under the same act that women could vote for all other school officers not provided for by the constitution. The two cases are not at all in conflict, and the distinction between them is clearly pointed out. While no person was authorized to vote for the election of any officer mentioned in the constitution unless he possessed the qualifications of an elector prescribed by that instrument, yet this was not true of officers over whom the legislature had complete power and control. It was said: "It cannot be doubted that, in providing for a system of free schools, a form of organization essentially different from the present one might have been adopted. Entirely different officers might have been provided for, and provision might have been made for the designation of those officers by appointment rather than by an election. Accordingly, it is provided by section 17 of article 6 of the General School Law, that in cities having a population exceeding 100,000 the members of the school board of education shall be appointed by the mayor, by and with the advice and consent of the common council, and, unquestionably, a similar mode of appointment of school officers, other than the two above mentioned (provided for in the constitution) might have been constitutionally adopted. The general assembly having complete control of the subject, had, of course, the power to provide for the choice of these officers by popular vote, but such an election is not necessarily a proceeding identical with the elections provided for by the constitution, nor is it necessary that the qualifications of those voting for school officers should be the same as those of electors, as defined by the constitution." To the same effect is the decision in *Wheeler v. Brady*, 15 Kan. 26. It is said in this case: "There is no school district election or meeting provided for in the constitution, there is no provision as to how school district officers shall be elected, appointed, or chosen, and we sup-

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pose that no one will claim that they are, by the terms of the constitution, to be elected at either of the elections provided for in the constitution; hence it would seem that the legislature would have complete power over the matter; that the legislature might provide for the election or appointment of school district officers as it should choose, when it should choose, in the manner it should choose, and by whom it should choose." The cases of *State v. Cones*, 15 Neb. 444, and *Belles v. Burr*, 76 Mich. 1, were decided on the same principle. The late case of *Coffin v. Thompson*, 21 L. R. A. 662, does not conflict with the decisions above cited. The act of the legislature declared unconstitutional in the *Coffin Case* authorized women to vote at all elections for school, village, and city officers, and it was decided that it was not competent for the legislature to confer the elective franchise upon women for the purpose of voting in city elections. Such elections were embraced in the constitution of that state, and hence the qualifications of electors prescribed by the constitution for voters at all elections applied. The constitution expressly referred to city elections and provided that the officers of cities and villages shall be elected at such time and in such manner as the legislature may direct. But the distinction drawn in the cases we have cited was recognized. The opinion says: "These cases involved the validity of acts conferring upon females the right to vote for school district officers, under constitutions which, like our own, name no school district officer, do not prescribe or suggest how such officers shall be chosen, but in express terms relegate to the legislature the duty of providing for and establishing a system of primary schools." In speaking of the power of the legislature to prescribe qualifications of city officers, Judge Dixon said in *State v. Von Baumbach*, 12 Wis. 310: "As to all such offices and public trusts, to which the people, in the exercise of their paramount authority, have impliedly declared who shall be eligible, either by prescribing special circumstances which shall disqualify, or by reserving to themselves or to the appointing authorities a certain freedom of choice, there are very obvious reasons for holding that eligibility is in the nature of a constitutional right, and that the legislature possesses no power of exclusion not given by the constitution; but it is manifest that those reasons cannot be applied to a mere statutory office which the legislature may create and abolish at will, and concerning which the constitution contains no express provisions."

A careful examination of all the authorities at hand has not revealed any conflict as to the principles of law announced in the foregoing cases. The right of suffrage is not an inherent right, but is subject to the disposal of the sovereign power of the state. If the constitution has regulated it in any department of government, it is subject to the limitations of that instrument, but should this matter, important as it is, be entirely relegated to the legislature, or left entirely to its discretion, the only limitations placed upon legislative power are contained in the

Federal Constitution. The principles of law here stated must govern us in testing the constitutionality of the act of the legislature in question, and guided by them the conclusion is inevitable. The constitution is a limitation upon the powers of the legislature, and it is incumbent on those who maintain that the legislature is forbidden to act in the matter to point out the specific provisions of the constitution containing the prohibition. If we entertain a reasonable doubt about the act being in violation of the plain spirit and provisions of the constitution, the question must be resolved in favor of the act. There are provisions in the constitution which apply to municipal corporations, but we do not think that section 1 of article 6 does. On the contrary, a careful consideration of the provisions of the constitution applicable impress us with the view that the revisers have purposely exempted municipalities from its provisions, and relegated the matter to the legislature. We are duly sensible of the gravity of this question, and have given it that consideration which its importance demands. Municipalities are auxiliaries of state governments, and the rights and interests affected by them are just as vital and dear as those involved in state and county governments, and in some particulars even more so. The justice or wisdom of constitutional or statutory regulations, however, are matters not subject to our control, but we must give effect to the law according to its meaning to be ascertained by a consideration of all of its provisions. The authorities cited by counsel on this branch of the case have been carefully read, and while they sustain fully the position that the legislature cannot make any unreasonable or unnecessary regulations tending to abridge or impair the right of suffrage secured by the constitution, they fall short of establishing the vital point in this case, that elections to fill municipal offices created by the legislature are subject to suffrage clauses in constitutions with provisions similar to our own. The decision in *Gooding v. Brown*, 23 Fla. 487, was made under the old constitution, and it is clear that the clause in that instrument prescribing the qualifications of voters was recognized as applying to municipal elections, as it undoubtedly did, but the limitations in the present constitution do not apply to such elections as we have pointed out. The case of *People v. Canaday*, *supra*, was well considered, and contains a lucid statement of the law, but there it was clear that the constitutional limitation as to suffrage did apply to municipal elections. The constitution of North Carolina, in broad terms, provided that every male person twenty-one years old, resident in the state twelve months, and in the county thirty days, shall be an elector. In other sections it was provided that all county and township elections shall be by the qualified voters therein, and that no county, city, town or other municipal corporation shall contract any debt unless by a vote of a majority of the qualified voters therein. There was nothing in the North Carolina constitution to negative its application to municipal elections, but its provisions showed clearly that

it was intended to so apply. The same may be said of the case of *Atty-Gen. v. Detroit*, 58 Mich. 213, 55 Am. Rep. 875. There the clause of the constitution prescribing the qualification of voters expressly refers to elections in townships and wards, and there was no question raised as to the application of the suffrage clause to municipal elections. None of the decisions cited conflict with the construction that we are constrained to put upon the clauses of our constitution. The result is, that none of the grounds alleged in the information for annulling the act in question, based upon the exclusion of the classes of persons mentioned possessing the constitutional qualifications of voters for state and county officers since the general state election in 1892, are availing. The legislature had complete power over this matter, and in the absence of constitutional limitation it will must prevail.

II. Another alleged ground attacking the validity of the act in question, is that by its terms persons were permitted to vote in the municipal election who were qualified electors at the general state election held next prior thereto but who had afterwards lost their domicile in the state of Florida and county of Duval, and had not regained the same in time to become an elector at the time of the city election. The act confines the right to vote in municipal elections to residents of the city at the time of the city election, who were qualified electors, or entitled to become such, in any of the election districts within the city at the time of the general state election held next preceding. It is insisted that this will permits persons to vote in the city election who, though qualified electors at the last general state election, may have become disqualified to vote, since said state election, by reason of conviction for crime or other cause. It is not alleged as a matter of fact that any such disqualified persons voted at the election in July, 1893, but the law is claimed to be void because by its terms such persons are permitted to vote.

The election commissioners named in the act are required to prepare a list of the electors qualified to vote in each of the city wards at the last general state election, and this is made the list of electors at the city election, "except that the said commissioners shall add to or strike from the lists the names of such persons as may, as herein provided, appear improperly placed upon or left off said lists, or by reason of subsequent qualification entitled to be added thereto." In making the list of electors for the city election the commissioners are given access to the county registration books, tally sheets, and poll lists used at the last general state election, as well as to all other papers in the office or custody of the county supervisor of registration, and in the office of the tax collector of Duval county. The names of the persons on the list when made are required to be published, and the election commissioners from the best information obtainable are to revise the lists so as to contain all and only the names of persons who at the time of revision are residents of the city, and who were at the time of the last general state

election, qualified electors of the election districts in the city, or who have since that time registered and paid their poll taxes as provided in the act. It is also provided that "if an elector be challenged he shall make oath that he is a resident of the city and entitled to vote at the election. "If his name appears upon the list of electors for the ward (and, if required, he take such oath,) he shall be permitted to vote, but no person whose name does not so appear shall be permitted to vote."

The constitution provides that no person convicted of any felony by a court of record shall be qualified to vote at any election unless restored to civil rights, and the legislature is directed to enact the necessary laws to exclude persons convicted of certain crimes from the right of suffrage. Sections 4 and 5, article 6. In obedience to this command the legislature has enacted a general law excluding persons convicted of certain crimes from the right of suffrage. Rev. Stat. § 154, div. 5. There is no purpose manifested in the act under which the election in question was held to repeal the general law in reference to excluding persons convicted of crime from voting at elections, and if the two can be construed in harmony with each other the rule is that it must be done. The act, it is true, declares those persons, residents of the city, who were qualified electors at the time of the last general state election, or entitled to become such by registration and the payment of poll taxes due for 1890 and 1891, qualified and entitled to vote in the city election, and there is in the act no express direction to the election commissioners to strike off the names of persons convicted of crimes disqualifying them to vote at any election, but the reference is to the qualified voters at the last state election, and no purpose is shown to suspend the operation of the criminal laws in reference to crimes disqualifying one to vote. The general law and the act we are construing can be construed in harmony in reference to the conviction of crimes taking away the right of suffrage, and this being the case such construction should be given to them. Those who possessed the qualifications of electors at the general state election next preceding the city election and complied with the law as to registration and the payment of poll taxes, or could have done so, were authorized to vote at the city election provided they were at that time residents thereof. Residence of a qualified voter in the city at the time of the election in connection with the qualifications mentioned at the preceding general state election conferred the right to vote at the city election without regard to changes of residence since the said state election. There is no constitutional prohibition against the power of the legislature to prescribe such qualifications.

III. It is further alleged that the act is void for the reason that by the terms thereof only those persons were allowed to vote whose names appeared on the lists after the same had been revised by the commissioners of election, without regard to registration in fact. After declaring who should constitute the qualified electors authorized to vote at the city election (being those persons resid-

ing in the city at the time of the city election, and who at the time of the general state election held next preceding, were qualified electors of any of the election districts within said city, or who were entitled to qualify themselves to vote at said state election by registering and paying their poll taxes due for the years 1890 and 1891), the act directs the commissioners of election to prepare a list of the electors qualified to vote at each of the city wards at the last general state election, and this list, it is declared, shall constitute the qualified electors to vote at the city election, subject to revision and alteration as provided in the act. In making up the list of qualified voters for the city election access was given the commissioners to the county registration books, tally sheets and poll lists used at the last general state election, and all other papers in the office or custody of the county supervisor of registration, and in the office of the tax collector of Duval county. The names of the qualified voters on the list prepared by the commissioners are required to be published, not more than two weeks before the city election, one time in a newspaper with notice of a time and place when the commissioners would meet to revise the list, the notice to be published at least two days before the meeting. At the time and place mentioned in the notice the commissioners were required to meet, and "from the best information obtainable revise said lists so as to contain all and only the names of persons at that time residents of said city, and who were, at the time of the last general state election, qualified electors of the election districts in said city, or who have since that time registered and themselves paid their own poll taxes for the years 1890 and 1891. Such lists so revised shall constitute the list of qualified voters for the several wards at said city election." It is further provided that not less than five printed copies of the lists for each ward shall be made out, on the same form as the county registration books, so as to show the number of registration certificates, age, color, etc., and each copy to be certified to be correct by the chairman of the board of election commissioners. The lists so made and certified are for the use of the inspectors and clerks appointed to hold the election, and they are required to be prepared and open to inspection at least five days before the election, and subject to correction of clerical errors by the board of election commissioners. No person whose name does not appear upon the list of electors for the wards shall be permitted to vote.

It is apparent from the provisions of the act that the commissioners were not given arbitrary power to put on the list to be prepared by them such names as they pleased, but it was made their duty to place thereon all and only the names of persons possessing the qualifications of electors prescribed by the act for voting in the municipal election. In ascertaining who were the persons authorized to vote in the city election the commissioners were under a duty to act according to law, and not arbitrarily, and their action in this respect was subject to review

by a court of competent jurisdiction. Many authorities hold that where a law provides that no vote shall be received at an election unless the name of the voter is on the registration list as prepared by the registering officers, it is in violation of that portion of the constitution defining the qualifications of electors. *Dells v. Kennedy*, *State v. Corner*, *Doggett v. Hudson*, and *People v. Canaday*, *supra*, belong to this class of decisions. They are based upon the theory that the constitutional qualifications of electors apply, and that the legislature cannot by any regulations deprive the voter of a right given him by the constitution without fault on his part. But as we have already seen, the qualifications of electors prescribed by our constitution at all elections under it do not apply to municipal elections, hence there is no inhibition in this clause against the authority of the legislature to make the ascertainment of the elector's right to vote in the city election by the election commissioners conclusive. It may be contended, however, that after prescribing the qualifications of those who were entitled to vote in the municipal election, the legislature could not confer upon the commissioners the power to conclusively determine who were possessed of the qualifications thus prescribed, on the ground that it was granting to a mere ministerial board judicial powers with which it could not be invested. If it be conceded that the legislature could not make the ministerial ascertainment by the board of election commissioners conclusive of the voter's right under the statute, this will not authorize the vacation of the election held in July last on the showing before us. It is not alleged or claimed that any voter was denied his right to vote at said election by reason of the failure of the commissioners to perform their duty under the statute, and for aught we know every person in the city authorized to vote cast his ballot. The legislature had the right to prescribe the qualifications of voters at such an election, and it was competent for it to provide the means of ascertaining who were the persons authorized to vote. Although the action of a ministerial board in performing the duty of ascertaining the qualified electors under a statute may not be given a conclusive effect as to the voter's rights, and to the extent that the statute before us undertakes to make such action conclusive, it may be inoperative, yet this alone should not invalidate an election in the absence of any showing that voters were deprived of any rights under the statute.

IV. It is also alleged that by the terms of the act in question the qualified electors of the city of Jacksonville were not permitted to vote for whom they pleased, but were restricted in the right of suffrage to vote for persons whose names were placed upon an official ballot by the election commissioners. It has been held by this court that the last clause of section 6 of article 6 of the Constitution, which is, that "in all elections by the people the vote shall (be) by ballot," applies to municipal elections. *State v. Anderson*, 26 Fla. 240. We still adhere to this decision. It was here said that "the ma-

terial guarantee of this constitutional mandate of vote by ballot is inviolable secrecy as to the person for whom an elector shall vote. The distinguishing theory of the ballot system is that every voter shall be permitted to vote for whom he pleases, and that no one else shall be in a position to know for whom he has voted, or shall know unless the voter shall of his own free will inform him." There is no doubt in our minds about the right of the legislature to prescribe an official ballot and to prohibit the use of any other, and the provisions of the act in reference to printing the names of candidates regularly nominated by a convention, mass-meeting, or primary election, or who run as independents, are valid. But the legislature cannot, in our judgment, restrict an elector to voting for some one of the candidates whose names have been printed upon the official ballot. He must be left free to vote for whom he pleases, and the constitution has guaranteed to him this right. If the legislature can restrict the voter to some candidate whose name is printed on the official ballot, then it may prescribe such regulations for getting the names of candidates on the ballot as will completely destroy the liberty of choice.

Counsel for defendants contend that while the act prescribes an official ballot, and prohibits the use of any other, and also provides for the printing upon the official ballot to be used, the names of all candidates who have been certified to the election commissioners as put in nomination by any convention, mass meeting, or primary election, as well as independent candidates who have the indorsement for that purpose, of ten per cent, and not less than twenty-five, of the electors qualified to vote for such office, yet it does not prohibit the voter from putting another name by "paster" over the name of any candidate on the ballot, or from erasing the name of any candidate and writing in lieu thereof another of the voter's choice. We have considered the cases cited on this point, *State v. Black*, 54 N. J. L. 446, 16 L. R. A. 769; *Detroit v. Rush*, 82 Mich. 532, 10 L. R. A. 171, and *De Walt v. Bartley*, 146 Pa. 520, 15 L. R. A. 771,—and recognize fully the rule that every presumption is in favor of the constitutionality of the law, and that it will require a very clear case to justify a court in striking it down on the ground of unconstitutionality. It is also true that where an act is fairly susceptible of two constructions, one of which conflicts while the other is in harmony with the constitution, that construction which supports will be preferred to that which destroys the law. *Emporia v. Norton*, 13 Kan. 569. The act before us prescribes an official ballot and prohibits the use of any other. Upon each ballot shall be printed in uniform plain type in a single column the names of all the candidates certified to the election commissioners in the manner provided in the act, and the names of all candidates for the same office shall be printed together, and arranged alphabetically according to the initials of their surnames, irrespective of party. Immediately to the left of each name, in a line with

the middle of the letters of the name, a dash or short line not less than one quarter of an inch in length is required to be printed. Specific directions are then given for arranging on the ballot the names of the various officers to be voted for as follows, viz.: "On said ballots shall be printed, first, under the head of 'Mayor,' the words 'vote for one,' followed by the names of all the candidates for that office; next under the head 'Councilmen at Large,' the words 'vote for seven,' followed by the names of all the candidates for that office," and so on for all the officers to be elected. On the ballots for councilmen at large on the line with the name, the number of the ward in which the candidate resides is printed, and each ballot is to have attached to it a stub so attached that when the ballot is folded the stub can be detached without injury to the ballot or exposing its contents, upon which stub the number of the ballot for that ward must be printed. Provision is also made for attaching together in blocks the ballots for use at the wards, the number of the ballots to be used, and for furnishing the inspectors of election with the ballots for use on the day of election. It was entirely competent for the legislature to prescribe the regulations here referred to, and if there were no others on the subject of casting the ballot, we think the voter, although confined to the use of the official ballot, could put upon it the name of any person in lieu of the name of the candidate printed thereon, and such a ballot would be legal. There is in the provisions here referred to no denial, express or implied, of his right to do so, and under the decisions cited we think he would have such right. But in another portion of the same section of the act, in providing for the entrance of the voter into the polling place and the receipt by him of an official ballot, it is enacted that "he shall go to one of the voting shelves, tables, or compartments, and there privately cross or check-mark across the dash, or short line in front of the name of the candidate of his choice for each office to be filled, which cross or check shall constitute his vote." The requirement is that he shall check the name of the candidate of his choice. The candidate here referred to cannot fairly or naturally mean any other than some candidate whose name had gotten on the ballot in the manner provided in the act. This is the only fair and reasonable construction to be put upon the clauses mentioned, and its effect is to restrict the voter to a choice of candidates printed on the ballot which we have said cannot be done. That phase of the act, then, which restricts the voter to checking the name of some candidate on the official ballot is in conflict with the constitutional provision in reference to voting by ballot.

The result just stated gives rise to the question whether the valid parts of the act can remain operative, notwithstanding the unconstitutional feature, and whether they are so essentially and inseparably connected in substance that the legislature would not have enacted the one without the other. If the two can be separated and the legislative purpose expressed in the valid portion can

be accomplished independently of the void part, and considering the entire act it cannot be said that the legislature would not have passed the valid part had it been known that the invalid portion must fail; it is our duty to sustain so much as is good. In *English v. State*, 81 Fla. 840, and *Donald v. State*, Id. 255, the constitutionality of the Act of 1891, reducing a grand jury to twelve persons, and giving eight of the number the right to find a bill, was before us. It was held that the legislature could not authorize less than twelve grand jurors to find an indictment, but upon consideration of the entire act in which the provision reducing the number to twelve was found, it could not be said that the legislature would not have passed the provision making the jury consist of twelve persons had it been known that the other clause authorizing eight to concur in finding indictments could not be carried out. In the *Donald Case* it was said that "the distribution of statutes into sections is, however, purely artificial, and in determining whether the valid parts can remain operative notwithstanding the unconstitutional parts, the point is not whether they are contained in the same section, but whether they are essentially and inseparably connected in substance, or are so interdependent that the legislature would not have enacted one without the other." The unconstitutional feature of the statute now before us is in requiring the voter to check a candidate printed on the official ballot. If this feature be eliminated the remaining portions of the act are sufficient to authorize an election and permit the electors to vote for whom they please. The leading and controlling purpose of the act was to permit the electors named in it to vote for municipal officers in the city of Jacksonville, and we cannot say that the legislature would not have passed the valid portions of the act if the void feature had been called to its attention. The greatest difficulty we have had on this branch of the case is in determining the effect of the void portion of the act on the election already held. In the case of *State v. Constantino*, 42 Ohio St. 437, 51 Am. Rep. 883, it was decided on quo warranto proceedings that a statute authorizing an election of four members of the police board at the same election, but denying an elector the right to vote for more than two members, and directed the rejection of any ballot with more than two names on it, was in conflict with the constitution regulating the right to vote by ballot, and that the members elected at such an election were not duly elected, and should be ousted from their offices. In *People v. Kenney*, 96 N. Y. 294, it was held that where part of a statute was unconstitutional, this did not affect the validity of the remainder, unless the provisions are so interdependent that one cannot operate without the other, or are so related, in substance and object, that it is impossible to suppose that the legislature would have passed the one without the other. After striking out the invalid part, if that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, it must be retained, and this

is so although the condemned portion is found in the same section with the part retained. In this case it was further held, in construing an act providing for the election of aldermen at large of the city of New York, and prohibiting the electors from voting for more than two thirds of the whole number to be elected, that conceding such a provision, as to voting for two thirds only, to be in conflict with the constitution, this did not affect the validity of the residue of the section, or prevent the election of aldermen in the manner specified. It is said: "So far as the case discloses, every voter in the city voted for as many candidates for aldermen at large as he wished to. It does not appear that any voter claimed the right to vote for all the six aldermen, and was denied that right. If he chose voluntarily to waive his constitutional right to vote for six, and to vote for but four, that he could do and his ballot would be a valid ballot." *People v. Perley*, 80 N. Y. 624, holds that where a statute prohibits those voting at an election from voting for more than two of three officers to be elected, ballots cast in pursuance of the act are not invalidated by its unconstitutionality in part; the fact that the electors exercised in part only their privilege or duty of voting, does not affect the votes actually given. The decision in *Andrews v. Saucier*, 13 La. Ann. 301, was that the principal object of an election is the casting of votes, and the unconstitutionality of police provisions of an election law cannot render votes cast illegal, and thus disfranchise those who vote; the citizens have the prerogative of voting, and the legislature cannot, by encompassing with unconstitutional provisions an election law, make the votes of electors null and void. The public good demands that the will of the people as determined at the ballot box should not lightly be disturbed.

In considering objections to an election on the ground that the registration law made no provision for the registration of those who might become qualified to vote after the registration is closed, and before the day of election, *Judge M'Kay* said, in *Weil v. Calhoun*, 25 Fed. Rep. 865: "It seems to me that such objections to the registration ought, for reasons of public policy, to conform to the rules applicable to objections to elections not held in strict conformity to law, to wit: it should be made affirmatively to appear that the result would have been different had the illegality not existed. Perhaps the voter might have private redress for the wrong done him in refusing his vote, but that is a very different thing from making an election void on a mere abstraction not affecting the result." In the Ohio case cited, the void portion of the act was regarded as destructive of the whole, but the other cases mentioned are opposed to this view.

As has already been stated, if we reject the void portion of the act before us, which must be done, what remains is sufficient to authorize an election, and there is no allegation that any voter, at the election in question, desired to vote for any other person than some candidate on the official ballot, and was as a matter of fact denied the right

to do so. The state is standing entirely upon the unconstitutionality of the entire act, and the rights of all the voters at the election are involved. The better rule is, it seems to us, that where an election authorized to be held is attacked solely on the ground of the illegality of some of the provisions of the law under which it is held, but not affecting it as an entirety, it should be made affirmatively to appear that the result would have been different had the illegality not existed.

V. What has been said disposes of all the objections alleged in the information to the validity of the act in question, but others were urged in argument here and insisted on in the briefs filed, and we should notice them. Several objections are made to the provisions of the act requiring the payment of poll taxes by those who were entitled to qualify themselves to vote at the last general state election by registration and the payment of their poll taxes for the years 1890 and 1891, but failed to do so. The first objection under this head is, that the act is void because it requires the voter to pay in person the poll taxes mentioned, and denies him the right to do so by an agent. The language of the act on this subject is: "Provided, however, that prior to the holding of the first city election as provided herein, there shall be given to each person who was entitled to qualify himself as an elector at the last state election by registration and the payment of his poll taxes for the years 1890 and 1891, and failed to do so, an opportunity to qualify by registering and himself paying his own poll taxes for such years, more than two weeks before said first city election." The list of persons authorized to vote at the city election prepared by the commissioners of election is required to be revised so as to contain "all and only the names of persons at that time residents of said city and who were, at the time of the last general state election, qualified electors of the election districts in said city, or who have since that time registered and themselves paid their own poll taxes due for the years 1890 and 1891." Our construction of the provisions mentioned is, that they do not deprive the voter of his right to pay his poll taxes through an authorized agent, and that a payment made by such agent would be a valid payment under the terms of the act. A liberal construction should obtain in favor of the voter's right to make the payment through another, and the act does not in terms deny such right. It is true it says "himself paying his own poll taxes" for the years mentioned, but the general principle, *qui facit per alium facit per se*, should apply, and the payment through an authorized agent would be the payment by the voter himself. In the case of *State v. Johnson*, 30 Fla. 499, we held that under the statutes regulating the payment of poll taxes since June 12, 1892, a tax collector had no right to refuse to receive such taxes when tendered by a party on behalf of others from whom they are due, although the person making the tender was not authorized by the other persons to pay the same. This was the construction put

upon the statutes in force since the adoption of the Revised Statutes in reference to paying poll taxes, and no question as to the power of the legislature to restrict the voter to the payment of such taxes in person arose or was decided in the case. In the present case we hold that the legislature has not denied the voter the right to pay his poll taxes through another authorized to do so, and that payments made by such agent must be considered payments made by the voter himself. This being the proper construction to be placed upon the act, it is unnecessary to say anything in reference to the power of the legislature to require payments in person by the voter.

VI. It is further objected that the act under consideration requires the payment of two poll taxes, that is, poll taxes for both of the years 1890 and 1891, as a prerequisite to the right to vote in the municipal election held in July, 1893. The meaning of the act, and hence the proper construction to be put upon it, is that the class of persons mentioned as being entitled to qualify themselves to vote at the last general state election, by registration and the payment of their poll taxes for the years 1890 and 1891, and failed to do so, shall be permitted to do so by registering before the election commissioners and paying, within the time specified, such poll taxes as they were due for the years 1890 and 1891. The act does not impose upon the class of persons mentioned any poll taxes that were not due for the years 1890 and 1891, but does require the voter to pay within the time mentioned in the act such poll taxes as he would have had to pay in order to vote at the state election in 1892. This is apparent from the language of the act, that they shall "pay their own poll taxes due for the years 1890 and 1891." Under the state registration law the supervisor of registration was directed to note on the books to be furnished the inspectors of the different election districts the names of all persons registered therein who shall have paid, at least thirty days before the day of election, their poll taxes for two years next preceding such election as shown by the lists furnished to the supervisor by the tax collector, and only such persons shall be deemed qualified voters or authorized to vote at any general, special or municipal election; "provided, that no person shall be prevented from voting on account of not having so paid a poll tax, for any year which shall not have been lawfully assessable against him by reason of his not having been a resident of the state, or not having been of age, and who shall have obtained from such supervisor a certificate to that effect, and shall at the time of offering to vote exhibit such certificate to the inspector of elections." Rev. Stat. § 173. The act under consideration has reference to the poll taxes due under the General Revenue Law for the years 1890 and 1891, and if no poll taxes were due under the requirements of that law, then none could be insisted on under the municipal act as a prerequisite to the right to vote in the city election. If, however, a poll tax was due for either of the years mentioned, it was required to be paid.

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This is the proper construction to be placed upon the act, we think, and if it is competent for the legislature to make the payment of the one dollar capitation tax for more than one year in arrear a prerequisite to the right to vote in municipal elections, all objections, as to the right to demand payment of poll taxes from the municipal voters, must fall. The constitutional provisions on this subject are: "The legislature may also provide for levying a special capitation tax, and a tax on licenses. But the capitation tax shall not exceed one dollar a year, and shall be applied exclusively to common school purposes." Art. 9, § 5. "The legislature shall have power to make the payment of the capitation tax a prerequisite for voting, and all such taxes received shall go into the school fund." Art. 6, § 8. One dollar a year is the limit authorized to be imposed for a capitation tax, and this tax can be made a prerequisite to the right to vote. There is in the provisions of the constitution referred to no limitation against the right to require delinquent capitation taxes to be paid as a prerequisite to voting; provided such taxes do not amount to more than one dollar each year. Neither the state law, nor the act under consideration, requires the payment of more than one dollar a year for the years 1890 and 1891. It is competent for the legislature to require the payment of the capitation tax, as a prerequisite to voting, and this includes all the annual capitation taxes remaining unpaid, not exceeding of course one dollar for each year.

Under this head it is further insisted that the requirement as to the payment of poll taxes more than two weeks before the election is void. This objection may be considered in connection with the one against the regulations prescribed as to registration before the commissioners of those persons who were entitled to qualify themselves to vote at the last general election and failed. The provisions, both as to the time of payment of the poll taxes and the registration of the persons designated, it is insisted are unreasonable, unnecessary and tend to impair and subvert the right to vote. Those persons residing in the city at the time of the city election, and who at the time of the general state election held next preceding, were qualified electors, were declared by the act to be the qualified electors in the city election, with a further provision that those who were entitled to qualify themselves to vote at said state election by registering and paying their poll taxes due for the years 1890 and 1891, and failed to do so, should have an opportunity to register and pay said taxes two weeks before the city election. The tax collector's books were required to be kept open from the first of June, 1893, until the time for paying poll taxes for the purposes of the election expired. The registration contemplated was to be had under the supervision of the election commissioners. They were directed to meet on or before the 3d day of July, 1893, and provide for the registration of those to whom the opportunity for registering had been given. We again observe that it is not a constitutional right here

regulated, but the conferring of a right by the legislature not guaranteed by the constitution. Neither is it alleged or claimed that the election commissioners did not in fact make ample provision for registering all those who were entitled to register, or that any person so entitled did not register and vote. The election is claimed to be void because the regulations as to paying poll taxes and registering are unreasonable and impair the voter's constitutional rights as an elector.

It is not necessary to say what would be our conclusion if we were dealing with regulations of the right of suffrage secured by the constitution, as the voter at municipal elections under our constitution has no such right. The legislature under our system has control of this matter. In the case here the legislature provided that certain persons should have the right to vote at a municipal election by paying poll taxes in arrear and registering two weeks before the election. The registration contemplated was to be under the control and supervision of the election commissioners, and they were required to meet on or before the 8d day of July and provide for the registration of those who were given an opportunity to do so. In passing upon the validity of this act we are to be guided by the rule that a deliberate act of the legislature must be upheld if it can be done without doing violence to the fundamental law. Its reasonableness or justice, so long as it does not contravene some portion of the organic law, is a matter for legislative consideration, and not subject to our control. Should we entertain the view that the time given in the act for registration was unreasonable, the legislative view is different, and as there is no constitutional limitation upon its action in this respect, its will must stand as the law. The attack upon the election held thereunder is based solely upon the sufficiency of the law authorizing it, and such election cannot be set aside, especially where there is no showing that any voters were deprived of any rights given by the statute by reason of the failure on the part of the election commissioners to perform the duties imposed upon them.

VII. A further objection is made that it was not competent for the legislature to appoint or designate the three election commissioners named in the act, for the reason

that this was not a legislative function, but executive in its nature, and thence forbidden to be exercised by the legislative department. The act declares that three persons named shall constitute "a board of election commissioners to make all the necessary preparations for and hold and declare the result of the election to be held July 18, 1898; and thereafter the board of police commissioners shall perform those duties." The objection here made is not that the legislature cannot provide for a board of election commissioners to make the necessary preparations for and to hold and declare the result of the election, but that the designation of the members of the board is an executive function, and does not belong to the legislature. It is entirely clear that the three election commissioners provided for in the act are not officers within the meaning of section 27 of article 8 of the Constitution, nor are they officers in any sense, but constitute a temporary board for the performance of certain specified duties in connection with holding an election authorized by the legislature. If the appointment of such a board is inherently and essentially executive in its nature, the distribution of powers of government under the second article of the Constitution will take it out of the powers of the legislature. But our conclusion is that the designation of persons to perform the functions conferred upon the commissioners of election in the act before us is not necessarily or essentially executive, and that the legislature can exercise such a power. For a discussion of the law bearing on this subject we refer to the cases of *Roanoke v. State*, 118 Ind. 426, 4 L. R. A. 93; *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *Hovey v. State*, 119 Ind. 387; *Fox v. McDonald* (Ala.) 21 L. R. A. 529; *Barnes v. Pike County Suprs.* 51 Miss. 305; *note to People v. Freeman*, 18 Am. St. Rep. 122, 80 Cal. 233, and authorities cited.

We have maturely considered all the objections presented as to the constitutionality of the act in question, and the validity of the municipal election held under it in July last, and the foregoing pages contain a reference to and discussion of all the material points in the case.

Our conclusion is, that *the demurrer to the information should be sustained*, and it is so ordered.

PENNSYLVANIA SUPREME COURT.

W. W. HAGUE *et al.*

v.

N. P. WHEELER and L. R. Freeman *et al.*, *Appts.*

(157 Pa. 324.)

Allowing gas to escape into the open

air and go to waste, because it is not profitable to utilize it, from a well which has been lawfully drilled, without malice or negligence, in one's own premises, gives no legal ground of complaint to a neighboring owner on the ground that gas is thereby drained from the adjoining lands to the detriment of his wells, and

NOTE.—The novelty of the above case and the able discussion both in opinions and briefs of the questions involved make the case one of unusual interest. The question of motive in the use of one's own property is so far reaching and so imperfectly settled by authorities that every case which adds

anything to that subject is of great importance.

On the question of malice in the use of one's own property, which is suggested but not decided in the above case, see the cases of *Flaherty v. Moran* (Mich.) 8 L. R. A. 183, and *Rideout v. Knox* (Mass.) 2 L. R. A. 51, as to malice in erecting fences.

the latter has no right to plug the well and prevent the waste of the gas, even at his own expense.

(October 2, 1892.)

APPEAL by defendants Freeman *et al.* from a decree of the Court of Common Pleas for Warren County granting a preliminary injunction to restrain defendants from permitting the gas from a well which they had put down to go to waste, and from removing from the well a plug or cap which had been placed there by complainants. *Reversed.*

The opinion delivered by the court below was as follows:

"A preliminary injunction was granted *ex parte* at chambers October 26. October 29 a hearing was had upon notice to the defendants, and I am now to determine the right of the plaintiffs to a continuance of the injunction until further order. The material facts, as disclosed by the bill and affidavits, are as follows: The plaintiffs, W. W. Hague and the Citizens' Gas Company, are lessees for oil and gas purposes of certain lands lying in this and the adjoining county of Forest. The defendants Watson, Freeman, and Syms are lessees or owners of the oil and gas in certain other lands lying near those in which the plaintiffs are interested. Since 1887 and 1888, respectively, the plaintiffs have been producing and marketing natural gas upon their respective premises in paying quantities. In 1890 the defendants caused a well to be drilled upon their premises, which produced gas in large quantity, but they never have used or marketed the same. In 1891 the derrick at this well was destroyed by fire, and the gas escaped into the air. The defendants refusing or neglecting to shut it in, the plaintiffs did so at their own expense, and the well remained in this condition until shortly before the present application. The allegations of the bill that the defendants agreed to shut in the well and put it under the control of the plaintiffs in consideration of \$1,650 per annum, and that they threatened to keep the well open unless paid an exorbitant price, are expressly denied in the affidavit of Mr. Freeman, and we lay them out of view. At the time the bill was drawn the defendants had given directions to have the well opened, and at the time of the hearing it was conceded that it was, in fact, open, and on fire, the gas thereby going to waste. The only answer to the plaintiffs' allegations thus far made is the affidavit of Mr. Freeman, before referred to. It denies that the injury to the plaintiffs will be serious or irreparable, but gives no facts bearing upon the matter, and states the affiant's belief that the plaintiff Hague has no interest in the leases set out in the bill. These averments are too indefinite to defeat the right of the plaintiffs to an injunction, especially in view of the conceded fact that the granting of such an order will work no pecuniary loss to the defendants, while its refusal will inflict great loss upon the plaintiffs, if in fact they are entitled to such relief. The positive statement in the affidavit that the acts of the defendants now complained of had been invited by the Citizens' 22 L. R. A.

Gas Company through its president might defeat this application so far as that company is concerned, but as it cannot affect the plaintiff Hague it is not necessary to consider it at this time. I am obliged, therefore, to consider this application upon the merits of the case, leaving out of view any contractual relations between the parties and regarding only their respective rights and duties as adjacent owners of oil and gas. For the purposes of this case they may be treated as owners of the land itself.

"The mere fact that the defendants, by operations upon their land, are taking gas from the earth, and thereby diminishing the quantity of gas which would otherwise come to the plaintiffs' wells, furnishes no ground for complaint or equitable interference, and this is freely conceded. If the plaintiffs have any right it rests upon the fact that the defendants are not taking gas in the ordinary course of mining, or for purposes beneficial to themselves or others, but are permitting it to go to waste. Malice is not expressly alleged in the bill, but the facts disclose no possible motive for so doing except a purpose of diminishing the amount which the plaintiffs will get through their wells, though the natural inference would be that the defendants are not actuated by feelings of malevolence towards the plaintiffs, but are seeking, through their power to injure, to secure a better bargain. The questions thus presented for my determination on this preliminary application are of great importance and delicacy, and, so far as I am advised, have never been determined in any court. I regret that I am obliged to decide without the aid of adequate and thorough argument, such as the able counsel representing the respective parties could have made had they not been prevented by the emergency of their case. I have, however, examined every authority bearing upon the case which I have been able to find, and will state the conclusions to which they lead my mind. If the defendants have a right to take gas from their well in unlimited quantities for their own profit, how far is their right affected by the fact, if it be a fact, that their motive in taking it is not profit, but injury to another, —malice in the legal sense? There are many dicta and some authorities which seem to declare that an act done in the exercise of a lawful right, and without negligence, may be unlawful if done with express malice. Prominent among these is the carefully considered case of *Wheatley v. Baugh*, 25 Pa. 532, 64 Am. Dec. 721, in which the rule of the civil law is cited with approval by *Chief Justice* Lewis to the following effect: 'He who, in making a new work upon his own estate, uses his right without trespassing either against any law, custom, title, or possession which may subject him to any service towards his neighbors, is not answerable for the damages which they may chance to sustain thereby, unless it be that he made that change with a view to hurt others without any advantage to himself.' The same doctrine is approved in *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511, and *Pennsylvania Coal Co. v. Sanderson*, 113

Pa. 148, 57 Am. Rep. 445, and other cases.

"The suggestion that one may not do maliciously what he might lawfully do if his motives were good is found in many English cases, among which are *Acton v. Blundell*, 12 Mees. & W. 338, and *Chasemore v. Richards*, 7 H. L. Cas. 387. It has been more or less clearly made in the following, among other cases, in other states of this Union: *Greenleaf v. Francis*, 18 Pick. 117; *Roath v. Driecoll*, 20 Conn. 538, 52 Am. Dec. 352; *Carson v. Western R. Co.* 8 Gray, 423; *Howland v. Vincent*, 10 Met. 371, 43 Am. Dec. 442; *Brown v. Illius*, 25 Conn. 588, 71 Am. Dec. 49; *Gallagher v. Dodge*, 48 Conn. 389, 40 Am. Rep. 182. I have not been able to find any case, however, in which a party has been actually held to liability on this ground alone. On the other hand, there are many cases in which malice, as a criterion of liability for civil damages, is distinctly repudiated, and among these our own cases of *Cavanhoran v. Hart*, 21 Pa. 495, 60 Am. Dec. 57; *Jenkins v. Fowler*, 24 Pa. 308; *Fowler v. Jenkins*, 28 Pa. 176; and *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599. 'Malicious motives,' says Black, J., in *Jenkins v. Fowler*, 'make a bad act worse; but they cannot make that wrong which in its own essence is lawful. . . . As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches the heart.' To the same effect are *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505; *Chatfield v. Wilson*, 28 Vt. 49.

"Without lengthening out this opinion by pointing out the distinctions between these cases, it is enough to say that my mind inclines strongly to the conclusion that the presence or absence of malice cannot of itself determine the liability of an owner of land for an act done upon it. If the act is lawful when done with innocent intentions, it is no less so because the motives were bad. If these defendants might lawfully drill a hole into the gas-bearing rock, and suffer the valuable gas to escape, because they foolishly but honestly believed that the use of natural gas is an injury to mankind, they may do so for the purpose of keeping their neighbor from getting it, even if the motive is purely malevolent. Such, in my opinion, is the weight of the authorities, as well as the reason of the case. But this assumes that the act done with malicious intent invades no legal right of another. The cases are all of this character, or were so regarded by the courts deciding them. On the other hand, the cases which seem to announce a different doctrine deal with rights which are not absolute and exclusive, but qualified and correlative. An example of the former is *Fowler v. Jenkins*, *supra*, in which the action was brought for maliciously tearing down a fence which neither the plaintiff nor the defendant had a right to maintain. Of the latter is *Greenleaf v. Francis*, in which the action was brought for digging a well so near the plaintiff's well as to divert the water. The

instructions of the trial court to the jury, which were indorsed by the appellate court, were: 'That if the defendant had a legal right to dig a well upon any part of his own land for the purpose of obtaining water for his own use; that if he dug his own well where he did for that purpose, he was justified in so doing, although the effect might be to diminish the water in the plaintiff's well; that if he dug where he did for the purpose of injuring the plaintiff, and not for the purpose of obtaining water for his own use, he was liable in this action; but if he thus dug his well for the purpose of accommodating himself with water he was not liable for so doing, even if he at the same time entertained feelings of hostility towards the plaintiff, and a desire to injure her, and these feelings were thereby gratified.' Malice implies knowledge. If the defendant in the case above cited dug his well maliciously, he knew beforehand where to dig to tap the same subterranean stream from which the plaintiff's well was supplied. His right in such water was qualified by the right of the plaintiff in the same flow of water. He could use it without stint, even if it exhausted the plaintiff's well, but he could not wantonly destroy it, nor take it not for use, but merely to injure his neighbor. Malice in such a case is not the criterion of liability, but is an index which clearly shows an overstepping of the line, otherwise difficult to trace, between the respective rights of the parties. The true place of malice in such inquiries is clearly defined by the court in *Chatfield v. Wilson*, above cited, in the following paragraph from the opinion of the court: 'There are many cases in the books relating to the relative use of surface streams, where the case has turned upon the question whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are correlative rights to the use of the water, and the boundary of the right is a reasonable use of it.' Respecting rights in water I find the following from the pen of Judge Cooley in the *Southern Law Review* (reprinted 14 Alb. L. J. 63), which, though not delivered *ex cathedra*, is none the less dispassionate and sensible: 'There seems to be some difficulty in laying down a rule for these cases that will be quite satisfactory in principle and in its workings. That a man may lawfully make an excavation on his premises for the sole purpose of drawing away the water from his neighbor's well and rendering it useless, seems to be, and is in fact, a monstrous doctrine. On the other hand, it cannot be said, consistent with the authorities, or perhaps with reason, that adjoining proprietors have rights in the water percolating the soil corresponding to those they may have in a running stream which crosses their several estates. Such a rule would raise questions of reasonable use, and create difficulties both of evidence and of application that would make the right to such waters more troublesome than valuable. The courts have doubtless been right in declaring that one proprietor cannot insist on another keeping his estate

as a filter for the use of the former, nor be heard to complain if the use by his neighbor of his own estate draws off the secret particles of water which otherwise he might have gathered. These waters belong to no one until they are collected, and they may be appropriated by the one who collects and puts them to use. But though neither proprietor has such a right in or control over the water as will enable him to complain of his neighbor's appropriation, does not each owe to the other certain duties of good neighborhood, among which is the duty to abstain from purposely withdrawing the water that may be useful to both, when a use of it is not intended? Conceding that he may collect it for use, does this entitle him to do so not for use, but of malice? If he sinks a well to supply his house, or water his stock, it must be admitted that no question can be raised whether this is or is not a reasonable appropriation of the water; but if he digs a hole to injure his neighbor, it is not perceived that the two cases are necessarily to be governed by the same rule. What is a man's right to water percolating through the soil? The just answer seems to be this: It is a right to gather and appropriate it to his lawful uses. When he does this he is exercising his right, and his motive is not open to inquiry. But when he collects it, not for use, but to injure his neighbor, he exceeds his right, and there is that conjunction of wrong and injury which constitutes a tort and will support an action. In most of the cases malice and negligence are coupled together, and in respect to the rights of the party injured it would seem that liability would result from one in any case where it would from the other. No matter how negligently an act may be done, it creates no liability unless some legal right of another is injuriously affected. The same is true of an act done maliciously, and the converse holds in both cases. And where the right of one to do an act is limited by any qualification, it must be held to stop short of a right to do it from pure malice.

"What, then, are the rights of adjoining owners of oil and gas? Are they absolute and independent, or qualified and correlative? These valuable products are obtainable only in connection with the ownership of land, and for many purposes are to be regarded as minerals, and as constituting an integral portion of the land itself. *Punk v. Haldeman*, 53 Pa. 229; *Stoughton's App.* 88 Pa. 198. But they are not, like coal and iron ore, fixed in their place in the rocks, so that the owner may know his own, protract his lines downwards to mark his boundaries, and take them when he pleases. As water percolates by untraceable rills through the gravel, so these 'minerals *feræ naturæ*,' as they have been aptly called in a recent case, permeate the porous rocks deep in the bowels of the earth, and rush to the surface through any opening made through the impervious cap by which the basin which contains them is sealed. No landowner gets through his wells oil or gas exclusively from his own land. That which saturates his rocks may be lawfully taken by his neighbor through wells

on his land, tapping the common reservoir. From the very nature of the case, the right of each owner is qualified. It is common to all whose land overlies the basin, and each must of necessity exercise his right with some regard to the rights of the others. Notwithstanding the fugitive nature of oil and gas, I think it will not be doubted that if a party by negligent operations upon adjacent land injures the flow of oil wells, as, for example, by neglecting to case off the fresh water, he would be liable in damages to the well owners so injured. Such a liability as to wells of water was established in *Collins v. Chartiers Valley Gas Co.*, 131 Pa. 143, 6 L. R. A. 280, and the right to gas or oil would seem to be of as high a character as the right to water. If the owner of gas wells or land has such an interest in the gas that he can recover for an injury done by negligence, he surely may when it is done of deliberate purpose. The same considerations of natural justice which limit the ownership of running water to the usufruct, and of percolating waters to their use in a broader sense, must of necessity impose qualifications upon the enjoyment of all right of property which, from the nature of the things possessed, man must enjoy together. The owners cannot be permitted to carry on their operations in lawless irresponsibility, but must submit to such limitations as are inevitable to enable each to get his own. The fact that these limitations are not found clearly defined in the books is no proof that they do not exist. The common law is a growing tree; its principles must be continually adapted to new facts, and the changing conditions of modern life. Only the legislature can grub it up, but the courts are charged with the duty of pruning its branches, and sometimes grafting a new scion on the old stock. I concede that the defendants may lawfully take as much gas as they can get by wells drilled upon their land, and apply it to any useful purpose, though with an avowed intention of destroying the plaintiffs' wells by so doing, and a malicious pleasure in the act. But their well in its present condition is not a means of obtaining gas for any purpose. It is a mere conduit, by which the gas imprisoned in the rocks is enabled to escape into the atmosphere. All who have proved their ability to obtain gas from that reservoir are interested in common in its preservation, and the reckless waste of it is an injury to all. Whatever other qualifications may attach to the landowner's right, it seems to me clear that it must of necessity be limited to legitimate operations for profit,—not malice,—and by the requirement of ordinary care for the protection of others interested in common with himself. I am aware that the conditions attending the production and sale of natural gas are peculiar. There may be cases where the wasting of gas seems to be the only alternative to permitting another to take it without compensation. How far a court of equity would be influenced by such considerations it is not necessary now to decide, for no such facts appear in this case at present. Upon the whole case I am of the opinion that the injunction should be continued."

Messrs. Lindsey & Parmlee and Ball & Thompson, for appellants:

The plaintiffs' right to an injunction must grow out of the contractual relation between the parties, or some privity of estate, or because of waste, or the commission of trespass. There is no claim that either of the first two relations exists. Nor can the alleged injury be characterized as waste.

Grubb's App. 90 Pa. 234.

Neither is there any act of trespass on the part of the defendants.

The plaintiffs' right to the gas under their leasehold is to so much gas only as may be obtained through the well or wells or openings upon the land owned by them, or embraced within the boundaries of their leasehold.

Westmoreland & C. Nat. Gas Co. v. De Witt, 5 L. R. A. 731, 130 Pa. 235; *Duffield v. Rosenzweig*, 144 Pa. 537.

The use of the gas is an incident of the ownership, and not the ownership an incident of the use.

The owner is defined to be, "He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right to enjoy or do with as he pleases,—even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right."

2 Bouvier, Law Dict. 269; Anderson, Law Dict. 741; 1 Bl. Com. 138.

The learned court below has classed natural gas and oil with water. A more natural classification would be among those natural substances which are or are not in themselves the subject of ownership and property.

The substances of light, air, and water are by common consent, and it is believed the universal voice of mankind, not of themselves the subject of property.

See Angell, Watercourses, p. 12, note 1; *Race v. Ward*, 4 El. & Bl. 702; *Haupt's App.* 3 L. R. A. 536, 125 Pa. 224; *Garber v. Com.* 7 Pa. 265; *Philadelphia v. Collins*, 68 Pa. 116.

It is not so with oil. Whether oil be taken from the ground or from the surface of the earth by a stranger, the owner of the land from which it is taken may retake it.

Gas is also the subject of property of itself, and an action may be had to recover its value without reference to the land.

Kitchen v. Smith, 101 Pa. 452.

Doctrines derived from the analogy between different substances apply along the lines of similarity between those substances, and cease to exist at the point where the similarity between the substances ends.

The principle that a man's ownership of land covers all the land enclosed within vertical lines drawn from the boundaries of his property to the center of the earth, makes the owner of the land the owner of the oil and gas which is contained therein.

The boundary line between the lands of the defendants and the adjoining owners, in the absence of any contractual relation, limits the boundary of their respective rights.

If ownership is dependent on applying to a useful purpose, then plaintiffs have no such right in the gas as will entitle them to maintain these proceedings. Instead of having an abso-

lute property in the gas, their right is a qualified and contingent one. It becomes absolute only when and as they reduce the gas to their possession at the mouth of their wells and apply it to some useful purpose.

Natural gas, like petroleum oil, coal and iron ore, is a mineral, belongs to and is part of the realty.

Punk v. Haldeman, 58 Pa. 229; *Stoughton's App.* 88 Pa. 198; *State v. Indiana & Ohio Oil, Gas & Min. Co.* 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 120 Ind. 575.

The rights of the owner of the land even to the water which percolates, seeps, or filters through the soil are not qualified, as they are in streams which flow upon the surface of the earth, and well defined watercourses which flow under the earth, but are absolute.

Acton v. Blundell, 12 Mees. & W. 324; *Chasmore v. Richards*, 2 Hurlst. & N. 168; *Greenleaf v. Francis*, 18 Pick. 117; *Roath v. Driscoll*, 20 Conn. 533, 53 Am. Dec. 352; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 852; *Wheatley v. Baugh*, 25 Pa. 538, 64 Am. Dec. 721; *Chatfield v. Wilson*, 28 Vt. 49; *Frazier v. Brown*, 13 Ohio St. 264; *Chase v. Siloerstone*, 62 Me. 175, 16 Am. Rep. 419; *Delhi v. Youmans*, 50 Barb. 816; *Ellis v. Duncan*, 21 Barb. 230; Angell, Watercourses, 7th ed. 174; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49.

The reasons given in most of the cases are based on the fact that percolating water is a "part of the soil, or, at least, cannot be distinguished from it, so that if correlative rights as to a flow of percolating water were recognized between adjacent or neighboring owners, the landowner would be deprived of that absolute dominion over his soil which is his by the common law." These reasons apply with still greater force to natural gas.

Westmoreland & C. Nat. Gas Co. v. De Witt, 5 L. R. A. 731, 130 Pa. 235, would seem to draw the analogy between percolating water and gas very closely.

The presence or absence of malice cannot of itself determine the liability of an owner of land for an act done upon it.

Covanhovan v. Hart, 21 Pa. 495, 60 Am. Dec. 57; *Jenkins v. Fowler*, 24 Pa. 808; *Fowler v. Jenkins*, 23 Pa. 176; *Glendon Iron Co. v. Uhler*, 75 Pa. 467, 15 Am. Rep. 599; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461; *Clinch v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Phelps v. Nowlen*, 72 N. Y. 89, 28 Am. Rep. 98; *South Royallton Bank v. Suffolk Bank*, 27 Vt. 505; *Chatfield v. Wilson*, *supra*.

The ground that the defendants are not taking the gas for any useful purpose is not sufficient to support this injunction.

Mahan v. Brown and *Phelps v. Nowlen*, *supra*; *Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 444; *Chatfield v. Wilson* and *Frazier v. Brown*, *supra*; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511.

Allowing the gas which they have rightfully taken from their own land to escape into the air, does not render the act wrongful.

Pickard v. Collins, 23 Barb. 444.

Natural gas from its "fugitive and wandering existence" belongs to the owner of the land only while it is in his land and when subject to his control, or within his grasp; but when it escapes and goes into other land or comes

under another's control, the title to the former owner is gone.

Westmoreland & C. Nat. Gas Co. v. De Witt, supra; Brown v. Vandergrift, 80 Pa. 147.

Messrs. Roger Sherman and Samuel Grumbine, for appellees:

To absolve one from liability for injuries to others resulting from the use of his property, the use must be proper, ordinary, and natural, and the damage must be unavoidable, that is, resulting solely from the lawful use of one's own.

Collins v. Chartiers Valley Gas Co. 6 L. R. A. 290, 181 Pa. 143; Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 57 Am. Rep. 445.

If the property is land, and it contains a valuable though volatile product useful to man, and of commercial value, and in every day and general use for the comfort, convenience, and profit of mankind, it could not be called an ordinary and natural use of it to prevent men from using it, to destroy its commercial value and to deprive mankind of its comfort, convenience, and profit.

Williams, J., delivered the opinion of the court:

The learned judge of the court below was quite right in saying that the questions raised in this case "are of great importance and delicacy, and have never been determined in any court." The production of oil and gas in this state has furnished many questions "of great importance and delicacy" that were new, and required to be considered and determined upon facts that were never dreamed of by the sages of the common law. In the treatment of this case it is a matter of first importance to get a clear apprehension of the facts on which the questions are raised. There are two plaintiffs who join in the bill, whose interests, while like in kind, are nevertheless several and distinct. There are several defendants, but their interests appear to be joint. The two plaintiffs hold separate leases on parts of tracts in Warren and Foster counties, Nos. 5,202, 5,203, 5,207, and 5,209, aggregating about 2,200 acres. The gas company began drilling on its leases in 1887. Hague began in 1888. Each has a gas well or wells furnishing gas in sufficient volume to enable the owner to utilize it by transportation to and sale in towns in the vicinity. The defendants are owners and lessees of part of tract No. 5,207, which adjoins the lands of the gas company, and is not far from the lands of Hague. In 1890 they drilled a well on their tract, and obtained gas in considerable volume, but not sufficient to enable them to utilize it by transportation and sale. They have therefore allowed it to escape into the open air. The plaintiffs allege that the "geological formation in that locality" is such that the gas-bearing sand rock underlying all these tracts and forming the common reservoir or deposit from which the gas is obtained "is subject to drainage by the drilling of wells on any part thereof." For this reason they assert that "the flow of gas from the said well of defendants is so great that it will, if allowed to go to waste, seriously and irreparably injure the wells of the plaintiffs by drainage from the lands adjoining

and near to said defendants' wells. To prevent this they state that they entered on the defendants' land, and at a cost of about \$200 shut in the gas and closed the well. The defendants then threatened to remove the cap or plug and permit the gas to escape again into the air. Upon these facts the plaintiffs asked the court below to enjoin the defendants from removing the cap or plug from the casing or tubing in the well, and from "permitting the gas therefrom to flow into the air, or otherwise go to waste." The injunction was granted, and from that decree this appeal was taken. The affidavits show that the defendants drilled their well in 1890, at the suggestion and request of the gas company, and that negotiations for its purchase by the gas company have been conducted at some length, but without resulting in a bargain. This fact—that the well in controversy had been drilled at considerable cost by the defendants, at the request of the gas company—the learned judge rightly regarded as a significant one. In the opinion filed by him, which is an able one, he says that this fact "might defeat this application so far as the gas company is concerned;" but he regarded it as of no consequence so far as the other plaintiff was concerned, for he immediately added: "But, as it cannot affect the plaintiff Hague, it is not necessary to consider it at this time." He then proceeds to state and consider the question on which his decree was based, upon a state of facts such as might arise where an adjoining owner was guilty of malice or negligence in the conduct of operations on his land resulting naturally in injury to his neighbor. But is this conclusion of the learned judge that Hague stood on higher ground than the gas company a correct one? The acts complained of were the drilling of the well in 1890, when the wells of both the plaintiffs were in full operation, and the subsequent failure to utilize or shut in the gas. The drilling of the well was accounted for, and the suggestion of malice or negligence therein negatived by proof that it was done at the instance of the gas company. This company had a considerable gas plant, and was engaged in the supply of gas to its customers for fuel. It was interested in the development of the region, and evidently expected to buy the defendants' well if it was of sufficient size to be capable of utilization. The defendants and the gas company could not agree upon the price of the well after it was drilled, but the fact that it was drilled at the request of the company, and not of the mere motion of the defendants, was an answer to any allegation of malice or negligence on the part of Hague as well as on the part of the company, since it accounted for the act of drilling by assigning a motive therefor, both lawful and neighborly. It will not do to say that an act thus accounted for as to one plaintiff may be assumed to be the result of malice or negligence as to the other, in the absence of proof to sustain the assertion. These plaintiffs stand on common ground. Neither of them can complain of the defendants for the act of drilling the well on their land on any other ground than the existence

of malice or negligence. When the act is accounted for in such a manner as to show that it was not done with malice, or in negligence, but in good faith, as an act of ownership, and at the solicitation of the gas company, the character of the act is established, and as a basis of relief it falls out of the case. What have we then? Three landowners owning considerable holdings in the same basin, or overlying the same gas-bearing sand rock, each having an open gas well or wells on his land, drilled without malice or negligence, in a lawful manner, and for a lawful purpose. Two of these owners have been able to utilize the gas from their respective lands and find a market for it. One of them has not been so fortunate. He has gas from his well, but up to the time of the filing of this bill he has not been able to utilize or dispose of it, and his gas has gone to waste for that reason. His more fortunate neighbors come into a court of equity, and ask that he shall not be permitted to let his gas run, because, while this gas is his own, underlying his tract, and finding its way to the surface through his well, it has a tendency to drain the sand rock, and so to reduce ultimately the flow of gas from their wells. This would be equally true if the defendants were able to utilize their gas; yet it is conceded that in that case their right to the gas from their well would be as incontestable as the right of the plaintiffs to use the gas from theirs. How is that right lost? By their inability to find a purchaser? If they can find a purchaser, or turn the gas to any useful purpose, their right to the gas that flows from their well is conceded. If they cannot, their right is denied. Their well must be shut in, while their successful neighbors drain the entire basin through their open wells, and receive pay for the gas. This is a proposition to limit the power of the owner over his own by the use he is able to make of it. If he can sell his gas or his oil, or turn it to some practical purpose, his power over it as owner is unabridged. If he cannot find a purchaser, or a practical purpose to which to apply his yield of gas or oil, then his power as owner is gone. This would be an adaptation to actual business of the spiritual truth that "to him that hath shall be given; but from him that hath not shall be taken away, even that which he seemeth to have."

Does the maxim, "*sic utere tuo ut alienum non laedas*," require us to grant the relief sought in this case? If in burning the gas from their well the defendants should direct the jet towards the plaintiffs' buildings or timber, or should leave it uncontrolled, so that the wind might drive it against or towards the plaintiffs' property so as to injure or endanger it, a case would be presented in which the maxim would be applicable, and we should take pleasure in enforcing it. If the defendants' well produced nothing, and they were leaving it without plugging, so that the water might find its way into the sand rock, to the injury of others, we could punish them under the statute which prescribes the manner of plugging an unproductive well, and makes it obligatory on the owner to adopt it. But we have a well

drilled for a lawful purpose, in a lawful manner, and actually producing gas, which is not directed towards the property of another, or so consumed as to affect the buildings, timber, or crops of any adjoining owner. It is therefore not the use of the gas of which the plaintiffs complain. It is the production of it when the owner cannot sell it or turn it to any practical purpose. Now, it is doubtless true that the public has a sufficient interest in the preservation of oil and gas from waste to justify legislation upon this subject. Something has been done in this direction already by the acts regulating the plugging of abandoned wells, but it is not the public interest that is involved in this litigation. It is the interest of an adjoining owner who seeks to appropriate to himself so much of his neighbor's gas as he cannot turn into money or use for some practical business purpose, and he asks a court of equity to hold his neighbor's hands by an injunction until this appropriation is accomplished. We cannot find any rule of law or any principle of equity on which such an injunction can rest. The scope of the golden rule may be sufficiently ample to cover this case, and it may be that it would require an owner to surrender to his neighbor so much of his own property as he could not turn to his own advantage, if his neighbor was so situated that he could profit by it. Assuming this to be so, the moral obligation so arising is not enforceable by civil process. The owner of timber may pile it in heaps, and burn it, as was done in the early settlement of the country, notwithstanding the fact that his neighbor has a sawmill and all the facilities for preparing the sawed lumber for market and converting it into money. The power of the owner of the timber over it is neither greater nor less because of his neighbor's readiness and ability to market it. An owner of land may have a deposit of coal under some portion of it so small in extent, or with such an inclination, as to make it impossible for him to mine through his own tract without a greater cost to him than the value of the mined coal when brought to the surface. His neighbor may have an open mine that reaches it, and through which it could be brought at a fair profit. These circumstances do not affect the title of the owner of the coal, or confer any right on the adjoining mine owner; but it is said that the oil and gas are unlike the solid minerals, since they may move through the interstitial spaces or crevices in the sand rocks in search of an opening through which they may escape from the pressure to which they are subject. This is probably true. It is one of the contingencies to which this species of property is subject. But the owner of the surface is an owner downward to the center, until the underlying strata have been severed from the surface by sale. What is found within the boundaries of his tract belongs to him according to its nature. The air and the water he may use. The coal and iron or other solid minerals he may mine and carry away. The oil and gas he may bring to the surface and sell in like manner to be carried away and consumed. His dominion

is, upon general principles, as absolute over the fluid as the solid minerals. It is exercised in the same manner, and with the same results. He cannot estimate the quantity in place of gas or oil, as he might of the solid minerals. He cannot prevent its movement away from him, towards an outlet on some other person's land, which may be more or less rapid, depending on the dip of the rock or the coarseness of the sand composing it; but so long as he can reach it and bring it to the surface it is his absolutely, to sell, to use, to give away, or to squander, as in the case of his other property. In the disposition he may make of it he is subject to two limitations: he must not disregard his obli-

gations to the public, he must not disregard his neighbor's rights. If he uses his product in such a manner as to violate any rule of public policy or any positive provision of the written law, he brings himself within the reach of the courts. If the use he makes of his own, or its waste, is injurious to the property or the health of others, such use or waste may be restrained, or damages recovered therefor; but, subject to these limitations, his power as an owner is absolute, until the legislature shall, in the interest of the public as consumers, restrict and regulate it by statute.

The decree of the court below is reversed, and the injunction is dissolved.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA.

Annie COMITIS
v.

W. S. PARKERSON *et al.*

(56 Fed. Rep. 558.)

1. **Expatriation** must be effected by removal from the country.
2. **The relation of husband and wife** is not inconsistent with one being a citizen and the other an alien.
3. **In the absence of any act of congress** authorizing it, there can be no implied renuncia-

tion of citizenship by an American woman marrying an alien.

4. **A woman citizen of the United States who never intends to leave the country, and never, in fact, does leave it, does not become expatriated and become an alien by marriage with a subject of Italy, who, previous to his marriage has settled in the United States without intent to return to Italy, but who has never taken any steps toward naturalization.**

(June 17, 1893.)

NOTE.—Effect of marriage on wife's status as an alien.

This question is one which has not been definitely solved, and the contrariety of opinion upon it shows it to be difficult of solution. The doubt arises as to what effect should be given to modern statutes on naturalization and expatriation.

The ancient doctrine.

At the time when the existence of a right of voluntary expatriation was not recognized and there was little if any provision for naturalization the question was comparatively simple and the decisions are uniform.

The old doctrine was that an alien is not entitled to dower. Bacon, *Abr. Alien, c. Dower, a*; Comyns, *Dir. Alien*, chap. 1, *Dower, a, 2*; Co. Litt. 81 b; 2 Bl. Com. 181.

But by Statute 8 Hen. V., the alien wife might have dower if married by license of the king.

In accordance with that doctrine it was held that an alien widow of a subject is not endowable. *Priest v. Cummings*, 16 Wend. 617; *Greer v. Sankston*, 28 How. Pr. 471; *Du Bouchet v. Award of Commission*, 2 Knapp, P. C. 364.

So an alien widow of a natural born citizen cannot be endowed. *Mick v. Mick*, 10 Wend. 380.

And naturalization of the husband does not remove the disability of the alien wife to be endowed. *Sutliff v. Forgey*, 1 Cow. 86; *Delaney v. Seymour*, 5 Cow. 715; *Connolly v. Smith*, 21 Wend. 59; *Currin v. Finn*, 3 Denio, 229.

So an alien wife does not become a naturalized citizen by the naturalization of her husband. *White v. White*, 2 Met. (Ky.) 185.

In *Kelly v. Harrison*, 2 Johns. Cas. 29, 1 Am. Dec. 154, it was held that a wife who remained in Ireland when her husband came to America and who was separated from him for nearly thirty years could not claim dower in his estate, he having

become an American citizen, since there was evidence of a permanent separation, under which circumstances the citizenship of the wife did not follow that of the husband.

And the converse was also held that neither the marriage of a woman native born to an alien nor her residence in a foreign country constitutes her an alien. *Beck v. McGillis*, 9 Barb. 35.

So the marriage with an alien whether friend or enemy produces no dissolution of the native allegiance of the wife. It may change her civil rights, but it does not affect her political rights or privileges. The general doctrine is that no person can by any act of his own, without the consent of the government, put off his allegiance and become an alien. *Shanks v. Dupont*, 28 U. S. 3 Pet. 242, 7 L. ed. 666.

But it was held in that case that if she departed with her husband from our territory at the close of the war, her future allegiance was fixed by the treaty of peace to the British crown.

It was held that if the woman goes to a foreign country with her husband and remains there for ten years after his death, and expresses the intention of remaining there indefinitely, it will be presumed, in the absence of evidence to the contrary, that she took the necessary steps to become a citizen there. *Alsberry v. Hawkins*, 9 Dana, 177.

But a wife who, in duty bound, has shared the lot of her husband and abides by his choice during coverture, ought to be allowed at its termination to have the privilege of electing for herself, and of fixing not only her future but her past character. Her acquiescence in his choice, however willing, ought not to be considered as her own free independent act, but is the effect of that dependence and constraint which by law, as well as by nature, belong to her condition. If, therefore, after the husband's death she returns to her native country and resumes her residence and citizenship there, it

PLEA to the jurisdiction of the court over an action brought to recover damages for the alleged wrongful death of plaintiff's husband. *Sustained.*

The facts are stated in the opinion.

Messrs. E. A. O'Sullivan, City Atty., for defendant City of New Orleans, and H. C. Miller and Charles F. Buck for defendants Parkerson et al., in support of the plea.

Mr. John Q. Flynn for plaintiff, contra.

Billings, District Judge, delivered the following opinion:

This case is submitted on a plea to the jurisdiction of the court. The defendants are citizens of Louisiana. The question is whether the plaintiff is an alien. The admitted facts are these: The plaintiff was a native born citizen of the state of Louisiana. On the 30th day of July, in the year 1881, in Louisiana, she intermarried with Loretto Comitès, who was a native born subject of the kingdom of Italy, and had several years previous to that time immigrated from Italy, and established his residence in New Orleans, where he engaged in business, and where he, up to the time of his marriage, and he and his wife, after his marriage, continued to reside, it being at all times after his coming to Louisiana his purpose not to return to Italy to reside, but to continue to reside in Louisiana. After his death his wife continued to reside in Louisiana, and at no time had she the purpose to remove to Italy. The question may be generalized thus: Does a woman who was a citizen of the United States, who

never intended to leave it, and never did leave it, become expatriated and become an alien by marriage with a man who had been a subject of Italy, but who, previous to his marriage, had settled in Louisiana, and had forever severed himself from Italy?

The arguments on both sides have conceded (what could hardly be denied) that the tie which binds together a government and its subjects or citizens, and which creates the reciprocal obligations of protection and obedience, can be dissolved only in such a mode as has the assent of both parties; that, so far as concerns the government, this assent must be expressly made, or must be inferred from the fundamental or statutory provisions by which the action of the government involved is regulated. A change of the allegiance due to the United States, a throwing of it off on the part of a citizen, involves on the part of the government an acquiescence from that department of government which, according to its constitution, must acquiesce in it; and, on the part of the citizen, the manifestation of the purpose to expatriate himself by some unequivocal act, which must also be recognized by the government to be adequate for that purpose.

I shall consider the question in two aspects: First, has the government of the United States in any way authorized or sanctioned the withdrawal of the plaintiff's allegiance to itself? and, secondly, do the facts of the case show a purpose on the part of the plaintiff to withdraw and transfer her allegiance?

should be assumed that she merely submitted herself temporarily to the domain of the foreign country, without having renounced her native allegiance, that she never became an alien, and that her property rights remain as though she had never been out of her native country. *Moore v. Tisdale*, 5 B. Mon. 362.

The doctrine since the enactment of modern statutes.

In 1855 the United States adopted a law making the naturalization of the husband confer citizenship on the wife.

And the United States Revised Statutes, § 1999, gives the right of expatriation.

Both England and France have statutes similar to that of the United States, making an alien woman who marries one of their subjects herself a subject. 7 & 8 Vict. chap. 66; French Civil Code, art. 12. And each country also recognizes the right of expatriation.

Opinion is not uniform as to the effect to be given to this legislation. The opinion in *COMITIS V. PARKERSON*, shows the diverse opinions which the attorneys-general of the United States have held.

The opinions of law writers appear to be no more uniform.

Morse (*Citizenship*, § 98) quotes Calvo (*Derecho Internacional*, vol. 1, p. 238) to the effect that the marriage of a woman with a foreigner will change her nationality according to the legislation of nearly all the nations of Europe and America. Again (§ 101) he quotes Demangeat (*Condition Civile des Étrangers en France*) that the act of marrying an alien is a voluntary act of the woman which brings about the change of nationality. But he subsequently (§ 102) quotes Demangeat DeDelvincourt, de Duranton, de Demante and de Valette as insisting that the national character of the woman is not necessarily and without her con-

sent changed absolutely as an unavoidable incident of marriage.

Lord Chief Justice Cockburn in his work on *Nationality* (p. 216) adopts the view that the nationality of a married woman should always follow that of the husband, whether original or acquired.

Field in his outlines of an *International Code* (sec. 259) says: "The marriage of a woman in her own country with a foreigner domiciled therein should certainly not denationalize her." But (sec. 260): "If before or after her marriage the domicile of the woman is permanently removed from the territory of the nation to which she previously belonged, she acquires by such marriage and removal the national character of her husband."

Morse himself says, section 137, the original citizenship or nationality of a woman is acquired or lost as an incident of marriage.

In several cases before the Mixed Commission on British and American claims, provided for by the treaty of Washington of May 8, 1871, women born within the United States and always domiciled there were allowed standing before the Commission as British subjects. Report of Her Majesty's Agent on the Mixed Commission of British and American Claims, pp. 337-341.

The Commission on Mexican and American Claims under Treaty of July 4, 1868, held that a married woman by the mere fact of marriage invests herself with the nationality of her husband, without the necessity of any more manifest expression of her wish. *Martin's Case*, *Rodriguez History*, page 26.

Although one of the opinions of the Commission elsewhere stated that marriage to a foreigner does not necessarily deprive the wife of the national character of origin, citing *Case of Mary Diencourt*, No. 235, before United States and Mexican Claims Commission, Washington, D. C.

First, as to any authority or sanction of the government of the United States. There can be no doubt but that the department of government which, in the distribution of authority under the constitution, has power over the subject of naturalization, has it also over the subject of expatriation. The Constitution is silent on the subject of expatriation; but article 1, § 8, par. 4, provides that "congress shall have power to establish a uniform rule of naturalization." Where the Constitution is thus silent as to who can denationalize, that department which can nationalize must be held to have authority to expatriate. Since the decision of *Chirac v. Chirac*, 15 U. S. 2 Wheat. 260, 269, 4 L. ed. 234, 236, that power has been settled to be vested exclusively in congress.

Down to the Act of July 27, 1868, the question of right of expatriation and its limitations had been considered by the Supreme Court of the United States in the following cases: *The Santissima Trinidad*, 20 U. S. 7 Wheat. 283, 5 L. ed. 454; *Talbot v. Janson*, 8 U. S. 3 Dall. 133, 1 L. ed. 540; *Inglis v. Sailors Snug Harbor Trustees*, 28 U. S. 8 Pet. 99, 7 L. ed. 617; and *Shanks v. Dupont*, 28 U. S. 3 Pet. 242, 7 L. ed. 686. There is also an able exposition of the subject given by Chief Justice Ellsworth in his opinion in the *Case of Isaac Williams*, 1 Tucker, Bl. Com. pt. 1, Append. 486, cited in *Murray v. Charming Betsy*, 6 U. S. 2 Cranch, 82, 2 L. ed. 214, note. The law established in these cases is thus summarized by Chancellor Kent, 2 Com. *49: "The better opinion would seem to be that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no ex-

isting legislative regulation on the case, the rule of the English common law (perpetual allegiance) remains unaltered."

This doctrine upon the matter of expatriation was declared and reiterated and inflexibly maintained, notwithstanding congress had, from the year 1802, permitted an alien, in being naturalized in the United States, to abjure his native allegiance without any release of it from his former sovereign. The inconsistency of the theory of perpetual allegiance with the admission of foreigners to citizenship by requiring them simply to renounce for themselves all preceding allegiance was admitted by the supreme court in *Shanks v. Dupont*, *supra*, and by Judge Kent, but it was tacitly admitted by both the court and the commentator that no power could correct the inconsistency or deal with the subject save congress. Congress, on the 27th of July, 1868 (15 Stat. at L. 223), passed the act entitled "An Act Concerning the Rights of American Citizens in Foreign States." It is to be observed that the act itself, as does its title, deals only with the protection of aliens by birth who have become citizens by naturalization. As to them, it declares it to be the determination of the United States to accord to them, when in foreign states, the same protection as is accorded to native born citizens similarly situated. The whole scope and force of the act, when most liberally construed, even when expanded by the more general terms of the preamble, declares that naturalized citizens, having, according to the principles of our government, the same rights as native born citizens, shall have by law the same protection abroad. As to whether allegiance can be acquired or lost by any other means than

The uniform doctrine of the courts under these statutes seems to be that marriage of an alien woman with a citizen makes her a citizen regardless of her actual domicile.

Under the Act of February 10, 1855, the citizenship of the husband whenever it exists confers citizenship on the wife. *Kelly v. Owen*, 74 U. S. 7 Wall. 496, 19 L. ed. 233; *United States v. Kellar*, 11 Biss. 814; *People v. Newell*, 38 Hun, 78; *Luhrs v. Eimer*, 80 N. Y. 171; *Leonard v. Grant*, 5 Fed. Rep. 11, 11 Rep. 327, 6 Sawy. 603; *Gumm v. Hubbard*, 97 Mo. 811.

A woman married abroad to a citizen of this country becomes herself a citizen, although she never comes here. *Halsey v. Beer*, 52 Hun, 366.

An alien whose husband becomes naturalized thereby herself becomes a citizen, although she may have been living at a distance from him for years and never comes to the United States until after his death. *Headman v. Rose*, 63 Ga. 453.

The fact that the woman always continued to reside abroad is of no consequence under the act of congress. *Kane v. McCarthy*, 63 N. C. 299.

If the husband is a citizen, the wife will be a citizen. *Knickerbocker L. Ins. Co. v. Gorbach*, 70 Pa. 150.

The citizenship of the woman will not be prevented, under the act of congress, by the facts that her husband was naturalized after the marriage, that she had not resided in this country for five years and was under twenty-one years of age. *Renner v. Muller*, 12 Jones & S. 535.

In *Burton v. Burton*, 1 Keyes, 350, *Mullen, J.*, held that under the act of congress, only those women become citizens by marriage who are entitled to 22 L. R. A.

naturalization; and to be entitled to naturalization one must be a resident in this country, hence an alien wife, who has never resided in this country, does not become a citizen by the naturalization of her husband. But the majority of the court did not agree with him, and it was held that the naturalization of the husband naturalized the wife, although she had never been in this country.

An alien woman who has married a subject is no longer entitled to the statutory privileges of an alien. *Reg. v. Manning*, 2 Car. & K. 884.

When the contingency of a citizen woman marrying an alien domiciled here is viewed in the light of the above legislation, and of the probable course which foreign courts would take in reference to her citizenship as judged from the decisions which courts in this country have made in regard to women marrying citizens of the country and remaining abroad it would seem that she should be treated as an alien.

So it has been held that a French woman who has become naturalized under the statute by a marriage with an American citizen will again become an alien, capable of suing in the federal courts, by a second marriage to a French citizen residing in this country. *Pequignot v. Detroit*, 16 Fed. Rep. 211.

But it has also been held that the citizenship of a foreign born woman who has become an American citizen by marrying one is not lost by the death of her husband and her subsequent intermarrying with an alien so as to prevent her minor children from acquiring the rights of citizenship. *Kreitz v. Behrensmeyer*, 125 Ill. 141. H. P. F.

statutory naturalization is left by congress in precisely the same situation as it was before the passage of this act. During the year 1863, and since, five treaties have been entered into between the United States and foreign governments based upon this statute, in which the right of expatriation is dealt with, (which will be referred to hereafter;) and in all these treaties the right is confined, as is the statute, to that of citizens or subjects of our country who have become citizens or subjects of others by direct statutory naturalization. So that with reference to the question before the court, the law is left where it was previous to the year 1868, and congress has made no law authorizing any implied renunciation of citizenship.

I think the conclusion might be rested here. But, even if congress, in the preamble to the Act of 1868, had meant to declare that there might be expatriation effected in connection with other means than by naturalization abroad, the settled doctrine as to expatriation would prevent the plaintiff from being regarded as expatriated. Expatriation must be effected by removal from the country. It cannot be denied that whatever right of expatriation congress meant to declare by the act of 1868 is in the express language of the preamble based entirely upon the inborn right to seek happiness by free removal from one country to another. It could not, therefore, have been intended by congress in that act that citizens should expatriate themselves, and remain permanently within the country. The right is limited to or conditioned upon actual removal, by the public writers. Puffendorf, in his *Law of Nations* (Book 8, chap. 11, § 2), says: "But now the usual way by which subjection ceases is when a man by permission of his own commonwealth voluntarily removes into another, and settles himself and his effects and the hopes of his fortune there."

And again, in section 3, he says: "But then it must be observed that by removing in this place I understand the departing out of the dominions and territories of the commonwealth, and not the changing its authority, and continuing to live in its dominions."

Some light may be obtained upon the subject by considering the laws of the states before the adoption of the constitution. All were adverse to the right to expatriate save Virginia and Pennsylvania. I have not had access to the act of Pennsylvania. That of Virginia is given in *Talbot v. Janson*, 3 U. S. 3 Dall. 136, 1 L. ed. 541, *note*. The words of the law are these: "Whosoever any citizen of this commonwealth, shall, by deed in writing, under his hand and seal, executed in the presence of, and subscribed by, three witnesses, and by them, or two of them, proved in the general court, any district court, or the court of the county or corporation where he resides, or by open verbal declaration made in either of the said courts, to be by them entered of record, declare that he relinquishes the character of a citizen, and shall depart out of this commonwealth, such persons shall, from the time of his departure, be considered as having exercised his right

of expatriation, and shall thenceforth be deemed no citizen."

It will be seen from this statute that to effect the expatriation the citizens must make or have passed in a court of record a public declaration of his renunciation, but that, even after this had been done and recorded, the citizenship ceased not until from the time of the departure from the commonwealth. Whenever the subject has been referred to by the United States Supreme Court the same view has been taken. In *The Santissima Trinidad*, 20 U. S. 7 Wheat. 283, 5 L. ed. 454, *Justice Story*, at page 348, L. ed. 470, after declining to express an opinion upon the general question of the right of an American citizen, independently of the authority of a legislative act, to throw off his allegiance to his native country, adds: "It is perfectly clear that this cannot be done without a bona fide change of domicile."

The syllabus in *Talbot v. Janson*, 3 U. S. 3 Dall. 138, 1 L. ed. 540, as prepared by *Justice Curtis* in his decisions of the Supreme Court (vol. 1, p. 128), states the doctrine of that case upon this point to be: "If the right of expatriation exists, not only a renunciation of citizenship of the United States but actual removal for some lawful purpose and the acquisition of a domicile elsewhere are necessary to effect it."

See also *The Dos Hermanos*, 15 U. S. 2 Wheat. 76, 98, 4 L. ed. 189, 194, where the court says that, even if Mr. Miller had been expatriated by his resumption of domicile in the United States, he became a "reintegrated citizen."

To the same effect is the doctrine of the five treaties above referred to. Those treaties were: A treaty with the North German Confederacy (15 Stat. at L. 615); a treaty with Bavaria (Id. 661); a treaty with Wurttemberg (16 Stat. at L. 735); with Hesse, (Id. 743); and Ecuador (18 Stat. at L. 69). These treaties, as has been remarked, reciprocally give effect to the naturalization of the citizens or subjects of either government in the country of the other. So dependent is this recognition of change of allegiance upon actual change of country that in each treaty there is the same article as to the effect to be given to a return to the native country *animus manendi*. For instance, in the treaty with the king of Prussia (15 Stat. at L. 616), article 4 provides: "If an American naturalized in North Germany renews his residence in the United States, without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany."

Alsberry v. Hawkins, 9 Dana, 177, 38 Am. Dec. 546, is one of the few American cases which, following the law of Virginia, the parent state of Kentucky, maintains the right of expatriation. But the court there held that expatriation must be actual; there must be a going forth from the country allegiance to which is surrendered.

My conclusion, therefore, is that from the utterances of the public writers, of the supreme court, and the provisions of the treaties, even if congress meant to imply that ex-

patriline from the United States might be effected by means other than naturalization in a foreign country, it must have meant that it should be conditioned upon actual departure from the country.

It does not affect the conclusion that the domicile of the wife was controlled by that of the husband. Whether decided by her or by one whom she had authorized to decide for her, the fact of her residence here, with the purpose on the part of her husband and herself to remain here always, is, as it seems to me, both upon principle and authority, an insuperable obstacle in the way of her ceasing to be considered a citizen of the United States. Nor does it seem to me that the Act of Congress of February 10, 1855 (10 Stat. at L. 604; Rev. Stat. § 1994), which provides that an alien woman by marriage with a citizen shall become a citizen, authorizes any inference that congress meant to declare the converse, viz., that a citizen woman by marriage with an alien should become an alien. The law is in such well-considered and guarded terms as to forbid any extension of it by implication. The public policy of the United States on the subject of immigration has been based upon its interests. A continent was to be populated. Vast tracts of land were to be settled and occupied chiefly by foreigners. Therefore congress has uniformly encouraged and fostered the immigration and naturalization of foreigners in every proper way. *Lynch v. Clarke*, 1 Sandf. Ch. 657, 7 L. ed. 469, and *Chief Justice Ellis*—worth's opinion in the *Case of Isaac Williams*, 6 U. S. 2 Cranch, 82, 2 L. ed. 214, *note*. Again, congress considered the investiture of an alien with the rights of citizenship as an advantage in the reception of which acquiescence might be presumed, which would be far from true as to the loss of those rights by a citizen. The relation of husband and wife was dealt with by congress only in the furtherance of this public policy of the nation, and the statute was not intended as a general enactment upon the consequences of marriage between people of different nationalities. Therefore, as it seems to me, if inference is to be resorted to upon the subject, the motive on the part of congress for making an alien woman a citizen by her marriage with a citizen would have been the very reason for its not intending the converse,—that a citizen woman by marrying an alien should become an alien.

The relation of husband and wife is not inconsistent with one being a citizen and the other being an alien. In *Priest v. Cummings*, 16 Wend. 617, 626, the supreme court of New York, *Judge Nelson* afterwards *Mr. Justice Nelson*, being the organ of the court, held that in the act of congress, known as the "Naturalization Act," the words, "any alien being a free white person," included an alien married woman, and that an alien wife might be naturalized without the concurrence of her husband; *Judge Nelson* quoting from the opinion of *Shanks v. Dupont*, 28 U. S. 3 Pet. 248, 7 L. ed. 668, to the effect that "the incapacities of married women do not affect their political rights, nor prevent them from acquiring or losing a national character; that

their political rights do not stand upon the doctrines of municipal law, but upon the more general principles of the law of nations." If the doctrines of international law and our own naturalization statute sanction a married woman becoming a citizen for herself and without the concurrence of her husband, how shall the fact of a woman's marriage with an alien born husband, who has cast off forever all political connection with any country save this, and has settled here for life, work *ipso facto* an undeclared implied surrender of her citizenship? In *Beck v. McGillis*, 9 Barb. 35, it was held that the marriage of a female with an alien did not render her an alien, so as to prevent her taking real estate by dower.

I have so far considered the question submitted with reference to any assent on the part of the government to a renunciation of allegiance on the part of the plaintiff. Very much of what I have said bears upon the remaining point to be considered,—whether the plaintiff has herself done any act which, by fair intentment, manifested a purpose of voluntarily withdrawing her allegiance from the United States. The plaintiff is in this case claiming a privilege acquired, but the case must be determined upon precisely the same considerations as if the question arose upon an objection interposed against her claim of a right, such as if she was setting up a right of dower, and it was claimed she had become an alien. In either case the question would be the same,—has the plaintiff by her marriage with *Comitis* renounced her citizenship of the United States? According to the facts of the case, *Comitis* several years before the marriage settled here with a purpose to withdraw altogether from Italy, his native country, and never to leave this country, which purpose he retained till the time of his death. The plaintiff herself never left the country, and never intended to leave. The inference to be drawn from the plaintiff's marriage with *Comitis*, under these circumstances, as it seems to me, is that the plaintiff meant to retain, and her husband ultimately to acquire, citizenship in the United States. According to the doctrine laid down by the English courts, especially by Sir William Scott, and reiterated by the United States Supreme Court in *The Venus*, 19 U. S. 8 Cranch, 255, 8 L. ed. 554, in case of a war between the United States and Italy, if *Comitis* (doing less than is shown to have been done by him in his case towards making this his permanent domicile) "had removed to this country, settled himself here, and engaged in the trade of the country, he would have furnished such evidence of an intention permanently to reside here as would have stamped him with the national character" of the United States. Page 279, 8 L. ed. 562. I cannot see how, if these circumstances would have stamped upon him the national character, with respect to his goods on the high seas, they should not be considered as stamping the same national character upon him as a husband in the opinion of the woman who was about to marry him, and thus furnish a clear indication of the intent on her part not to renounce the protection of the

government of the country in which she and he intended to continue to reside. Both the husband and wife intended this country as their permanent domicile. By virtue of his settlement and residence here the constitution makes his children citizens of the United States. By reason of his settlement and residence here the courts adjudge his property, when outside of all countries, that of a citizen. If the controlling circumstances of a man's life render his children and his property American, can a union with him by marriage be held to indicate a purpose on the part of the wife to expatriate herself and render herself an Italian? If, even when renunciation of allegiance is permitted, express renunciation is not allowed except when accompanied by actual departure from the country, *a fortiori*, remaining and intending to remain in one's native country permanently forbid any withdrawal from allegiance by implication.

My conclusion, for the reasons which I have thus stated, is that on the questions of naturalization and expatriation the judgment of the courts must not outrun the action of congress, and that the courts must carefully ob-

serve the lines of demarcation which the congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by congress, and not by the courts; and that the laws of congress do not authorize, nor do her own acts impute, any cessation of her citizenship of the United States. Four attorney-generals of the United States have given opinions upon the question as to the effect of a female citizen marrying an alien husband. Two have held that she became an alien, two that she remained a citizen. One of the present justices of the supreme court, when he was district judge, whose every opinion has my great respect, due not more to his elevated position than to his commanding fitness for it, came to the opposite conclusion to that which I have reached. *Pequignot v. Detroit*, 16 Fed. Rep. 211. But in that case the facts characterizing the residence of the husband and wife may have made it what the public writers term temporary residence, whereas the intent of the plaintiff and her husband was to remain in the United States always.

I think the plea must be maintained, and the suit dismissed without prejudice.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Burdella PARROT *et al.*

v.

Miles W. AVERY, *Appt.*

(.....Mass.....)

1. The bare fact that a deed retained by the grantor without recording during his lifetime was executed in the presence of a witness is not sufficient to show that it was delivered during his life.
2. A gift by will of a chest and its contents does not operate as a devise of land, by reason of the fact that an undelivered deed of the land to the same person was in the chest.

(October 20, 1898.)

APPEAL by the tenant from a judgment of the Superior Court for Berkshire County in favor of demandants in an action brought to recover the possession of certain real estate which the tenant claimed under a deed executed by his grandfather, Miles Avery, deceased, but which demandants alleged was never delivered, and also under a clause of testator's will giving the tenant the chest and its contents, among which was the deed in question. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. A. Chalkley Collins**, for demandants, appellees:

The tenant cannot acquire title under his

deed unless there was a valid delivery of the deed by the grantor during his lifetime. Delivery is an indispensable requisite to the validity of a deed.

Shurtleff v. Francis, 118 Mass. 154; *Stone v. French*, 37 Kan. 145; *Weisinger v. Cock*, 67 Miss. 511; *Porter v. Woodhouse*, 59 Conn. 568; *Stillwell v. Hubbard*, 20 Wend. 44; *Wellborn v. Weaver*, 17 Ga. 267. 63 Am. Dec. 245, notes.

The mere manual transfer of the deed from the executor to the tenant cannot constitute a delivery.

Fay v. Richardson, 7 Pick. 91.

The tenant cannot take under the will, as there is no attempt on the part of the testator to convey the property by his will, except in the residuary clause. The testator does not refer to the deed in his will nor try to make it a part of the will, nor is there any evidence of any desire or intention on his part to do so.

1 Jarman, Wills, p. 741; *Newton v. Seaman's Friend Soc.* 130 Mass. 91, 39 Am. Rep. 433.

Mr. Herbert C. Joyner, for tenant, appellant:

The executors of the will, agreeable to its provisions, handed over said deed to the tenant. He accepted it, had it recorded, and took possession of the premises before this action was brought. Has there not been a delivery of this deed sufficient to give the tenant a title?

Where a deed is delivered to a third person for the grantee and is handed by that person to the grantee after the death of the grantor it is a good delivery and takes effect from the

NOTE.—It appears in the brief of counsel, though not stated by the court, that the attestation clause signed by the witness to the deed stated in the usual form that it was "signed, sealed, and delivered" in his presence, thus raising the question of the effect of such recital as evidence of delivery. 23 L. R. A.

For prior cases in this series, as to the delivery of a deed, see *Standford v. Standford* (Mo.) 3 L. R. A. 299, and note; *Lee v. Fletcher* (Minn.) 12 L. R. A. 171; *Cook v. Patrick* (Ill.) 11 L. R. A. 573; *Porter v. Woodhouse* (Conn.) 13 L. R. A. 64; *Peck v. Rees* (Utah) 13 L. R. A. 714.

time it was first handed over to the third person.

Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; *Foster v. Mansfield*, 5 Met. 413, 37 Am. Dec. 154.

If the court finds that it was the intention of Miles Avery to have this deed take effect at the time it was executed "signed, sealed, and delivered," it will be considered a delivered deed and transfer the title, although it was not actually handed over until after the grantor's death, and was never beyond the control of the grantor.

Sneathen v. Sneathen, 104 Mo. 201.

A deed may operate as a deed, although not actually handed over to the grantee until after the death or other disability of the grantor.

Wheelwright v. Wheelwright, 2 Mass. 447, 3 Am. Dec. 66.

A deed may be handed over by the administrator of a deceased grantor, where there has been a constructive delivery by the deceased in his lifetime, and it will operate as the deed of the grantor, taking effect from the time of the constructive delivery.

Ray v. Richardson, 7 Pick. 91.

When an instrument of conveyance is sealed and delivered with an intention on the part of the grantor that it shall operate immediately and there is nothing to qualify the delivery but keeping the deed in the hands of the grantor, it is a valid and effectual deed in law and equity. The execution of the deed in the presence of an attesting witness is sufficient evidence from which to infer a delivery.

Moore v. Hazelton, 9 Allen, 102.

The deed may remain with the grantor and it will be a good delivery if there are other acts and declarations sufficient to show an intention to treat it as delivered.

Regan v. Howe, 121 Mass. 424.

There is such reference to the deed in the will as to give the deed a testamentary character.

A testator may refer to deeds and other instruments or monuments or existing facts so as to make them part of his will.

Thayer v. Wellington, 9 Allen, 283, 85 Am. Dec. 753; *Newton v. Seaman's Friend Soc.* 130 Mass. 91, 89 Am. Rep. 433; *Thompson v. Lloyd*, 49 Pa. 128.

Should the court hold that there is such reference to this deed in the will of Miles Avery as to give the deed a testamentary character it is competent for the tenant now to offer to have the deed admitted to probate as a part of the will.

Newton v. Seaman's Friend Soc. 130 Mass. 91, 39 Am. Rep. 433; *Waters v. Stickney*, 12 Allen, 1, 90 Am. Dec. 122.

If testator refer to monuments or existing facts so that his purpose as to a particular legatee and the character of the legacy is shown to be fully settled, the law gives the legatee the benefit of the legacy.

Smart v. Prujean, 6 Ves. Jr. 580; *Habergham v. Vincent*, 2 Ves. Jr. 228.

The plain and lawful intent of the testator must not be defeated.

King v. Melling, 1 Vent. 231; *Doe v. Lamington*, 2 Burr. 1112.

Where a promissory note of the testator was

held void as a note it was held good as a legacy. *Loring v. Sumner*, 23 Pick. 98.

Allen, J., delivered the opinion of the court:

1. The agreed facts fail to show a delivery of the deed in the grantor's lifetime. The grantor retained control of the deed and of the land. There was no prior bargain with the grantee, and no indebtedness to him nor relation of trust towards him. He has no knowledge of the execution of the deed. The only consideration was love and affection. The deed was not recorded during the grantor's lifetime. There was no oral declaration by the grantor that he meant to have it take effect at once. In short, there was nothing tending to show a delivery of the deed except the bare fact that it was executed in the presence of a witness. The question of delivery is a question of fact, and delivery in the grantor's lifetime must be proved. There must have been an intention that it should operate as a present conveyance of title. A finding of the delivery of the deed would not be warranted on the agreed facts. *Stevens v. Stevens*, 150 Mass. 557; *Shurtleff v. Francis*, 118 Mass. 154; *Harvok v. Pike*, 105 Mass. 560, 7 Am. Rep. 554; *Brabrook v. Boston Five Cent Sav. Bank*, 104 Mass. 228, 232, 6 Am. Rep. 222; *Olase v. Breed*, 5 Gray, 440; *Younge v. Guilbeau*, 70 U. S. 3 Wall. 636, 641, 18 L. ed. 262, 263; 8 Washb. Real Prop. 5th ed. 299 *et seq.* There were no acts or declarations of the grantor sufficient to show an intent to treat it as delivered, or circumstances such as were found to be sufficient in *Lowd v. Brigham*, 154 Mass. 107, 113, 114, and cases there cited, and in *Regan v. Howe*, 121 Mass. 424.

2. Even though it be assumed that the undelivered deed was in the chest when the will was signed, the gift in the will of "my chest and its contents, except the bank books," does not operate as a devise of the land. The danger of using words of this kind in a will is pointed out by Chitty, J., in *Robson v. Hamilton* [1891], 2 Ch. 559, because an article may be in the chest one day and out of it the next, or may be put there for safe keeping during the testator's last illness by somebody who is taking care of things which are found lying about. Moreover, this form of gift, if it speaks from the death of the testator, would enable him to increase or diminish his gift at pleasure by putting things into the chest or taking them out from time to time, thus accomplishing what cannot be done by referring in the will to a separate paper thereafter to be prepared and signed by the testator. *Thayer v. Wellington*, 9 Allen, 283, 85 Am. Dec. 753. However, this aspect of the case need not be dwelt on, because the words of the gift are not sufficient to carry the land, even though it was clearly proved that the deed was in the chest all the time. The reason of this is that the deed is not to be considered as property in itself, but evidence of title to property situated elsewhere. Land cannot be deemed to be included among the contents of a chest, merely because a deed conveying it, or an undelivered deed describing it, is contained therein. Many cases are to be found in the books where ques-

tions have arisen whether gifts of goods, or chattels, or property, or things contained in or the contents of a certain place, or house, or closet, or cabinet, or desk, or trunk, should be held to include money, bonds, promissory notes, banker's receipts, or other similar articles of personal property, and the decisions have not been uniform. See cases cited in 1 Jarman on Wills, 6th Am. ed. by Bigelow, 709 *et seq.*; 2 Wms. Exrs. p. 1080 *et seq.*; Theobald, Wills, 8d ed. 145; *Penniman v. French*, 17 Pick. 404, 28 Am. Dec. 309; *Lock v. Noyes*, 9 N. H. 430. But no case has been cited by counsel, or found by us, in which it has been held that land would pass under such a gift by reason of a deed thereof being found among the contents of the place or receptacle designated. On the other hand, title deeds have been selected as the most striking illustration of what would not pass under such general

words. *Brooke v. Turner*, 7 Sim. 671; *Robson v. Hamilton* [1891], 2 Ch. 559, 565, 566. And a mortgage has been expressly held not to be so included, in *Fleming v. Brook*, 1 Sch. & Lef. 818, and *Brooke v. Turner*, *supra*. It is not as if the testator, in his will, had made a gift of the deed in express terms, or had directed it to be delivered to the tenant. That would have presented a different question. It is, of course, possible that the testator may have mistakenly supposed that his undelivered deed to the tenant would be effectual to convey the land after his own death. If that was so, it might be a reason why he did not give the land to the tenant by his will; but it would not change the construction of the will itself, and enlarge the meaning of the words used, so as to make the land pass under the gift of the chest and its contents.

Judgment for demandants affirmed.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, for
Use of Philadelphia County *et al.*, *Appl.*,
v.

George SCHOLLENBERGER.

(156 Pa. 201.)

1. That one having goods for sale is a nonresident manufacturer and sells his goods within the state through an agent does not, under the Federal Constitution, relieve him from the operation of the local police laws, if he keeps in the state a store containing a stock of goods for the inspection of customers from which he makes sales to actual customers.
2. An original package, trade in which is protected by the Federal Constitution, is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce.
3. Showing that a package of material to be used as food was made, stamped, and branded in another state is not sufficient to show that it is an original package, trade in which is protected by the Federal Constitution, without showing further that it was in the form usually adopted in the trade for purposes of transportation.
4. The sale of a package of goods, en-

tire and unbroken as imported from another state will be protected as interstate commerce only when the form and size of the package is that usually adopted in the trade for purpose of transportation, and not when adopted with a view to unlawful intrastate retail trade.

(July 19, 1893.)

A PPEAL by complainant from a judgment of the Court of Common Pleas No. 3 for Philadelphia County reversing a judgment of a magistrate's court in favor of plaintiff in an action brought to recover the statutory penalty for an alleged violation of the oleomargarine Act. *Reversed.*

The case was submitted upon an agreed statement of facts, which was as follows:

That the defendant is a resident and citizen of the state of Pennsylvania.

That the defendant is engaged in business at 219 Callowhill street, in the city of Philadelphia, Pa., as the agent of the Oakdale Manufacturing Company, whose principal office and place of business is in the city of Providence and state of Rhode Island; and was acting as such agent from the first day of June, 1891, and on the 30th day of November, 1891.

That the said defendant, on the 21st day of July, 1891, paid to the collector of internal revenue of the first district of Pennsylvania the

NOTE.—The above decision is a very notable one, making a new distinction or test as to original packages of commerce which is of very great importance. That the test adopted based on commercial usage is much less certain in its application than the test of the mere existence of an unbroken package as imported, does not imply that it is or is not the true one although certainty is much to be desired. But another consideration which may perhaps be regarded as more controlling is the question whether or not the shipper and importer of goods from one state into another to be sold in original packages in defiance of state law can be restricted by any custom of the trade as to the form and size of packages which shall be protected. Since the sale in any form or size of package is condemned by the state law and the parties to the business

must intend to do what the state law forbids, it may be questioned whether they have not the right if they are entitled to sell their goods in defiance of state law at all, to put the goods up in the form which will most facilitate their sales; or to put it in another form whether a package which can be readily sold directly to the consumer may not be an article of interstate commerce when transported from another state and sold unbroken. Whatever may be the final decision on this point by the Supreme Court of the United States, the Pennsylvania court has enlarged the law of interstate commerce in a very important particular.

As to what constitutes original packages, see also *State v. Chapman* (S. Dak.) 10 L. R. A. 432, and *Keith v. State* (Ala.) 10 L. R. A. 430.

sum of four hundred and eighty dollars, as and for a special tax upon the business as agent for the Oakdale Manufacturing Company in oleomargarine, and obtained from said collector a writing in the words following: "Internal revenue store license to defendant as agent."

That on November 30, 1891, in the city of Philadelphia, at his said place of business as aforesaid, said defendant, acting as agent for the said Oakdale Manufacturing Company, sold and delivered to one John H. Berry, carrying on the business of a coffee house, at 606 Lombard street, in the city of Philadelphia, Pa., a package containing eighty pounds of oleomargarine for the sum of \$12.40, which said sum of \$12.40 was paid to the defendant as agent of the Oakdale Manufacturing Company on the said 30th day of November, 1891; which said package of oleomargarine was manufactured in the state of Rhode Island and shipped to their agent, the defendant, the said George Schollenberger, who sold and delivered the said package, unbroken, to the said John H. Berry, and which package was marked, branded, and stamped in the manner prescribed by the commissioner of internal revenue with the approval of the secretary of the treasury.

If, upon this statement of facts, the court is of the opinion that the defendant is liable for the penalty imposed by the act of assembly, entitled, "An Act for the Protection of the Public Health and to Prevent the Adulteration of Dairy Products and Fraud in the Sale thereof," approved May 21, 1885, then judgment to be entered in favor of the commonwealth and against the defendant in the sum of \$100 and costs of this suit; but if the court be of the opinion that for any reason the defendant is not so liable, then judgment be entered for the defendant.

It is hereby agreed by counsel for plaintiff and defendant in the above case, that for the purpose of this case, the word "oleomargarine," when used in the case stated, is intended to mean "an article designed to take the place of butter or cheese produced from pure and unadulterated milk, or cream from the same; and manufactured out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or cream from the same."

It is further agreed that the said package was sold as an article of food within the words of the Act of May 21, 1885.

Messrs. Luther S. Kauffman, Charles F. Warwick and Wayne MacVeagh, for appellant:

The Act of May 21, 1885, Pub. Laws, 22, is constitutional.

Powell v. Com. 114 Pa. 292, 60 Am. Rep. 350, 127 U. S. 678, 32 L. ed. 253.

The Act of May 21, 1885, is excepted from the general scope of the decision in *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128; *Com. v. Zell*, 11 L. R. A. 602, 138 Pa. 628.

The Act of May 21, 1885, is a proper exercise of the police power of the state, and is not an interference with or regulation of interstate commerce.

Titusville v. Brennan, 14 L. R. A. 100, 3 Inters. Com. Rep. 735, 143 Pa. 642; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 980; 23 L. R. A.

McAllister v. State, 72 Md. 390; *Pierce v. State*, 63 Md. 596; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628.

Mr. A. B. Roney, for appellee:

The state of Pennsylvania cannot prohibit the sale of an article manufactured in and imported from another state, and recognized by congress to be an article of interstate commerce, while the same is still in the hands of the importer in the original package.

Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 204, 6 L. ed. 72.

Interstate commerce is such commerce as the nation at large shall determine to be interstate.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 189, 6 L. ed. 68; *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347; *Mobile County v. Kimball*, 102 U. S. 697, 26 L. ed. 239; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Com. v. Gardner*, 7 L. R. A. 666, 133 Pa. 284; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 493, 31 L. ed. 709; *Thurlow v. Massachusetts*, 46 U. S. 5 How. 504, 12 L. ed. 256.

It is in the power of congress exclusively to regulate this commerce.

Brown v. Maryland, 25 U. S. 12 Wheat. 441, 6 L. ed. 686; *New York v. Miln*, 36 U. S. 11 Pet. 157, 9 L. ed. 669; *License Cases*, 46 U. S. 5 How. 599, 12 L. ed. 299; *Passenger Cases*, 48 U. S. 7 How. 283, 12 L. ed. 702; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 478, 31 L. ed. 704; *Welton v. Missouri*, *supra*; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 233; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253.

If a law merely indirectly and remotely affects commerce the action of the state is valid if exercised under a valid state power.

Wilson v. Blackbird Creek Marsh Co. 27 U. S. 2 Pet. 245, 7 L. ed. 412; *Mobile County v. Kimball*, *supra*; *Withers v. Buckley*, 61 U. S. 20 How. 84, 20 L. ed. 816; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 718, 18 L. ed. 96; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 998; *Turner v. Maryland*, 107 U. S. 83, 27 L. ed. 370; *Morgan's L. & T. R. & SS. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 628.

It is a regulation of commerce and void.

(a) If the state law acts in an unreasonable manner or unnecessarily interferes with commerce.

Foster v. New Orleans Port Wardens, 94 U. S. 246, 24 L. ed. 122; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455; *Brimmer v. Rebmun*, 138 U. S. 78, 34 L. ed. 862; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638.

(b) Or is a taxation of that commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158; *Robbins v. Shelby County*

Taz. Dist. 120 U. S. 489, 30 L. ed. 694; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 888; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 894; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 687.

(c) Or amounts to a discrimination.

Wellton v. Missouri, 91 U. S. 275, 28 L. ed. 347; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Spragus v. Thompson*, 118 U. S. 90, 30 L. ed. 115; *Webber v. Virginia*, 103 U. S. 844, 26 L. ed. 565; *Sayre v. Phillips*, 16 L. R. A. 49, 143 Pa. 482; *Re Kimmel*, 41 Fed. Rep. 775; *Spellman v. New Orleans*, 45 Fed. Rep. 8.

(d) Or is a prohibition of a traffic or intercourse recognized as interstate commerce.

Crutcher v. Kentucky, *supra*; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137; *Re McAllister*, 51 Fed. Rep. 282; *State v. Gooch*, 44 Fed. Rep. 276.

This exclusive power of congress begins when the journey to another state has actually begun.

Coe v. Errol, 116 U. S. 517, 29 L. ed. 715; *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999.

It continues during the journey.

Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; *Louisville, N. O. & T. R. Co. v. Mississippi*, 138 U. S. 587, 33 L. ed. 784; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 194, 6 L. ed. 69.

While the articles are in the hands of the railroad or common carrier.

Bozman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

In the hands of the consignee.

Brown v. Maryland, 25 U. S. 12 Wheat. 449, 6 L. ed. 689; *Bozman v. Chicago & N. W. R. Co. supra*; *Low v. Austin*, 80 U. S. 13 Wall. 29, 20 L. ed. 517; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128.

Until sale by the importer.

Brown v. Maryland, supra.

On breaking of the original package by the importer.

Ibid.; *Wellton v. Missouri*, 91 U. S. 275, 28 L. ed. 347.

Unless congress has provided otherwise.

Wilkerson v. Rahrer, 140 U. S. 545, 35 L. ed. 572.

The decision of the lower court is supported by *Con. v. Paul*, 48 Phila. Leg. Int. 4; *State v. Gooch* and *Re McAllister, supra*.

Williams, J., delivered the opinion of the court:

This case belongs to an rapidly growing class, that has already become uncomfortably large and troublesome in this state. The profits to be derived from an unlawful traffic are much larger than those that flow from legitimate trade, provided the unlawful traffic may be pursued without serious interference from the officers of the law. Law-abiding citizens will not embark in a business that is forbidden by the laws of the state

in which they live. Timid men are afraid to do so. This kind of operation is left therefore to those who have no respect for law, no interest in the public welfare, and no fear of public opinion. When such men deliberately determine to put money in their pockets by engaging in a business which the state has declared to be injurious to the public morals, the public health, or the public peace, and has therefore forbidden altogether, or placed under strict police regulations, they are morally certain to seek immunity for themselves and their unlawful business by immediate flight to the sanctuary of the national constitution, and there laying hold on the horns of the altar of interstate commerce. The road to this refuge of lawbreakers is well beaten. There are signboards at every crossing on the route, and the intermediate stations for possible rest wear conspicuous signs of invitation. The travelers over it are generally foreigners to the state whose laws they trample upon, and include a motley assortment of traders. Beginning with the peripatetic swindlers whose worthless wares are transported in tin trunks, which they carry in their hands, and who hunt their victims in the secluded villages and along the country roads, with an instinct that rarely fails, and running up or down the scale of lawbreakers to the men whose commercial operations extend to the sale of oleomargarine by the pound, and of intoxicating drinks by the pint, there is no man in the procession who is not a conscious and deliberate law-breaker, and who does not set his possible profits from a forbidden business above his duty to society or the state that protects him. These men seek to pervert a rule of law that has a wide and a beneficial field of operation. They claim to be engaged in interstate commerce, and to be entitled to the protection of the general government, as against the police laws of the individual states, for that reason. In support of their claim they will assert that their "goods," whether consisting of oleomargarine, beer, whiskey, paste diamonds, pinchbeck watches, or the like, were made on the other side of the state line, and imported by or for them; or it may be they will claim to be the agents or factors of the makers, or to have received, and to be engaged in selling, "original packages" consisting of a pound of oleomargarine, or a pocket flask of whisky, put up expressly for their trade at the still or factory, just "over the line." The mischief done and attempted in this manner, under the guise of interstate commerce, is so great, so open, and so difficult to suppress or punish that in many states besides this it has become a matter of general and sincere regret that the interstate commerce clause was ever held applicable to trade in any article recognized throughout the civilized world as a proper subject for police regulation and control. We are embarrassed by the difficulties in the way of the enforcement of our police legislation made in good faith, for the protection of our citizens. The question involved in this case is therefore one of great practical importance. It is nothing less than whether the police power of the states survives at all, or has been ab-

sorbed and extinguished by the interstate commerce clause in the national constitution. We recognize the fact that this is a federal question. It has been the subject of many decisions by the Supreme Court of the United States, and was at one time thought to be well settled in favor of the existence and proper exercise of police powers by the several states. We entertain that opinion still, but the contrary view has been pressed upon us with so much earnestness in the argument that we feel constrained to examine briefly some of the positions taken by the appellant.

It is said the recent case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, justifies the contention that this state is powerless to interfere with the defendant's traffic. But *Leisy v. Hardin*, like all other cases, must be read in the light of its own facts. Leisy was a brewer, who made beer in the state of Illinois. Hardin was an officer of the state of Iowa, where the law forbade the sale, and the keeping for sale, of any form of intoxicating drink except for sacramental, medical, or mechanical purposes. Leisy shipped from his brewers in Illinois to his agent in Iowa about 300 casks and eleven cases of beer, sealed in the ordinary manner. These were sent there for sale, and were in the hands of Leisy's agent or employer in Iowa for that purpose. While the entire consignment of beer was yet in the possession of the maker or his agent, with seals unbroken, it was seized by Hardin, under the law of Iowa, and taken out of the possession of Leisy's agent. An action of replevin was then brought to recover the casks and cases so taken. Two questions were thus raised. First, Did Leisy own the packages taken from the possession of his agent? Second, If he was the owner, has he a right to have them in his possession in the state of Iowa? The first question was not controverted. He was the maker and owner of the packages seized. The second question was one of law, and was disposed of upon the interstate commerce clause. The goods being in original packages, with seals unbroken, no sales having been made therefrom, it was held that they were not liable to seizure under the police laws of the state into which they had been brought. This is the single question involved in that case, and beyond that it is not binding as a precedent upon the court that rendered the judgment, nor upon us. We shall not question the wisdom of that decision, nor abate one jot from its legal force, though we sincerely regret some of its consequences. Standing, therefore, squarely on the case of *Leisy v. Hardin*, let us proceed to an examination of the question presented on this record.

The defendant, Schollenberger, is a citizen and resident of this state. For at least two years he has been living under the protection of its laws, and is bound by all the obligations that such residence and protection impose. He is a merchant, with a store in the city of Philadelphia. He sells his goods to customers as other merchants sell their goods, from his stock in store open to their examination. The commodity, or one of the commodities, in which he deals is oleomargarine, for the sale of which at his store in Phila-

delphia he has obtained a license under the internal revenue laws of the United States during the last two years. He sells, not for shipment in original packages to other countries or other states, but to local customers, and in the case now before us, to an eating-house keeper near by, for consumption upon his table as an article of food. Now, our statute explicitly forbids the sale and keeping and the offering of oleomargarine for sale as an article of food. The identical acts forbidden by the law are thus seen to be the acts which he admits he is engaged in, and which he claims the right to do, notwithstanding his residence in, and the statutes of, the state. This right he claims to derive from the interstate commerce clause in two ways. The first of these rests on the nonresidence of the manufacturer. He asserts that the oleomargarine is made in another state. Because the manufacturer can lawfully make and sell under the laws of the state where the manufactory is located, he contends that the manufacturer can sell his own product anywhere, and for this purpose can establish stores for its sale all over this state, if he chooses to do so. As the manufacturer may do this in person, it is contended that he can do it by an agent, so that he could have as many stores, conducted by as many agents as there are towns in the commonwealth, and conduct the trade in them all, regardless of the police laws of the state. The second line along which he claims to derive immunity is the "original package" doctrine. He says he sells in the packages made up at the factory. He does not divide a roll, a pail, or tub of his "goods," but requires the purchaser to take the entire roll, pail, or tub made, filled, or shaped at the factory. We think neither of these positions should avail the defendant. We do not deny that a nonresident manufacturer may sell his goods, and ship them to a buyer in the usual trade packages employed in good faith by manufacturers, without being amenable to the police laws of this state therefor. He may bring them here, and hold them in bulk without danger. So much is fairly ruled in *Leisy v. Hardin*. He may sell them to the trade or for shipment to the states in the same unbroken trade packages, notwithstanding their unlawful character. This clearly results from the rule in *Leisy v. Hardin*. We might have held, had the question been one for us, that the object of the interstate law commerce clause was quite different from what it seems thought to be. We might have thought it intended to prevent the establishment of state custom-houses and taxation along state lines, and to make for the general purposes of legitimate trade all the states open to the manufacturers and merchants of the several states. But for this the states might have intercepted all goods reaching their borders, and weighed, valued, and taxed them before permitting them to proceed to their destination. The destructive effect upon commerce of such restrictions was clearly foreseen and wisely guarded against by our fathers. But the protection of the lives, the health, and morals of citizens was the chief of the duties of government left to the states when the Union was

formed. The common-law rights and remedies are to be sought in the courts of the states. For this reason we would have held that the police regulations of the states stood on impregnable ground, and that, while no state had the right to tax or to burden interstate commerce, each state had the right to exclude from its territory such articles of food or drink as were injurious in their character and effect upon the health or the morals of the public. But, however this may be, it will not be denied that state commerce—that is, business conducted within the lines of a state—was left to state control. It was the intention of the United States to protect the citizens and the productions of one state against unjust discrimination by the other states, but it was and is the duty of the state to protect its citizens against each other.

If, then, the retail of oleomargarine at the defendant's store is to be regarded as in any sense his business, as it would seem to be from the form of the licenses attached to the case stated, and from all the facts, he is clearly liable as an individual to the penalty provided by the law which he has broken. Can the facts that the store is the store of the manufacturer, and that he is their agent, relieve him from liability? The sales are not made from the factory, nor under the right which the fact of making confers on the maker. On the contrary, the sales are made under a store license granted, not to an establishment located in another state, but to a store in this state. When a nonresident of Pennsylvania comes into the state to embark in business here, his situation is like that of any other resident, and his business done at his store is state, not interstate. It does not matter where he obtains his goods. Interstate commerce does not necessarily depend on the origin of goods; or, rather, all men who buy and sell foreign merchandise are not necessarily engaged in interstate commerce. If it was otherwise, all merchants would be superior to state laws, for all deal to some extent in goods made in other states and in other countries. It is not simply or mainly the origin of the goods, therefore, that is to be considered, but the nature of the business done. One who keeps a stock of goods in store for the inspection of customers, and sells from this stock to actual consumers, is a local dealer. His business is intrastate, not interstate. Our Act of 1885, under which this case arises, is not a trade regulation. It is a police law. This court has so held repeatedly, and our view of it was expressly affirmed by the Supreme Court of the United States in *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, a case which turned upon that single question. It does not undertake to deal with an importer from another country or state, but with manufacturers, and dealers within the state. It prohibits the manufacture of oleomargarine within the limits of the state. It also prohibits the sale, the offer to sell, and the having in possession with intent to sell, the same "as an article of food." It lays its prohibition on those who are fairly subject to its jurisdiction, and on no others. We have, then, a valid police law, so declared by the highest tribunal in the land, which pro-

hibits the sale of oleomargarine as an article of food within the state. We have the proprietor of a store located and licensed here making sales of the prohibited article to customers for the prohibited purpose. It does not matter that the merchant makes his home in another state, or that he makes his sales by a clerk or agent, rather than in person. He is a local dealer, selling in violation of the local law, and liable to its penalty. If the residence of the dealer could affect the character of his trade, then our police laws, intended to protect our own people, would operate as a discrimination against our citizens, and in favor of citizens of other states, and would commit to those having no interests in common with us a most odious monopoly in every form or kind of traffic which our state should attempt to regulate or to suppress. Trenched behind the interstate commerce clause so construed, citizens of other states could prey upon our people, trample upon our laws, and make gain out of a traffic forbidden to our citizens, only to be delivered up absolutely and unconditionally to them. It would require only that such citizen of another state should establish a local store in some of our towns or cities, or in all of them; conduct a local business, to meet a local demand; and, when called upon by the officers of the law, make reply that he made the goods in some other state, and, as a manufacturer, supplied himself, as a local dealer, with wares of a foreign origin. Neither the foreign origin of the goods sold, nor of the seller, nor both together, will convert a business that is local and intrastate into one that is general and interstate, within the meaning of the constitution of the United States.

But the defendant's second position is that, admitting the views now stated to be correct, he is, nevertheless, beyond the reach of the state law for another reason, viz. that his sales are made in original packages, and are therefore interstate commerce. We have examined the decisions of the supreme court of the United States for a definition of the term "original package." It does not seem, however, to have received, and perhaps at this time is not capable of, a precise definition, that may be applied to it in all cases. The idea for which it stands is, however, not difficult of apprehension or statement. The methods adopted by manufacturers and importers for packing and preparing goods for transportation by sea or land differ with the differences in the character, bulk, and material of the merchandise itself. The general purpose is to adopt that form and size of package best adapted to the safe and convenient transportation and delivery of the particular class of goods to be moved, because the convenience of the trade will be best subserved thereby. Such packages, put up with a view to the convenience and security of transportation and handling, in the regular course of trade, are the original packages of commerce. If we look at the meaning of the words "employed" we are brought to the same conclusion. "Original" means pertaining to the beginning or origin; the first or primitive form of a thing. "Package"

means a bundle or parcel made up of several smaller parcels, combined or bound together in one bale, box, crate, or other form of package. An "original package" is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. Such packages are not always made up by putting smaller packages or bundles together, but may include any form of receptacle that shall hold a fixed quantity; as a barrel of sugar or salt, a bag of coffee, a chest of tea, and the like. The package must not be divided or its unity destroyed. When it is received unbroken from the importer through the custom house, or from the manufacturer by the ordinary channels of transportation, it is within the protection of the interstate commerce doctrine, and the state may not subject it to vexatious delays, appraisalment, taxation, or trade restriction. But it has never been held that the importer might subdivide his package, and dispose of its several parts in detail. On the contrary, in many cases the United States courts have held that, upon such subdivision or breaking of bulk, the original package ceased to be such; and the goods became mixed with, and indistinguishable from, the merchandise already within the state, and therefore subject to state laws. This assigns to each jurisdiction its proper powers. The general government protects the citizens of the several states in the movement of their commodities across state lines for the purpose of commerce. The state regulates the retail trade conducted within its own borders, and forbids the sale of such articles to its citizens as it finds to be injurious to them. We are asked in this case to go a step further, and hold that any package which a manufacturer may choose to put up and send to himself as a merchant, or to a customer, is necessarily an "original package," because it was put up by a manufacturer outside of the state. We cannot so hold.

This question was brought to our attention recently by the case of *Com. v. Zelt*, 188 Pa. 615, 11 L. R. A. 602. In that case a distiller living, or at least making whiskey, just over the state line, established a store or an agency within the state. He put up his "goods" in bottles, ranging in capacity from one quart down to one-half pint, and, packing them in unsealed barrels, sent them to the Pennsylvania store. When they reached the agent, the bottles were taken from the barrels, and arranged upon the shelves and in the windows of the store in the manner usual in that trade, and sold to customers. The seller was prosecuted for the sale of intoxicating liquors without a license, such as the laws of the state require. His defense was—the now common one—that he was engaged in interstate commerce. His position was that the bottles sold by him singly to customers had been filled and corked at the distillery, which was in another state, and that they were the "original packages" put up by the maker, and transported across the line to his store for sale. The contention was seriously

and earnestly made that any size or shape of jug or bottle which the distiller might desire to meet the needs of the retail sale of drink became, when filled and shipped by him across a state line, an "original package," within the meaning of that phrase as used by the United States courts in the interstate commerce cases. The character of the package appears to have been submitted to the jury, who convicted the defendant. The defendant appealed to this court, and we said, through Paxson, *Ch. J.*: "Whether a box or a barrel of beer can be separated and sold in single bottles as original packages will be formally decided when the question squarely arises. The jury evidently regarded it as a trick and an evasion of our statute." The judgment was accordingly affirmed. The question which it was not necessary to decide in *Com. v. Zelt*, *supra*, is fairly involved in this case, so far as oleomargarine is concerned. The case stated concedes that the package was sold by this defendant for consumption, as "an article of food," but asserts that it was sold in the form in which the maker put it up at his factory. It is not said that it was an "original package" in express words, nor that it was in the form usually adopted in the trade for purposes of transportation. It is reasonable to infer that when the defendant was admitting the sale, and setting up his justification for a violation of the law, he would do this as strongly as the facts would sustain him, had he gone into the proof upon a trial before a jury. What the case stated does tell us is that the defendant sold at his store in Philadelphia, to one John H. Berry, the keeper of a coffee house at 606 Lombard street, Philadelphia, a package of oleomargarine, weighing eighty pounds, made and stamped and branded in Rhode Island, for use as an article of food. This is almost identical with the defense in *Com. v. Zelt*, which was that the bottles sold by the defendant were put up and shipped in another state, and sold in the same form in which they were received. This does not go far enough. The defendant in this case, as in *Zelt's Case*, was *prima facie* a lawbreaker. It was incumbent on him to show his right to violate the police laws of the state in which he lived or carried on his store affirmatively and clearly. It is not enough to hint or suggest the existence of such a right. It must be set up, and his ability to escape the penalty of the broken law depends on the sufficiency of the justification. The fact alleged as a justification is that the package sold was "made, stamped, and branded" in Rhode Island. To enable the defendant to stand on this statement, it is necessary for us to go with him to his legal conclusion, viz., whatever package is put up at a factory outside the state is an "original package," within the meaning of the interstate commerce doctrine. This we distinctly refuse to do. The United States courts have not so held as we understand the cases, and such a conclusion could not be sustained on principle, as the question presents itself to us. The consequences of such a holding are obvious. In this case the owners of the store in Philadelphia are the owners of the factory in another

state. As merchants they understand the needs of their retail trade, and the forms and sizes of rolls, tubs, or packages that will best suit the wants of their customers. As manufacturers they can put their product in packages of such size and shape as shall meet their own needs as merchants. They have both ends of the traffic in their hands, and may do, as they undoubtedly are in the habit of doing, whatever their profits as retailers require them to do as manufacturers. A jury would be justified in finding in such a case, as the jury found in *Zett's Case*, that the mode of putting up the packages was not adapted to meet the requirements of actual interstate commerce, but the requirements of an unlawful, intrastate, retail trade. In this case the facts are found for us as by the parties. We are to determine their legal effect. The defendant is found to have made sales of oleo-margarine as an article of food contrary to the provisions of our statute. It is also found that he made these sales for a nonresident employer. But the residence or business of the owner, standing alone, is wholly immaterial. Our law deals with the local trade, regardless of the nationality or residence of the trader. It is further found that the sales are

made in packages put up by the trader at his factory, and sent to his store in this city for sale. This, as we have said, does not amount to an assertion that the sales are made in the "original packages" of commerce. If it shows anything upon the subject, it shows that they are not so made. One who plants his feet squarely upon the police laws of this state, and defies its officers to suppress or to punish his unlawful trade, must show a clear legal right to take and maintain his position as a public enemy, or suffer the penalty of the broken law. To hold otherwise would make it impossible for the people of any state to protect themselves from evils that by common consent throughout the civilized world need to be restrained and removed by suitable legislation. It would also strike a blow of absolutely crushing weight at the existence of the police power in the several states, and render all attempts at its exercise ineffectual and useless.

The judgment of the court below is reversed, and judgment is now entered on the case stated in favor of the plaintiff for the sum of \$100, with the costs of suit. After judgment is properly entered, let the record be remitted for purposes of execution.

PENNSYLVANIA SUPREME COURT.

H. A. SCHLICHTER *et al.*

v.

M. F. KEITER *et al.*, *Appts.*

(156 Pa. 119.)

1. The burden is on those who seek to dispossess of church property trustees who with their predecessors have been in continuous possession of it for more than sixty years to show affirmatively how and when their title accrued and that it is good and valid.
2. Acquiescence in and use of a constitution by a church society for more than fifty years settles the question of its validity.
3. For the purpose of settling the title to church property courts may inquire into and determine the validity of an attempt to amend the constitution and confession of faith of the society so as to ascertain whether those adhering to the original or amended documents constitute the society.
4. The finding of a referee affirmed by the trial court is conclusive as to whether or not an attempted amendment of the confession of faith of a religious society was so radical as to destroy the identity of the church, unless clear error in the finding is pointed out.
5. A provision of a church constitution that no rule shall be passed "to change or do away with the confession of faith as it now stands" does not prevent changes in the interest of clearness of expression or fullness of statement of the accepted doctrines of the church.
6. An affirmative vote of more than two

thirds of those voting in response to a proposition of the governing body of a church to change the constitution is effective under a constitution authorizing changes "on the request of two thirds of the whole society" although the whole number of votes cast is only a little over one third of the church membership.

7. The adherents to the new constitution and not the dissenters therefrom constitute the church, where the governing body makes a proposition for a permissible change to the old constitution and confession of faith which after ample time for consideration and a suitable system for ascertaining preferences is adopted by the required majority of those voting and the change is then promulgated by the bishops under the direction of the governing body.

(July 19, 1893.)

APPEAL by defendants from a decree of the Court of Common Pleas for Franklin County in favor of complainants in a suit brought by the officers of the Church of the United Brethren in Christ, at Greencastle, to enjoin defendants from interfering with them in the exercise of their respective offices, and also to enjoin them from interfering with the church property. *Affirmed.*

The opinion of the court below was as follows:

"The subject of this controversy is the house of worship owned by the congregation of the United Brethren in Christ at Greencastle, in this county. The building was erected by the congregation, out of voluntary subscriptions, upon a lot of ground acquired by the same means, and which was conveyed by deed bearing date 22d March, 1828, to

NOTE.—In connection with the above decision as to church divisions, see *Smith v. Pedigo* (Ind.) 19 L. R. A. 423; also *Finley v. Brent* (Va.) 11 L. R. A. 214, and note; *Mt. Zion Baptist Church v. Whitmore* (Iowa) 18 L. R. A. 196, and note.
23 L. R. A.

one John Dome, who thereupon by deed, in which it is recited that the lot was purchased for the purpose of erecting a church for the United Brethren in Christ, conveyed it 'to George Zeigler, Jacob Wingerd, Samuel Lenhard, and Solomon Moor, trustees of said congregation, for the only use and interest above described, and for no other purpose.' The parties to the contention, upon the one side and the other, are the office bearers and trustees of what, unfortunately, are now two distinct and separate congregations, each claiming, as against the other, the right to the exclusive use of the church property, as being the only true congregation of the United Brethren in Christ at Greencastle. Both alike make their appeal to the civil power; each insisting that the other is an intruder, and asking that it be restrained from further interference with the other's rights.

"The case as disclosed by the respective bills, answers, and proofs, is substantially as follows: The denomination of the United Brethren in Christ has existed as an unincorporated religious association since about 1800. From a small beginning, which seemed without much promise of expansion or permanence, it has grown into an organization which numbers its adherents by hundreds of thousands, and which now takes rank with the prominent and leading representatives of Protestant Christian thought and work. It has its institutions of learning, its boards of charities, missions, and publication, and other organized departments of religious activity. It has an established polity and church government, peculiarly its own, which have grown and developed with the increase of the society in numbers and importance. Under this general system, the individual churches belonging to the denomination are subordinate members, owing and yielding allegiance and submission to the authority of the whole church, as represented by its general conference, where resides the ultimate power. They are also subordinate to certain established intermediate tribunals, whose authority acts more directly upon them. The scheme of government contemplates, first of all, the individual church, or congregation; next, the circuit, which embraces several churches associated under the general supervision of one minister, designated 'preacher in charge'; next, the quarterly conference, composed of the presiding elder, the preachers of the several churches in the circuit, and certain officers of each church; next, the annual conference, with such territorial limits as are defined by an authority still superior, and which is composed of the presiding elders and preachers within the bounds of the conference, and a lay representative of one from each church; and, finally, the general conference, which is made up of the bishops of the church and delegates elected from each annual conference. It is unnecessary to inquire into the limitations of power of these subordinate departments, nor is it important to inquire into the growth and development of the system of government. The general conference, as an ultimate court, has had an

existence since 1815. In this year it formulated and promulgated a system of doctrine and belief, and rules of discipline, which, by reason of its imprimatur, became the law of faith and practice throughout the entire church. In 1841, at a regular meeting of the conference, and in the exercise of an authority which, if questioned at the time, has been fully acquiesced in ever since, it ordained the only constitution the church ever had until the present contention began. Its final authority in all such matters has been recognized and approved during all the years of the church's existence since its first meeting in 1815. With the rapid growth of the society came diversity of views, and the harmony which had contributed so much to the prosperity of the church was disturbed by urgent demands on the one side for a change in the articles of faith and constitution, and by conservative resistance on the other. The conference of 1885 was in sympathy with those who demanded revision; and it ordained a commission of twenty-seven, composed of the bishops of the church, and ministers and laymen designated by itself, with powers thus defined: 'To consider our present confession of faith and constitution, and prepare such a form of belief and such amended fundamental rules for the government of this church in the future as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world.' The action of the conference contemplated a submission of the work of the commission to a vote of the society or church, and the commission was directed to devise regulations for its publication and submission. A revised confession and constitution were agreed upon by the commission; and by a vote of the church, taken in accordance with the method presented by the commission, they were approved by a large majority—more than two thirds—of those voting thereon. At the next regular session of the conference, held at York, Pennsylvania, in 1880, the commission reported the confession and constitution as revised by it, and made return of the vote which had been taken thereon. Whereupon, by a vote of 110 to 20, the report was adopted by the conference, and a majority of the bishops united in a proclamation to the churches, wherein the result was announced, and it was declared that the document which had been voted upon 'is the confession of faith and constitution of the Church of the United Brethren in Christ, and we do pass from under the old, and legislate under the new, constitution.' Of the minority who opposed this action, about fifteen, including one of the regular bishops of the church, withdrew from the meeting, and, assembling elsewhere, organized themselves into a conference, and sat in regular sessions, claiming to be the regular general conference of the church. They repudiated the action of the body from which they had withdrawn, as violative of the fundamental law of the society, and revolutionary, and proceeded with the business of the conference they had organized regardless of the other body. Thus occurred the separation which has been so

fruitful of strife and litigation throughout the whole church, and which has so divided the allegiance of the membership of the church at Greencastle as to occasion this present contention. With two general conferences, each claiming to represent the church at large, and each having its own proper subordinate annual conferences and circuits, and all the external organs of separate legitimate existence, we have, in point of fact, two distinct organized societies. One or other is the Church of the United Brethren in Christ by right and historical succession, but both cannot be. Which is it? This, in brief, is the question here raised. The house of worship at Greencastle, for the possession of which both parties are here contending, is the property of the congregation of the United Brethren in Christ at Greencastle, and those persons constitute the congregation who are in connection and correspondence with that body which is the true general conference of the church. It is with the rights of property that we are dealing, and these rights can be determined only by the relations which the contending parties sustain to the church of the United Brethren in Christ.

"Several considerations agree in giving to the plaintiffs the advantage of a *prima facie* case. There is the fact of uninterrupted succession in, and controlling action of, the conference to which they are adherents. That the body which met at York was the general conference of the church is not questioned. There is no complaint that it was irregularly or improperly constituted. Of the one hundred and thirty members who composed it, at least one hundred and ten continued to the end, participating in its work, and maintaining their allegiance to its organization. The general machinery of church organization has remained under its control, as has the management of the charities and temporalities of the church. It has continued to command the allegiance and support of a large majority of the bishops, ministers, and laity of the church, and by far the greater number of the local churches continue their connection with it, accepting the new confession of faith, and submitting to the government of the revised constitution. The majority of the members of the Greencastle congregation support it. The act of withdrawal from this general conference was the act of those who composed the conference to which the defendants adhere. Under this state of facts, we may start with the presumption of regularity in that division of the church here represented by the plaintiffs, and which, for purposes of convenience, we shall designate as the 'Liberals,' since, if that is not their adopted name, it is the one by which they have come to be generally known; and call upon the defendants, who represent the division known in the same way as the 'Radicals,' to make good their claim to legitimacy. This, by their answer and cross-bill, and the evidence offered, they claim to have done, and it is for us now to inquire how far they have succeeded.

"The immediate cause of separation was the adoption of the new constitution and the new or revised confession of faith by the gen-

eral conference of 1890. The radicals reject both, maintaining their organized existence under the constitution of 1841, and observing the confession of 1815 as their only rule of faith. Their contention is, first of all, that the inheritance and succession is in them, because they are identical in faith and practice with the original historic Church of the United Brethren in Christ; that, although a minority, they are the only existing organization that recognizes the constitution which has been the law of the church since 1841, and accepts the confession of faith which the church adopted and proclaimed in 1815,—a position which, however important as part of the defendants' case, would not, of itself, be conclusive of the controversy, no matter how well sustained, as will appear subsequent; and, secondly, that the liberals, through the conference to which they adhere, have, by a proceeding irregular and revolutionary, adopted a new and different constitution from that which was and is the law of the church, and have adopted and proclaimed a new and different standard of faith from that which the church had always observed, and that by so doing they have formed a new and different religious society, and so forfeited all claims to recognition as the Church of the United Brethren in Christ. The first position, as I have stated it, may be conceded. The radicals do adhere to the old confession, and do observe as the law of their organization the old constitution, both in all their literalness; and they are the only society of which this can be said. The inconclusiveness of this, however, will appear further on. It is the second proposition which challenges and invites investigation. It suggests two distinct inquiries: First, as to the change in the constitution; and, second, with respect to the change in the confession of faith. We shall observe this order in their consideration.

"Two general objections are made to the action of the general conference with reference to the constitution: First, that the change was not made in accordance with the laws and usages of the church; and, second, that certain provisions of the old constitution, which were therein declared to be inviolable, have been so altered and amended as to work a virtual repeal of the original provisions. In the view we take of the case, it is unnecessary to discuss, or even indicate, the points of difference between the old and new constitution. It is enough to say that they do not in any serious manner affect the internal order and government of the society. The gravamen of the first objection lies in the alleged disregard of the 4th section of article 2 of the old constitution, which provides that 'there shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society.' It is undoubtedly true that both the idea of revision, and the scheme for its accomplishment, originated with the general conference of 1885, held at Fostoria, Ohio. It had no request of any kind before it, looking to this end. That conference created the commission, of its own motion, 'to consider our present confession of faith and constitution, and prepare

such a form of belief, and such amended fundamental rules for the government of the church in the future, as will, in their judgment, be best adapted to secure its growth and efficiency in the work of evangelizing the world.' It authorized and empowered this commission to devise a plan for the submission of their work to a vote of the society, without first reporting it to the conference. In November following, the commission met, prepared a new confession and constitution, and adopted a plan for their submission to popular vote, to be taken during the month of November, 1888. At this election, held in November, 1888, throughout the churches, the smallest vote that was cast for any part of the revised work—it having been submitted in several separate sections—was 46,994, while the largest vote cast against any part was 7,298. The vote in favor was thus largely in excess of two thirds of the entire vote cast, though not reaching to even a majority of the whole society; the evidence showing a total membership somewhat exceeding 200,000. At the next quadrennial conference, in 1889, the commission reported its work, and the result of the vote taken thereon; and by a vote of 110 to 20 the report was approved and adopted, and proclamation was made of the result by the board of bishops. So we have, then, two particulars in which it is alleged there was serious and fatal disregard of constitutional provisions, viz., the adoption by the conference of a new or amended constitution without a previous request, and its adoption upon less than a two-thirds vote of the entire society. We shall not consider the charges of *mala fides* which are made by the defendants in this connection, with respect to the method of submission, for even the unfairness which they impute, if established as a fact, would not constitute fraud; and, in considering the two particulars above stated, we shall take no account of those minor and subordinate complaints which relate to the time of the submission, insufficiency of notice, etc., since all these will find their appropriate answers in the conclusions we reach on the main propositions.

"With reference to these organic changes, it should be understood that they are to be inquired into only for the purpose of ascertaining whether there has been any loss or change of identity in the organization. The law has no supervisory power over these societies, which would enable it to correct mistakes, if any are made. So long as they do not violate the settled rules of property and morality, they can preach and practice and govern as they please, without let or hindrance from the civil power. But when a change of organic law results in a division of the society, and two rival bodies contend at law for the control, the methods by which the change was effected become a proper subject of inquiry, since, if these methods were inconsistent with, and opposed to, the fundamental law,—in other words, revolutionary,—it would be clear usurpation in those acting under them to exercise control, as against even a minority adhering to the original compact. In such case the minority,

if organized, would be the true, legitimate body, both in fact and law. It is in this aspect that the question is both proper and material. Says *Chief Justice Gibson* in *Com. v. Green*, 4 Whart. 598, in speaking of the general assembly of the Presbyterian Church and the relation it bears to its trustees, who are formed by the law into a distinct corporation: 'It is a segregated association, which, although it is the reproductive organ of corporate succession, is not itself a member of the body, and in that respect it is anomalous. Having no corporate quality in itself, it is not a subject of our corrective jurisdiction, or of our scrutiny, further than to ascertain how far its organic structure may bear on the question of its personal identity or individuality. By the charter of the corporation, of which this is the handmaid and nurse, it has a limited capacity to create vacancies in it, and an unlimited power over the form and manner of choice in filling them. It would be sufficient for the civil tribunals, therefore, that the assembled commissioners had constituted an actual body, and that it had made its appointment in its own way, without regard to its fairness in respect to its numbers, with this limitation, however: that it had the assent of the constitutional majority, of which the official act of authentication would be at least *prima facie* evidence. . . . Hence, where, as in this instance, the members have formed themselves into separate bodies, numerically sufficient for corporate capacity and organic action, it becomes necessary to ascertain how far either of them was formed in obedience to the conventional law of the association, which, for that purpose only, is to be treated as a rule of civil obligation.'

"Were the changes here complained of made in conformity with, or in violation of, the fundamental law? This makes a consideration of the constitution of 1841 necessary. Under that instrument the general conference is invested with great amplitude of power, yet manifestly less than it had before, since the constitution itself was originally of its own making. The preamble recites that the purpose of the constitution is, among other things, to define the power and business of quarterly, annual, and general conferences. By section 1 of article 1, 'all ecclesiastical power herein granted, to make or repeal any rule of discipline, is vested in a general conference, which shall consist of elders elected by the members in every conference district throughout the society.' By article 2, power is given it to define the business of the annual conferences, to elect the bishops, and to try, by impeachment, annual conferences. The only restrictions or limitations upon the general grant of power are to be found in sections 4-7. These are, in substance, that 'no rule or ordinance shall be passed to change or do away with the confession of faith, as it now stands, nor to destroy the itinerant plan;' 'no rule shall be adopted that will infringe upon the rights of any, as it relates to the mode of baptism, the sacrament of the Lord's Supper, or the washing of feet;' 'no rule shall be made that will deprive local preachers of their votes in the annual con-

ference to which they may be attached;' and 'there shall be no connection with secret combinations, nor shall involuntary servitude be tolerated in any way.' That these are intended as restrictions upon the grant of powers to the general conference is obvious. They were directed against the only body in the church that had authority to make and ordain rules, and they can have no significance whatever, except as we apply them to that body. They were not of the nature of a bill of rights, excepting these particular subjects from governmental interference or change; at least, we have no right to assume that they were. Indeed, the contrary becomes manifest, in the light of the fourth article, which, in its single section, provides that there shall be no change 'in the foregoing constitution, unless by request of two thirds of the whole society.' The instrument thus itself provides for their change, for they are part of 'the foregoing constitution;' and furthermore, it commits the power to make the change to the general conference, subject only to the limitation that the two thirds of the whole society shall request it. The chief purpose of the constitution seems to have been to evidence by written fundamental law that the general conference was the supreme tribunal of the church, invested with highest legislative and judicial functions, and restricted only as therein expressed. The powers which it had theretofore exercised without question or dissent were bounded only by extremest limits. The constitution contains but little that does not refer to the conference; and if we read it in the light of ordinary language, the circumstances attending its formation, and the earlier government of the church, as we are bound to do, we must conclude that it commits to the general conference all power except that which it expressly reserves or denies. Not by rule, not by ordinance, not by legislative enactment, could the conference change the confession of faith, or establish connection with secret combinations, or do any of these things expressly denied it; but, upon request of two thirds of the whole society, it could accomplish any or all of these things in the way pointed out,—that is to say, by first changing the constitution. The essential thing, to make the change consistent with the law, was the assent of the two thirds to the removal of the constitutional restriction. The power was given to the conference, with this limitation fastened upon it.

"We cannot consider seriously the argument that would avoid the action of the conference because a formal request had not been submitted to it before it began the work of revision and change. The objection is purely technical, and, so far as we can see, without merit. It sticks in the bark. Says *Chief Justice Gibson in Com. v. Clark*, 7 Watts & S. 188: 'A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them; and to this end its commands as to time or manner of performing an act are to be considered merely directory, whenever it is not said that

the act shall be performed at the time or in the manner prescribed, and no other.' If the assent of the requisite number was obtained to the proposed change before the change was actually made, the purpose of the constitutional limitation was fully met. To hold otherwise would be to give to a mere formality, which is without essential purpose, an importance which neither the phraseology nor the spirit of the instrument suggests. Now, was the assent of two thirds of the whole society obtained, as required by the law? The change was made finally by the general conference, the only body, as we have seen, that could make it; but its regularity depends upon the previous assent of the constitutional number. In interpreting this provision, we must have regard to the general scheme of the church's government. In the proper exercise of its power, the conference had raised up the commission, and charged it with the work of preparing a revised constitution, and had empowered it to arrange and provide for an election throughout the church, the vote to be upon the acceptance or rejection of the commission's work. The orders of this commission with reference to this election became the instrumental process through which the authorized expression of the society's will was to be obtained. 'When a law becomes the instrumental process of amendment,' says *Chief Justice Agnew in Wells v. Bain*, 75 Pa. 47, 15 Am. Rep. 563, 'it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace. Irregular action, whereby a certain number of the people assume to act for the whole, is evidently revolutionary. The people, that entire body called the "state," can be bound as a whole body only by an act proceeding from themselves. In a state of peaceful government they have conferred this authority upon a part to speak for the whole only at an election authorized by law. It is only when an election is authorized by law, the electors, who represent the state or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend.' This was said of the state, but it is alike applicable to church government. The constitution is silent as to the method of ascertaining the will of the society. It is not unreasonable to suppose that an election was the contemplated method, since it is the usual one in such cases; but, whether so or not, the conference had the right to prescribe it as the method of ascertaining the will or request of the society, in the absence of any contrary rule, and so it became the instrumental process, of which all qualified electors were bound to take notice. All had the opportunity of voting. It was the duty of all to vote, and those not voting became bound by the result, because they are counted with the majority, as assenting to their action. 'To all questions put by the established organ, it is the duty of every member to respond, or be counted

with the greater number, because he is supposed to have consented beforehand to the process pre-established to ascertain the general will.' *Com. v. Green*, 4 Whart. 804. 'This rule is fundamental in all forms of popular government, and it can be overborne only by express direction to the contrary. It would be entirely competent for a society to adopt a different rule, but such purpose should clearly appear. In *Craig v. First Presby. Church of Pittsburgh*, 88 Pa. 45, 82 Am. Rep. 417, the question turned upon the construction of a statute which made the assent of 'a majority of the members of such society or church, expressed at a church election,' essential. It was held that a majority of those voting at the election was sufficient. We quote from the opinion delivered by Mr. Justice Paxson: 'It may be asked, however, what is meant by the "majority?" Does it mean the concurrence of the major part of those who happen to be present at a regular corporate meeting, or does it mean a concurrence of the majority of a whole body? There is this distinction between a corporate act to be done by a definite number of persons, and one to be performed by an indefinite number: In the first case, it is to be observed that a majority is necessary to constitute a quorum, and that no act can be done unless a majority be present; in the latter, a majority of any number of those who appear may act. And where a corporation is composed of several integral parts, and each part consists of a definite number, a majority of each part must be present, to constitute a quorum. But where a corporation consists of several integral parts, one of which is indefinite, if any number of persons composing the latter, however small, are present, after having been duly summoned, it is sufficient. The distinction is between a definite and an indefinite number. In the former case a majority must be present, whereas, in the latter, a majority of those present may act, whether a majority of the whole body or not. When, therefore, the legislature, by the Act of 18th April, 1877, provided for ascertaining the wishes of a majority of the members by a church election, it is fair to presume that the majority intended by the act was the majority of those who should attend and vote at such election. The act provides for taking the sense of the congregation in the usual manner, and prescribes no new rule as to what shall be binding upon them. Had it been intended to require the assent of a majority of all the members, whether present at the meeting or not, such intention might, and probably would, have been expressed clearly in the act.' It needs no argument to enforce the applicability of this authority to the case in hand. The reasoning applies as well to a case where the law requires two thirds, as where a simple majority is sufficient. The size or extent of the majority is immaterial. That is governed by the act of submission. The important fact to be observed is that by 'the whole society' we have an indefinite number,—manifestly so; and, when such a factor enters into the case, those voting are regarded as the whole body, provided always, that no contrary rule is ex-

pressed in the law itself, and that it is at an election legally ordered. That the election held throughout the churches in November, 1888, was a legal election, we can have no doubt whatever. It was in the power of the general conference to order it. The constitution provided for its own change, by the general conference, upon a request of two thirds of the whole society, but is silent as to how this request was to be preferred. The necessary inference is that, with respect to all such matters of detail, the conference had full power to act. The essential purpose was to prevent any change, except as it might be agreed to by a two-thirds vote, fairly ascertained, upon a fair submission of the question to the whole society. Any different construction of this constitutional provision would impose upon the society methods not only unreasonable, but wholly impracticable.

"But the sufficiency of this vote, judged by the constitutional requirement, does not depend upon the correctness of this reasoning, satisfactory and convincing as it is to ourselves. It can be vindicated in a way so conclusive as to end all discussion. The interpretation of this constitutional provision was a proper subject for the judicial action of the general conference. If susceptible of different constructions, it had the right to say what it meant,—whether two thirds of all the members of the society, or two thirds of those voting at the election; and, acting strictly within its powers, it did decide that it meant two thirds of those voting. From that decision no appeal lies, for there is no higher tribunal within the church, and we cannot rejudge its decrees. The law upon this subject is aptly and concisely expressed in *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666: 'The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent, and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts, and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.' This same doctrine has repeatedly been held by our own supreme court. Indeed, it has long since passed beyond discussion, into the settled law of the land. It is sufficient to refer to the cases of *German Reformed Church v. Com.*, 3 Pa. 291, and *McGinnis v. Watson*, 41 Pa. 10, without quoting therefrom. Notwithstanding the conclusiveness of these authorities in establishing the sufficiency of the

vote, we preferred to reach our conclusions through the line of argument first attempted, for the reason that by the inquiry there pursued we were able, not only to determine whether the course adopted by the conference was conformable to the constitution of the society, but at the same time see whether the end had been accomplished by considerate and proper regard for the rights of a dissenting minority. On both these issues we find for the plaintiffs. The change was made agreeably to the conventional law of the church, by methods entirely fair, and the legitimacy of the liberal general conference has been in no way affected thereby.

"We turn now to the other branch of the defendants' contention, viz. that which relates to the change in the confession of faith. It seems to have been mistakenly assumed by the general conference that the provision in the constitution for a change of that instrument applied as well to the confession of faith, and the same procedure was resorted to in making the change. The confession of faith is no part of the constitution, and the latter makes no provision for the change of the former. It simply forbids the general conference to pass any rule or ordinance changing or abolishing it. With this limitation upon the power of the general conference, a change was impossible, under that constitution. To effect a change by constitutional methods, regular procedure would have first required a change in the constitution itself. The mistake that was made is obvious; but whatever effect it may have upon the authority and binding force of the new confession,—upon which we express no opinion,—we cannot allow it the significance in this contention which defendants' counsel claim for it. It can serve no purpose here to inquire into the regularity of the procedure by which the change in the confession was effected. We made the inquiry with respect to the constitution only that we might determine the identity of the organic structure. On no other grounds would the inquiry have been pertinent. We could have no such reason for investigating the procedure as it relates to the confession, for, even though the irregularity be established,—and we concede as much,—the identity of the organized society remains. The latter is not affected by a change of faith. If the contention were that the new had not supplanted the old confession, because of the irregular procedure in its adoption, and we were competent to pass upon that question, an inquiry into all the proceedings which led up to its adoption would be necessary. But both parties to this controversy assume that a valid and binding change was made, and therefore there is nothing left to consider but the effect and consequence of this change. The proposition insisted upon by the defendants, and which we are asked to affirm, is that the new confession of faith differs so radically and materially from the old that by the adoption of the former a new and distinctive church has been established, and that to allow the property involved in the present dispute to be used by such church would be to divert the trust from the purposes intended by its

founders. So much of this proposition as implies the power and duty of the court to interfere, and require a trust to be administered according to the intention of its founders, when a misapplication is attempted, is conceded, of course. The duty of the court in such case is obvious. The trust which is recognized by the law will be protected by the law, and, where the protection of the law is inadequate to the purpose, equity will come to the relief; for has it not been said that 'a trust is the child of the law, and more especially the ward of chancery?' But the other matters embraced in the proposition invite closer scrutiny. They suggest important and material inquiries.

"The existence of the trust or religious use is not denied. The origin of the title is found in John Dome, who by his deed declares that the lot was purchased for the purpose of erecting a church of the United Brethren in Christ, and who then conveyed it to certain parties, trustees of said congregation, for the use aforesaid. If the conclusion already reached, viz., that the division of the local church here represented by the plaintiffs, known as the 'Liberals,' is the United Brethren congregation of Greencastle, because it is in connection with, and in subordination to, the legitimate government of the organized society, it needs no discussion to show that, so far as the will of the founders is expressed in the grant, they are the true and proper beneficiaries of the use. But it is contended on behalf of the defendants that it is a necessary implication, derivable from the terms of this grant, that the beneficiary under the trust was to be a congregation of the United Brethren in Christ, distinguished and individuated as such, not only by name, but by adherence to the doctrines held and advocated by that church when the grant was made. To state it still more concisely, we give the proposition as we find it in the brief of the defendants' counsel,—that the [constitution and] confession of faith are as fully a part of every trust deed of conveyance as if written therein.' That the founders of this trust could have made adherence to the confession of faith, as it then stood, a condition of the use, will not be denied, since "*cujus est dare, ejus est disponere*." But we are asked to go beyond this, and hold that, notwithstanding no such condition is expressed in the grant, yet the law implies as much, and imputes to the donor a purpose to impose, as a condition of the enjoyment of his bounty, that the congregation should continue devoted to an unchanging and unchangeable faith. If such be the law, it makes largely for the defendants' contention, in spite of the fact, already ascertained, that the legitimate succession is with the plaintiffs.

"The essential elements of every trust are determined by the will of the donor. He it is who founds it, and whatever conditions he has imposed, and whatever purpose he has defined, if lawful, will be enforced, so that the end he had in view may be secured. The maxim of the old feudal system is still applied to modern grants, '*tenor est qui legem dat feudo*.' In the present case the donors or

founders are those who contributed to the purchase of the lot, and the effort must be to ascertain the interests they desired to promote, and the purpose they had in view. It is of no consequence that the present house of worship was erected at a much later period by the voluntary subscriptions of members who stood in no relation to the congregation when the lot was purchased. By the common law, even subsequent contributors have no other right of direction than that which the founder has prescribed, for they come in and give their money on a basis already established, and they can neither add to it, nor take anything from it. *Presbyterian Cong. v. Johnston*, 1 Watts & S. 87. The rules of construction require that we must first have recourse to the instrument by which the trust was created, and the use declared. Here, then, it is the deed from Dome to the trustees. If that expresses with sufficient clearness for an intelligent understanding the wishes and intentions of the founders, we are forbidden to look beyond, and must accept what is there declared as conclusive. If its language interprets itself, we have no occasion to resort to rules of art or precedents to guide us. The deed is as follows: 'Know all men by these presents, that the within-described lot of ground, No. 97, was purchased for the purpose of erecting a church for the United Brethren in Christ, and the said John Dome doth, by these presents, release and quitclaim his right of the within lot of ground to George Zeigler, Jacob Wingerd, Samuel Lenhard, and Solomon Moor, trustees of said congregation, for the only use and interest above described, and for no other purpose.' But very little is here expressed. Did the donors intend more? They intended all that is legally and fairly inferable from the language used, but to what extent does this carry us? We have a use declared for a particular congregation for the erection of a church for the United Brethren in Christ. That this contemplated that the congregation should be in connection and association with the larger organization known as the 'Church,' is an unavoidable inference. Indeed, it may be said to be expressed, and it is about all that is. A denominational designation is used. What significance attaches to this? Can we infer from this fact that the distinctive faith, or rather the entire creed, of that particular denomination, whether distinctive or not, was made an essential element of the trust? Such, as we understand it, is the defendants' contention, and they would have us read in the words, 'United Brethren in Christ,' the entire confession of faith that was adopted in 1815. That by the use of a distinctively denominational name very much may be expressed, will not be denied. It is often of great help in determining the proper limits of a grant. In *Hale v. Boerett*, 58 N. H. 70, 16 Am. Rep. 82, it was held that when a conveyance is made to, or a trust created for the benefit or use of, a religious society, by its denominational name,—which denominational name is descriptive of the fundamental doctrines of the sect to which it belongs, with no other particular designation in the deed of the tenets or doctrines which it is to

be used to advance or support,—the denominational name may be a sufficient guide as to the nature of the trust, so far as respects doctrines which are admitted to be fundamental. In the case in which this was said, the denominational name was 'The First Unitarian Society of Christians in Dover,' and it was very properly held that the terms 'Unitarian' and 'Christian' were both expressive of fundamental and essential doctrines, and that, by the use of a denominational name in which both these terms occurred, it was made an implied condition of the grant that the society should avow no doctrines inconsistent with these. But of what fundamental doctrine is the denominational name of 'United Brethren in Christ' expressive? If any, it determines the use to that extent. It helps, nothing to inquire what are the distinctive doctrines of the denomination, or whether it has any. What concerns us is to ascertain what distinctive doctrines are expressed in the denominational name. Arminianism may be, and we are told is, one of the fundamental doctrines of the church, but it is not ascertainable from the denominational name. The name is not contradictory of extreme Calvinism. So, opposition to all secret associations may be a distinguishing characteristic, but the name does not so inform us. If this name indicates anything as to doctrine, beyond the divinity of Christ, and the brotherhood of all believers in Him, we fail utterly to see it. As to these doctrines, the name furnishes us with an unerring guide, but its value stops right there.

"The cases all distinguish between a dedication of property to support particular tenets, and a dedication to support such tenets in subjection to a particular church government; and the rule is that when the *cestus que trust* is a congregation, indicated by its denominational name, the law will make it a condition of the grant that the congregation maintains the appropriate ecclesiastical connection, but when nothing appears in the grant, except the church name, to indicate the form of belief, the law will make conditions only of those fundamental doctrines which the name clearly expresses. In *Miller v. Gable*, 2 Denio, 510, it is said: 'There may be a support of tenets without subjection to any ecclesiastical power which upholds them; but it may be a condition of grant of property that a trust is to be maintained in subordination to a particular power, as, if a church be established in connection with a particular ecclesiastical body, a severance from that body would be a violation of the trust.' In our own state we have entire unanimity of decision on the general principles which govern in these cases; and, while we find no single one—where matters of faith were the disturbing cause—which turns upon a declaration of use so meager as this, yet they all accord with the authorities cited, and sustain the rule as we have stated it. The subordination to a particular church government may be made a fundamental condition, is the doctrine declared in *Presbyterian Cong. v. Johnston*, 1 Watts & S. 87. It is repeated and emphasized in *Means v. Pres-*

byterian Church, 8 Watts & S. 308. In *App. v. Lutheran Cong. of Belingroove*, 6 Pa. 201, where the grant is almost identical with this, it is not only decided that it may be, but that it is, an essential condition; and in that case there is nothing from which such condition could be inferred but the denominational name. So, too, in *Rohls's App.*, 69 Pa. 465, 8 Am. Rep. 276, where the dedication was almost exactly similar, — 'in trust for the use of the said German Reformed Church.' 'The principle which governs in all such cases,' says *Mr. Justice Sharswood*, 'is old and well established, and has frequently been asserted by this court. Whenever a church or religious society has been originally endowed in connection with, or in subordination to, some ecclesiastical organization and form of government, it can no more unite with some other organization, or become independent, than it can renounce its faith or doctrine, and adopt others.' *McGinnis v. Watson*, 41 Pa. 14, and *Schnorr's App.*, 67 Pa. 146, 5 Am. Rep. 415, are to the same effect. These authorities all recognize this ecclesiastical connection, implying submission, as a fundamental condition, and several of them, as we have indicated, infer this condition from the use of the denominational name in the grant; and, however much any of them may seem to emphasize adherence to faith and doctrine as a condition, it will be found to be only in cases where there is an expressed condition to this effect, and even in such they limit it to doctrines which are distinctive and fundamental. In those of our state cases where the grant most resembles this one, the effort was to carry away the local church property, or at least to secede from the original organization. In *Schnorr's App.*, *supra*, one party, having declared themselves independent of all synods, and absolved from the government of the church of which they had been a part, claimed the local church property, notwithstanding the fact that it had been conveyed 'for the use of the congregation of the German Evangelical Reformed Church, and with the condition that no change shall be made in said congregation for any other denomination.' It was in this case, and with reference to this positive prohibition in the grant, that *Justice Sharswood*, in expressing his dissent from the language used in *McGinnis v. Watson*, *supra*, uses the emphatic language which is so much relied upon by the defendants. He says: 'Courts, which have the supervision and control of all corporations and unincorporated societies or associations, must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guaranty of religious freedom has nothing to do with the property. It does not guarantee freedom to steal churches. It secures to individuals the right of withdrawing, forming a new society, with such ends and government as they please, raising from their own means another fund, and building another house of worship, but it does not confer upon them the right of taking the property consecrated to other use by those who may now be sleeping in their graves.' What is this but saying that the will and

intentions of the donor alone determine the limitations and conditions of the trust, and that, when these are clearly expressed, the law of the land, which is superior to any supposed 'law of intellectual and spiritual life,' in its operation on property rights, at least, will enforce them? In *App's Case*, *supra*, the bequest was claimed by a congregation which did not belong to the old Lutheran Church, was attached to a new synod, and not under the same ecclesiastical government that ruled when the bequest was made. *McGinnis v. Watson*, *supra*, was a case of secession. In *Presbyterian Cong. v. Johnston*, *supra*, there was no ecclesiastical connection prescribed. And so we might distinguish all the cases from the one we are now considering. None of these suggest anything inconsistent with the rule of the interpretation as we have stated it, while in several, as we have shown, it has been applied in a most conclusive way.

"Confining our search, then, for the intentions of these donors, to the words of the conveyance from Dome, can we discover any intention to impose other conditions than that the beneficiary must be a congregation in connection with the Church of the United Brethren in Christ? that it must be distinctively Christian in faith, and accept the doctrine of the brotherhood of all believers in Christ? If more was intended, could it not have been easily expressed? As was said in *Princeton v. Adams*, 10 Cush. 129, it is perfectly easy for persons giving their own private property to a religious use to limit that use, and devote the property to a particular faith; and as was said in *Atty-Gen. v. Dublin*, 88 N. H. 510, 'they need no professional assistance or technical learning to supply them with a peculiar phraseology. Any intelligible language will answer the purpose. They can have no difficulty in saying, in some comprehensible form, that they intend the dissemination of the thirty-nine articles of the English Church, or the Westminster Catechism; the doctrines of Luther, or Loyla; of Edmonds, or Channing, or Jefferson; the tenets held by some sect at a certain time, or such as it may hold from time to time in the course of its existence in a changing world. If they intend a theological limitation, they will express it; and then the court may be called upon to decide, by legal rules settled by the wisdom of ages, not what the faith is, but what limitation is expressed by the words used.' If, by our interpretation, we have confined this trust within limits too narrow, to what extent are they to be opened up? Can it be maintained for a moment that they are to include, as an essential condition, the entire confession of faith which was recognized by the denomination when the trust was created? If so, it must be by necessary intentment from the single fact that there was such a confession in existence. Any such view not only imputes to the donors what they did not express, and which could have been readily expressed if intended, but it ignores what we have tried to show was the paramount purpose, because it is expressed, to wit, to place the subject of the trust in a congregation in

subjection to the general order and government of the church at large. The United Brethren in Christ were an organized body long before the trust was created. So, too, the Greencastle congregation had an earlier existence, and was in ecclesiastical connection with the general body, and subject to its authority and legislation, when the property was dedicated to its use. This much the donors knew, and are presumed to have had in contemplation. Is it reasonable to suppose, under such circumstances, that they intended a use inconsistent with the submission of the congregation to established authority? We think it evident that the paramount purpose was to secure the property to the local society, in subordination to the higher authority of the church, whereby the regular connection and relation of the parts to the whole would be secured; and surely, if this be correct, such a qualified use as is here contended for would be inconsistent with this purpose, except upon the theory that it is beyond the power of the church to change its creed,—an assumption which we cannot allow. Why cannot the church change its creed? It made it; and why cannot the same power which made, unmake? It can change its name, its order of worship, its discipline, its government. Then, why not its creed? To deny it this right is to deny its existence as an organized society, or else deny it the freedom of conscience which is guaranteed to the individual. The power to make implies the power to change. It is inherent and inextinguishable as well in churches as in individuals. We are not denying that certain legal consequences affecting property rights may result from a change of creed. What we are saying is that the power to change the creed is implied in the very existence of the church, and that this power inhered in the church before, and at the time when, this particular property was dedicated to a local congregation in connection with the church. This the donors are supposed to have known, and to have indicated the use accordingly. With this knowledge, either actual or imputed, of the inherent power of the church over its creed, is it not, and ought it not to be, a controlling circumstance in the case, that no condition whatever in regard to faith or doctrine, beyond what is expressed in the denominational name, can be found in the letter of the grant? We certainly so regard it, and in this view we are largely supported by the case of *Gibson v. Armstrong*, 7 B. Mon. 481, which stands out with the prominence of a guidepost. It is no answer to say that it was in the belief that the church would adhere to its confession of faith, as then written, for all time to come, that the dedication of the property was made. That is assuming a fact, in support of which there is no evidence at all. But grant it to be a fact. What have we to do, in determining this question, with the belief and inducements which operated on the minds of the donors when they have expressed in the grant itself the use they intend? If the grant were doubtful or uncertain,—which it is not,—we could

resort to extrinsic circumstances, and consider, perhaps, the belief and motives of the grantors as aids, but not otherwise. This grant cannot be regarded as requiring extrinsic evidence to construe it, simply because it may be thought by some, from the circumstances under which it was made, and its brevity, that more was intended than is expressed. Any such rule would open the way for extrinsic evidence to disturb, if not destroy, any trust in existence. And when a church, in the exercise of its undoubted right, in a legal and sufficient way, changes its creed, what property rights are affected thereby? It unquestionably forfeits its right to all property, the use of which was conditioned by the donor, in his grant, on an unchangeable creed, but nothing beyond. We have argued to show that the conditions in the present case are that the property be used by a Christian congregation in connection with a particular denomination, holding to the doctrine of the brotherhood of all believers in Christ. Any connection with a different denomination, or the avowal of a faith inconsistent with the doctrines of the Christian religion, or the brotherhood of believers in Christ, would be a perversion of this trust, such as the law would forbid and correct; but, until such radical and fundamental perversion as this is attempted, those whom we have found to compose the true and real congregation at Greencastle, and here represented by the plaintiffs, are entitled to the undisturbed possession and enjoyment of the church property.

"In the view we have taken of this case, any further examination into the changes made in the confession of faith is unnecessary. It remains distinctively and unequivocally Christian in its character. So much is conceded, and it is all that concerns us to know. We may, however, be permitted to add that, in comparing the new with the old, we fail to see how any one professing his belief in either could be denied membership or fellowship in the society which professes belief in the other. Literally, they are not the same; but if inconsistent with, or repugnant to, each other, with respect to any doctrine which has ever been made the basis of separate denominational existence, such fact has not been brought to our notice. The schoolmen may have made some of the points of difference the subject of their violent polemics, and it may interest the student of history or science to know just how they were regarded by these men who were so wasteful of their learning and zeal; but, in modern Christian thought, they are not considered of sufficient importance to disturb the unity of the faith. Since, then, the liberal congregation at Greencastle, here represented by the plaintiffs in the original bill, is in connection with, and subordinate to, the authority of the legitimate Church of the United Brethren in Christ, and since none of the conditions of the grant under which it holds the property now in dispute have been violated, it follows that these plaintiffs are entitled to the relief prayed for, and that the defendants' cross-bill must be dismissed."

Mr. O. C. Bowers, for appellants:

I. The constitution of 1841 was, from the time of its adoption, the organic law of the Church of the United Brethren in Christ.

Philomath College v. Wyatt (Or.) Oct. 5, 1892.

II. The amended constitution of 1889 was not legally or regularly adopted in accordance with the method provided in the constitution of 1841 for the amendment or change thereof.

III. The election, at which it is supposed by the plaintiffs that the amended constitution and revised confession of faith were ratified by the people of the church, was not an election authorized by law, and therefore those voting had no power to represent or to bind those who did not choose to vote.

The 4th article of the constitution of 1841 provides, "there shall be no alteration of the foregoing constitution, unless by request of two thirds of the whole society."

The words "vote" and "request" are not the equivalent of each other. They are not synonyms.

The framers of this constitution when they used the words "request of two thirds of the whole society" had in their minds voluntary petitions coming up from two thirds of the whole membership asking that this or that be done.

"Request of two thirds of the whole society" is not to be construed to mean two thirds of those voting.

Com. v. Wickersham, 66 Pa. 184; *State v. Winkelmeier*, 35 Mo. 108; *State v. Sutterfield*, 54 Mo. 391; *State v. Foraker*, 6 L. R. A. 422, 46 Ohio St. 677; *State v. Swift*, 69 Ind. 505; *State v. Lancaster County Comrs.* 6 Neb. 474; *State v. Babcock*, 17 Neb. 188; *People v. Brown*, 11 Ill. 478; *People v. Wiant*, 48 Ill. 268; *Egypt v. Hanover Twp.* 25 Ohio St. 618.

This election was not authorized by law, and therefore those voting had no power to represent or bind those who did not choose to vote.

Wells v. Bain, 75 Pa. 47, 15 Am. Rep. 568; *Com. v. Green*, 4 Whart. 581.

An election must be by virtue of legal authority. There is no inherent power in the people to hold elections.

6 Am. & Eng. Encyclop. Law, 298, 294.

An election can only be held by a proper officer; and the power to order and to hold elections cannot be delegated.

Ibid.; *Com. v. Baxter*, 35 Pa. 263; *People v. Mathewson*, 47 Cal. 442; *People v. Johnston*, 6 Cal. 678.

IV. Under the constitution of 1841 the confession of faith was absolutely unchangeable at least so long as that constitution remained the organic law of the church.

The 4th section of article 2 of the constitution provides: "No rule or ordinance shall at any time be passed to change or do away the confession of faith as it now stands, nor to destroy the itinerant plan."

The claim that a majority of the people, with no right reserved in the constitution to do so, can make a new confession of faith, is revolutionary and communistic. It would subvert not only every associated church organization, but all the secret orders, associations of all kinds, and even the national and state governments.

It is denounced and condemned in principle 22 L. R. A.

by the Supreme Court of the United States in the great Dorr rebellion case of *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 561, in which the state court of Rhode Island declared that there was no inherent right in the people to revolutionize a state government, whose constitution prescribes a mode of changing its constitution. The same principle is held in the cases which affirm that a state constitution cannot be changed except in the mode therein authorized.

State v. Swift, 69 Ind. 525; *State v. Foraker*, 6 L. R. A. 422, 46 Ohio St. 677; *Collier v. Frierson*, 24 Ala. 100.

The prohibition against change enters into and is a part of the implied contract of church membership as fully as if written in every trust conveyance of church property.

Austin v. Bearing, 16 N. Y. 112, 69 Am. Dec. 672, note; *Wayland*, Moral Science, 384.

V. The revised confession of faith was not adopted in accordance with any law of the church, not even in accordance with the provisions of the amended constitution of 1889.

VI. The revised confession of faith is materially different from the old, in that it changes many of the doctrines contained in the old, rejects or ignores others, and adds new doctrines thereto.

VII. The courts have jurisdiction to inquire and determine whether or not the action of the church authorities in relation to the adoption of the amended constitution and revised confession of faith, was in accordance with its own organic law; and if it was not, to declare such action *ultra vires* and void, especially in view of the fact that property rights are involved.

The doctrine held in our own state as to the jurisdiction of the courts over questions of this character is clearly shown by the following cases, which at the same time indicate with equal clearness the parties to whom the property of a divided church or congregation will be awarded.

In the Reformed Presbyterian Church the general synod, its highest judicatory, is bound by its system of religious principles with the same force as individual members.

McAuley's App. 77 Pa. 397.

In the Reformed Presbyterian Church the powers of the general synod are derived from and contained in the church standards, and the exercise by it of an authority opposed to or subversive of such standard is *ultra vires*, and cannot of right demand the respect and obedience of its subordinates.

Kerr's App. 89 Pa. 97.

The title to the property of a divided congregation is in that part which is acting in harmony with its own law, and the ecclesiastical laws, usages, etc., which were accepted before the dispute, are the standard to determine which is right.

Schnorr's App. 67 Pa. 138, 5 Am. Rep. 415; *McGinnis v. Watson*, 41 Pa. 9; *Roach's App.* 69 Pa. 462, 8 Am. Rep. 275.

In *Hochreiter's App.*, 98 Pa. 479, this court held that a new constitution of an unincorporated society not having been adopted in accordance with the provisions of the existing constitution, was illegal and of no effect.

In matters of faith and doctrine churches are left to speak for themselves, but when rights

of property are in question, courts will interfere.

O'Hara v. Stack, 90 Pa. 477. See also *Presbyterian Cong. v. Johnston*, 1 Watts & S. 9; *App. v. Lutheran Cong. of Selingsgrove*, 6 Pa. 201; *First Methodist Prot. Church of Scranton's App.* 16 N. C. 245.

Messrs. Rowe, Gillan & Stewart, for appellees:

The constitution of 1841 was never submitted to the people of the church for approval or rejection. Authority it had none during all its existence beyond that it acquired by the enactment of the conference.

A constitution is "the written instrument agreed upon by the people."

Cooley, Const. Lim. 5; *State v. McCann*, 4 Lea. 9.

An instrument of government made and adopted by the people.

People v. New York Cent. R. Co. 24 N. Y. 486.

A fundamental law or basis of government, established by the people in their original sovereign capacity.

McKean v. Devries, 3 Barb. 198.

A form of government delineated by the mighty hand of the people.

Vanhorne v. Dorrance, 2 U. S. 2 Dall. 808, 1 L. ed. 393.

An agreement of the people in their individual capacities.

State v. Parkhurst, 9 N. J. L. 528.

In our own state the active assent of the people is recognized as of the very essence of constitutional validity.

Wells v. Bain, 75 Pa. 89, 15 Am. Rep. 568; *Woods' App.* 75 Pa. 59.

As to the church bodies acting under it, the inferior bodies had no choice; constitution or not, it was a valid enactment of the church legislature and as such bound them until repealed. The general conference acted under it probably because it did not care to repeal it. Certainly no argument that it could not repeal it is to be drawn from the fact that it did not do so.

The general conference of 1815 enacted the confession of faith, the conference of 1841 enacted this body of law which it called a constitution. Both bodies were undoubtedly competent to go so far, but when the latter attempted to withdraw both these important subjects from the control of its successors, it transcended its powers, and its acts were void.

Cooley, Const. Lim. 146, 147; *Bloomer v. Stolley*, 5 McLean, 158; *Com. v. Lancaster*, 5 Watts, 162; *Wall v. State*, 23 Ind. 150; *State v. Oskins*, 28 Ind. 384; *Oleson v. Green Bay & L. P. R. Co.* 86 Wis. 888. See also *Christ Church v. Pope*, 8 Gray, 140; *Kellogg v. Oshkosh*, 14 Wis. 624; 3 Am. & Eng. Encyclop. Law, 691.

Even when a by-law requires that no alteration of a law shall be made except by a two-thirds vote of the members, yet the same body by which the by-law was made may repeal it by a majority.

Richardson v. Union Cong. Soc. of Frances-town, 58 N. H. 187.

Although voluntary associations frequently make constitutions and pass by-laws, which they declare are not to be altered, except in a 22 L. R. A.

certain manner, yet their constitution and laws may, at any time, be altered or abrogated by the same power that created them, and the vote of any subsequent meeting, abrogating or altering such constitution, though passed only by a majority, has as much efficacy as a previous vote establishing them.

Smith v. Nelson, 18 Vt. 512.

An attempt on the part of a legislative body to limit for the future its own powers is void because it is a betrayal of the trust reposed in it, and a perversion of the authority lodged with it.

Mott v. Pennsylvania R. Co. 30 Pa. 35, 72 Am. Dec. 664. See also Cooley, Const. Lim. 148, note 2; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

From histories of the church it appears that at the time the constitution of 1841 was adopted, there was no way of ascertaining the number of members in the denomination. Knowing, then, that the membership was uncertain in number, and the utter impossibility of ascertaining at any time whether two thirds or any other proportion of the members had joined in a petition, how can the general conference of 1841 be said to have intended that a literal request or petition signed by two thirds of its indefinite and indefinable number must be presented to a subsequent conference before any steps could be taken looking towards a change in the constitution?

Every interpretation that leads to an absurdity ought to be rejected.

Vattel, Law of Nations, bk. II., chap. 17, § 282; Smith, Stat. & Const. Constr. 695; Story, Const. Abridged, § 194.

"When a law becomes the instrumental process of amendment," says Chief Justice Agnew, in *Wells v. Bain*, 75 Pa. 47, 15 Am. Rep. 568, "it is not because the legislature possesses any inherent power to change the existing constitution through a convention, but because it is the only means through which an authorized consent of the whole people, the entire state, can be lawfully obtained in a state of peace."

The election held under this commission's direction was a legal one and one of which the members of the church were bound to take notice.

Com. v. Green, 4 Whart. 604.

It follows as a necessary result that if the proposed changes received the approval of two thirds of those who voted, the constitutional requirement of "two thirds of the whole association" were satisfied.

Craig v. First Presby. Church of Pittsburgh, 83 Pa. 42, 82 Am. Rep. 417; *Cass County v. Johnston*, 95 U. S. 360, 24 L. ed. 416; *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 644, 21 L. ed. 328; *Carroll County Supra. v. Smith*, 111 U. S. 556, 28 L. ed. 517; *People v. Wiant*, 48 Ill. 263; *State v. Woodford*, 15 Kan. 500; *McCrary, Elections*, 8d ed. § 178; *Lamb v. Cain*, 14 L. R. A. 518, 129 Ind. 496.

The interpretation of this constitutional provision was a proper subject for the judicial action of the general conference. If susceptible of different constructions it had the right to say what it meant, whether two thirds of the members of the society, or two thirds of those voting at the election, and acting strictly within its powers it did decide that it meant two

thirds of those voting. From that decision no appeal lies, for there is no higher tribunal in the church, and we cannot rejudge its decrees.

Watson v. Jones, 80 U. S. 18 Wall. 679, 20 L. ed. 666; *German Reformed Church v. Com.* 3 Pa. 291; *McGinnis v. Watson*, 41 Pa. 10; *Shannon v. Frost*, 8 B. Mon. 253; *Gibson v. Armstrong*, 7 B. Mon. 481; *Harmon v. Dreher*, 1 Speers, Eq. 87; *Ferraria v. Vasconcelles*, 23 Ill. 456.

The contention that the general conference has not judicially determined the construction of the disputed clause in the constitution cannot be sanctioned.

There is perhaps no more indefinite line of demarcation known to our law than that which separates legislative and judicial acts.

Greenough v. Greenough, 11 Pa. 499, 51 Am. Dec. 567; *Wayman v. Southard*, 23 U. S. 10 Wheat. 47, 6 L. ed. 263.

How, then, shall the courts make for the conference this distinction which it itself has ignored?

Every department of government, invested with certain constitutional powers, must in the first instance, but not exclusively (that is, to the exclusion of the superior departments), be the judge of its powers or it could not act.

Kendall v. Kingston, 5 Mass. 524.

So with the general conference. Its power to construe the laws of the church is undoubted.

The positive provisions of the constitution of 1841 are so plainly referable to the general conference that they seem to indicate unmistakably that what the framers had in mind was the formulation of a set of rules by which that body should be guided in the future.

Construing article 2, section 4, then, with reference to this evident object, it becomes apparent that the two can only be harmonized by understanding the prohibition contained in the former as applied to the passage of any rule or ordinance by the general conference.

Endlich, *Interpretation of Statutes*, § 73.

Is it to be presumed that the conference intended to go beyond its proper power and to fetter the hands of the people to which it itself, as it had declared, looked for authority? Is it to be presumed, in the absence of express words to that effect, that it intended to abridge that sovereign authority? Such a construction should never be admitted "unless the language used be too clear to admit of a doubt."

Gilman v. Sheboygan, 67 U. S. 2 Black, 510, 17 L. ed. 788; Endlich, *Interpretation of Statutes*, § 287.

It follows, then, that if this prohibition was aimed only at the conference, the power to alter the confession to any extent they wished remained with the people, even though such power were not specially reserved.

Luther v. Borden, 48 U. S. 7 How. 1, 12 L. ed. 581.

And the only way in which that change could be accomplished was by a "law, as the instrumental process of raising the body for revision and conveying to it the powers of the people."

Wells v. Bain, 75 Pa. 47, 15 Am. Rep. 563.

The true test as to the ownership of the property in dispute is, "Which of these parties represents a congregation in ecclesiastical connection with the United Brethren Church—in 22 L. R. A.

proper succession to the church of that name as it existed in 1838—and professing no doctrine inconsistent with a belief in Christ and the brotherhood of believers in Him?" We confidently affirm that the application of that test must be conclusive in favor of the appellees.

McBride v. Porter, 17 Iowa, 211; *Presbyterian Cong. v. Johnston*, 1 Watts & S. 1; *McGinnis v. Watson*, 41 Pa. 9; *Roski's App.* 69 Pa. 462, 8 Am. Rep. 275; *Schnorr's App.* 67 Pa. 188, 5 Am. Rep. 415; *Means v. Presbyterian Church*, 8 Watts & S. 808; *App. v. Lutheran Cong. of Selingsgrove*, 6 Pa. 201; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136; *Miller v. Gable*, 2 Denio, 493; *Hale v. Everett*, 58 N. H. 70, 16 Am. Rep. 63; *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *Gibson v. Armstrong*, 7 B. Mon. 481; *State v. Farris*, 45 Mo. 188.

To set the civil courts in motion there must be so plain and fundamental a change as to destroy the identity of the society to make what is in effect a new church.

Miller v. Gable, *supra*; *Trustees of Lutheran Cong. of Pine Hill v. St. Michael's Evangelical Church of Pine Hill*, 48 Pa. 21; *Keyser v. Stanifer*, 6 Ohio, 363.

Williams, J., delivered the opinion of the court:

The right to the decree asked for in this case depends on a question of ecclesiastical identity. The question is, which of the parties, and organizations represented by them, is the church and society known as the "United Brethren in Christ?" The society was a unit prior to 1839. It had a system of polity and a creed which were accepted throughout the whole church. They had taken form gradually, with the growth of the church, from a small beginning a hundred years or more ago, until they were reduced to form by the general conference. This was done, so far as the confession of faith is concerned, in 1815. The constitution was formulated and adopted in 1841. The confession of faith remained without any considerable change for three quarters of a century. The constitution had been recognized and accepted as the fundamental law of the society for a half century. The system of polity provided for the grouping of individuals into local congregations or churches. An indefinite number of churches were grouped to form a circuit. Circuits were united to make a district, and these, held together by the denominational bond, made up the church. The ecclesiastical power of the society was distributed through a succession of courts or tribunals. The church officers exercised this power in the individual congregation. In the circuit, it was exercised by the quarterly conference; in the district, by the annual conference; and, for the whole society, the general quadrennial conference was the supreme legislative and judicial body. Its confession of faith was brief, and in its outlines was what may be described as "Christological." Under these simple fundamental rules of polity and articles of faith, the society had grown until in 1839 its membership numbered over 200,000, distributed

over many states. It had become one of the influential Protestant organizations, and was the owner of much valuable church property. The local church at Greencastle was organized and officered prior to 1889 under the authority of this united and prosperous society, and was in full connection with it. The officers of this local church are the plaintiffs in this case, and they insist that since 1889, as truly as before, they have the right to the possession of the house of worship, and the lands appurtenant, belonging to the church at Greencastle.

Looking at the position of the defendants, we find that on the church records, as far back as 1865, there is evidence to show a growing difference of opinion in regard to three points of polity. These were the admission of lay representation, the rates of representation, and the attitude of the church towards secret societies. The Constitution of 1841 (art. 2, § 7) contained this provision: "There shall be no connection with secret combinations." This declaration was indefinite. It was susceptible of an interpretation so broad as to prohibit membership in the various social, charitable, and mutual aid societies that have grown so rapidly in number and in favor in recent years. It might with equal, if not better, reason, be construed as having reference to unlawful secret combinations, and not intended to interfere with lawful organizations, whose advantages were restricted to their own membership. The attitude of those who held to the first of these positions was regarded by many as imposing an unnecessarily hard restriction upon the freedom of action of the individual members of the church. The sentiment in favor of increased liberality towards the laity, in admitting them to participate in the government of the society, and removing unnecessary restrictions upon their individual action, grew steadily. Finally, in 1885, it had become so strong that a decided majority of the members of the general conference took action upon the subject. In a carefully worded resolution, they expressed their belief that both the creed and constitution could be improved in clearness and fullness of statement, and by this means brought more thoroughly into harmony with the views and wishes of the church. This was a mild form of revision, and the conference entered very deliberately upon it. The first thing done was to raise a committee of thirteen members to consider the subject, and report. After considerable deliberation, eleven members of the committee united in a report setting forth: "It is the sense and belief of your committee that the constitution, as it now stands, is not in harmony with the present wishes of our people, as has been indicated in discussion, petitions, and elections during the past year," and recommending that a commission, to consist of twenty-seven members, including all the bishops of the church, should be appointed to "consider our present confession of faith and constitution, and prepare such a form of belief, and such amended fundamental rules for the government of this church in the future, as will be best adapted, in their judgment, to secure its growth and

efficiency in the work of evangelizing the world." This commission was made up so as to distribute its members among the several districts composing the society, and was subjected to the following lines of limitation, viz.: "To preserve unchanged, in substance, the present confession of faith, so far as it is clear; . . . to retain the present itinerant plan; . . . to keep sacred the general usages and distinctive principles of the church on all great moral reforms." When the commission should complete its work of revision along these narrow and conservative lines, it was instructed to submit it to the membership of the society for approval or disapproval, in such manner as to secure general attention to it, and place it in the power of every member who would do so to express his or her opinion. This action was in no sense revolutionary. It did not propose to cut loose from any distinctive theological doctrine, or from the general system of polity, theretofore held by the society. The commission entered upon its work, and revised both the confession of faith and the constitution, with a view to greater clearness and fullness of statement upon certain doctrines, and greater liberality towards the membership in their individual action upon the subject of secret societies. Both documents were put in a more connected and logical form; and were relieved from the indefiniteness and ambiguity of expression out of which the differences of interpretation had arisen. The revised documents were then submitted to the society for an expression for or against their adoption in lieu of the constitution and confession then in use. Nearly three years were given for discussion and examination. At the end of this time a vote was taken throughout the society. The returns showed a very large majority of the votes to be in favor of the substitution of the revised forms for the old. At the general conference of 1889 the commission reported its work, the submission of it to the society, the votes given for and against its adoption, and submitted the whole to the consideration of that body. In this report twenty-five of its members concurred. One bishop and one other person dissented, and submitted a minority report. The general conference then referred the majority report to a special committee, charged to examine and report whether the commission had followed the instructions given to it, kept within the prescribed limits, and submitted its plan of revision to the society in a proper manner. All but two of this committee joined in a report affirming that the commission had acted with fidelity, had observed the limitations imposed upon their action, and had submitted their work to the membership, by whom it had been approved. They therefore recommended that the bishops should issue a proclamation announcing the adoption of the revised documents, and declaring them to be the confession of faith and the constitution of the Church of the United Brethren in Christ. This report was adopted by the very decisive vote of 110 yeas to 20 nays. The proclamation was accordingly made, and the revised forms became thereupon, and thereafter, the

accepted and binding law of the church. Fifteen of the twenty who voted nay—Milton Wright, a bishop, being of the number—withdraw from the general conference at this stage of the proceedings, and organized another general conference at another place in the same city, and assumed to be the true general conference of the whole church, and to have the rightful authority to manage and control all the property, business, and work of the church. The original body, containing 115 members, kept on in its work. The new body, with fifteen members, entered upon a rival system of regulation and control. The local congregation at Greencastle divided over the same subject. The majority adhered to the original or majority conference. A minority followed the minority in the conference, organized a new body, and took possession of the house of worship and property belonging to the local church, and excluded the majority therefrom. The officers of this new congregation at Greencastle are the defendants. The subject of the litigation is the house of worship and other property of the church at that place. The question raised is which of these parties is, or represents, the Church of the United Brethren at Greencastle; for to that one possession of this property should be awarded.

It appears that the real estate in question was conveyed to trustees, for the use of "the United Brethren in Christ," in Greencastle, as early as 1828, by one John Dome. A church of the United Brethren was organized prior to, or during, that year, which was the beneficiary intended by the donor. It has had a continuous existence since. It was the only organized society of that name in Greencastle until the withdrawal of the fifteen members of the general conference in 1889, followed by the organization of a new conference, and the division of the church. The plaintiffs and their predecessors have been in continuous possession for more than sixty years. The prima facies of the situation is with them, and it is incumbent on those who claim a right to dispossess them, and hold the possession against them, to show affirmatively how and when their title accrued, and that it is a good and valid title. The learned counsel for the defendants fully and clearly understood the requirements of his position, and put the reasons on which he rested his contention into seven propositions. The first of these asserts the validity of the constitution of 1841. The fourth asserts the "absolute unchangeability" of the fundamental law of the church, at least as to the confession of faith, under that constitution. The second, third, and fifth deny the regularity and legality of the action of the conferences of 1885 and 1889. The sixth affirms that the revision made in 1889 was so radical as to be subversive, and to destroy the identity of the church. The seventh insists that the courts have jurisdiction to inquire into and determine these questions, in order to settle the title to the real estate now in controversy. It will appear from what we have already said that we assent to the first proposition. Acquiescence and use for fifty years settled that point. We are prepared to assent to the seventh proposi-

tion. It is the duty of the courts to settle the question of the right to the real estate conveyed by John Dome in trust for the Church of the United Brethren in Greencastle. The sixth proposition raises a question of fact. It asserts that the revision made a complete theological departure from the creed of the church, as it stood before 1889. The master has found that this is not so, and, on the other hand, that the theology of the creed of 1815, and that of the revision, are the same in every essential particular, differing only in clearness of expression, and completeness of statement. The learned judge of the court below, in an excellent opinion, has concurred in, and vindicated fully, this conclusion of the master: This question is therefore disposed of, unless clear error in the finding is pointed out. We have attentively considered the suggestions made to us on this subject by the appellant, we have examined the old and the revised confessions, we have read the testimony of the distinguished theological experts who were called to testify as to the alleged doctrinal differences, and we are satisfied that the master and the court were right in denying the sixth proposition. There has been no substantial departure from the ancient belief of the church. The revision is simply a clear and ample statement of the great doctrines that are to be found in the creed of 1815, or that logically result from them. The "general usages and distinctive principles of the church" are preserved. Identity in both polity and creed are undisturbed. We feel the more satisfaction with this conclusion since it is in harmony with that reached by the court of last resort in matters of faith and discipline, within the church itself, viz. the general conference, and with the conclusion reached by a clear majority of the entire membership. If the question was one of doctrine alone, we should feel inclined to treat the decision of the general conference as final, in accordance with the rule laid down in several cases, among which are *App v. Lutheran Cong. of Selingsgrove*, 6 Pa. 201; *German Reformed Church v. Com.* 8 Pa. 282; *McGinnis v. Watson*, 41 Pa. 9. Two of the questions raised by the defendants' propositions remain to be briefly considered: First, was the confession of faith absolutely unchangeable under the constitution of 1841? Second, if not, was the change made in 1889 so made as to have a binding force upon the church?

The appellants' argument upon the first of these questions rests on section 4, article 2, of the constitution of 1841. It is as follows: "Sec. 4. No rule or ordinance shall at any time be passed to change or do away with the confession of faith, as it now stands, nor to destroy the itinerant plan." This provision is not to receive a technical interpretation, but is to be construed in the light which the whole instrument throws upon it, and so as to advance the interests of the church and promote its objects. *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 114; *Com. v. Clark*, 7 Watts & S. 127; *Com. v. Hartman*, 17 Pa. 119; *Com. v. Maxwell*, 27 Pa. 444. The purpose and effect of section 4, when so construed, is not to prohibit changes in the con-

fession of faith that are in the interest of clearness of expression, or fullness of statement, of the accepted doctrines of the church, but to prevent changes in the doctrines to which the church was committed. The provision was not intended as an impassable barrier thrown in the way of improvement of all sorts, but as a protection against the introduction of heretical doctrine, destructive of the distinctive theological character of the church. It follows that the changes made in 1889 were not within the prohibition of this section, since they are shown to be changes in statement in the interest of clearness and completeness of declaration of belief in the doctrines actually held by the church, and which are found less fully stated in the confession prepared in 1845. The contention of the appellants upon this subject fails, therefore, for this reason. The confession of faith was not "absolutely unchangeable" in its manner of expressing the doctrines held by the church. It was unchangeable so far as relates to the distinctive doctrines or principles actually embodied in it.

We come, finally, to inquire whether the proceedings of the conference and the commission, and the expression of assent and dissent by the society, are substantially in harmony with the provision of the constitution of 1841, that authorized changes on the request of two thirds of the whole society. The exact words of the provision are: "There shall be no alteration of the foregoing constitution unless by the request of two thirds of the whole society." Alterations are not forbidden, but, as the constitution is the fundamental law of the whole society, it is proper that it should be changed only by the action or assent of the body affected by it. But there are two requirements to a lawful alteration: The action of the society, and the action of its highest church judicatory. The action of the first must be formulated and declared by the last. Which body, the popular one, described as the "society," or the ecclesiastical body, called the "General Conference," shall originate the alteration, is not prescribed. The proposition may therefore come from either. The bishops and clergy, who make up so largely the membership of the conference, are, by reason of their constant attention to religious and theological subjects and the working of the machinery of the church, peculiarly qualified to lead the thought of the church on all such subjects. It is not desirable, nor is it necessary, under the provision we are considering, that they should sit with folded hands, waiting to be addressed by the society on any subject of denominational or religious importance. They may, and it is clearly their duty to, direct attention to any given subject. They may urge its consideration and counsel speedy action, but they cannot make the change that is needed. The society must move. The word employed is "request;" but how or when, in the course of procedure, the request must be made, is not stated. It may therefore be in any manner that expresses the desire of the society, and at any time before the final act of the conference. The only thing that can be positively affirmed as to its char-

acter is that it must express the wish of the society. In the present case, action by the conference preceded and followed the expressed wish of the membership. That which proceeded suggested the desirability of certain changes, and reduced them to form for the examination and action of the society. That which followed rested on the expressed wish of the society in regard to the proposed changes, and carried it into effect. The whole society was taken into council by the conference. Its wish was asked and its answer received. The enrolled membership at that time was something over 200,000. Of this number, 51,070 signified their desire for the proposed change by an affirmative vote. Those voting against the acceptance of the revision were only 8,810. Those who preferred another mode of proceeding than that which had been taken, and petitioned the general conference accordingly, were 16,187. The total number of those who expressed themselves upon the subject was 70,567. This was more than one third of the enrolled membership. How many of those who made no response to the request of the conference for an expression of opinion were old and feeble, how many were young and immature, how many were wholly indifferent to the subject, we have no means for estimating. It is said that some refrained from voting because of objection to the proposed revision, or the mode of proceeding to ascertain the wish of the society. If so, it was an ineffectual kind of opposition. In all elections the nonvoting must be counted as willing to be bound by the action of the majority of those who vote. Any other rule would lead to interminable trouble and uncertainty. *Craig v. First Presby. Church of Pittsburgh*, 88 Pa. 42, 53 Am. Rep. 417. In elections under the laws of the states or the United States, this has never been doubted. In parliamentary bodies the same thing is true, unless the rules of such body require that a quorum of the membership shall participate. In that case it is a majority of the required quorum, not of the whole body, that is necessary to the validity of any proposed action. A majority consists of more than one half of those who vote at a given election not of those who might have voted, but did not vote, for we have no machinery for ascertaining the number of the latter class, and we should find it still more difficult to determine on what side they should be counted. It is true that the voting, in its case, was not done under the authority of any general law of the church, and that it is not to be treated, in all respects, as an election. It was, in its object and results, a mere expression of the individual preference, wish, or request of the voter. If any of the members of the society felt that they had no wish or request to express on the subject, it was proper for such persons to say so, by refraining from any expression in answer to the request of the general conference. But, if a positive preference was felt, it was the privilege, if not the duty, of the member entertaining such preference, to express it, for the information and guidance of the highest ecclesiastical tribunal in the society. To one looking at this

subject from the standpoint of a disinterested spectator, it would really seem as though courtesy towards the growing body of the denomination, love for the church, and zeal for its prosperity and peace, alike required those who opposed revision to say so, squarely, on all suitable occasions, with voice and vote. The inference is a natural one that those who did not oppose were either favorable or indifferent to the proposed change.

Our conclusions on the whole case are as follows: This society had a constitution and a confession of faith prior to 1889 which established both the polity and the creed of the church beyond question, "so far as they were clear" and complete in expression. The general conference suggested revision of both documents, not for the introduction of new or heretical doctrine, but in the interest of clearness and fullness of declaration of the actual belief of the society, and for the removal of ambiguity and uncertainty from the written documents. The "whole society" was asked, in a regular and proper manner, to express its preference or wish upon the adoption or rejection of the revision proposed. An ample time for consideration and decision was afforded them, and a suitable system provided for gathering up the result of the wishes and

preferences to be expressed. A very large majority of those who expressed any wish on the subject favored the revision proposed. In conformity with their request or wish of the society, the general conference of 1889, by proclamation made by the bishops of the church, under its direction, declared the fact that, by the concurrent action of the society and the general conference, the revised constitution and confession of faith had been adopted, and were to be accepted as the constitution and creed of the society. This general conference, and the churches adhering to it, are the Church and Society of the United Brethren in Christ, as fully, to all intents and purposes, as they were prior to 1889. Those who withdrew from the conference of 1889, and organized another conference, together with those who adhere to them, while they may be, in theological belief and religious observances, identical with the body from which they withdrew, are ecclesiastically distinct, as a result of their own acts, and they have no title to the property held by the society prior to 1889.

The plaintiffs are therefore entitled to the relief prayed for, and provided by the decree appealed from, and *the decree is now affirmed*; the appellants to pay the costs of this appeal.

MAINE SUPREME JUDICIAL COURT.

Edmund F. WEBB, Admr., etc. of Ann S. Fuller, Deceased, *et al.*,
v.

Addie L. FULLER *et al.*

(85 Me. 443.)

1. **No statute is necessary** to enable a court of equity to set-off the amount due by a legatee to the testator's estate against his share of the amount ordered to be distributed by the court of probate.
2. **Neither the fact that a debt due by legatees to testator's estate is joint** nor that one of them is dead and his legacy is claimed by his administrator will prevent the amount of their debt being retained from their claims to legacies.
3. **A legatee who necessitates a resort to litigation** to compel him to permit a set-off of his debt to testator's estate against his legacy cannot have his costs paid out of the estate.

(May 31, 1893.)

REPORT by the Supreme Judicial Court for Kennebec County for the opinion of the full court of a bill in equity filed by the administrator of the estate of Ann S. Fuller, deceased, to compel the applications of the shares of defendants as distributees of decedent's estate to the payment of judgments which had been obtained against them by the administrator in favor of the estate. *Bill sustained.*

The facts are stated in the opinion.

Messrs. Webb, Johnson & Webb for plaintiffs.

Mr. W. P. Thompson for defendants.

Emery, J., delivered the opinion of the court:

Ann S. Fuller died intestate, leaving an estate to be divided after settlement into four distributive shares. Two of the heirs, to each of whom one share was payable, were jointly indebted to the estate. The administrator recovered upon this indebtedness a judgment against the two heirs. He was not able to collect the whole amount of this judgment, nearly \$25,000 remaining unpaid and uncollectible. He settled the estate as far as he could without the balance of the judgment, and the probate court made a decree for a distribution among the heirs of the balance in his hands, amounting to a little over \$18,000.

The administrator desired to apply to the further payment of this judgment the share of each judgment debtor in the balance to be thus distributed. To this each of the judgment debtors objected, and formally demanded that his distributive share be paid to him in full in accordance with the decree. Thereupon the administrator filed this bill in equity to compel the application of these two shares to the payment *pro tanto* of the joint judgments.

The respondents contend that the right of set-off is solely and entirely a creation of the

NORM.—On the subject of set-off between a distributive share of an estate and a debt of the distributee to the estate, see, in connection with the above case, that of Koons v. Mellett (Ind.) 7 L. 23 L. R. A.

R. A. 231, and note; Fiscus v. Moore (Ind.) 7 L. R. A. 235; Blood v. Kane (N. Y.) 15 L. R. A. 490; Gosnell v. Flack (Md.) 18 L. R. A. 153.

statute, and hence cannot be exercised in any case unless some statute expressly authorizes it. They further contend that the statute gives the probate court no authority to make such a set-off as is desired here; and that in no case and in no proceeding does the statute authorize a set-off of one joint debt against two several debts, as asked for in this case. Rev. Stat. chap. 82, § 57.

It may be conceded that no statute can be cited directly authorizing the action asked for in this case, but it does not follow that the court in equity is without power of action in the premises. Having now full equity powers, the court can do and compel equity in any case except where restrained by some statute or positive rule of law.

The right of an executor or administrator to retain a legacy or distributive share from a debtor to the estate, and apply it to the indebtedness, has long been recognized by the law as existing without any statute. It is not the technical right of set-off in actions at law. It is rather called in the old cases the "right of retainer." It is an equitable right of its own nature, and not at all dependent upon any statute. It is the plain moral, as well as legal, duty of the debtor to pay his debt to the estate. He has had the value from the estate. He ought in morals and law to restore it. It needs no statute to affirm this duty. It is self-evident.

The right of a legatee or an heir in the estate of a decedent is not self-evident nor equitable. He has paid no value for it,—has not earned it. It is a matter of grace. To make it a legal right needs statute affirmation, and without a statute or some positive rule of law the right would not exist. That the legatee or heir should fulfill his obligations to the estate before receiving the bounty of the decedent is clearly equitable. It is an equity which the court can enforce.

In *Jeffer v. Wood*, 2 P. Wms. 128 (temp. 1695), the court said: "The legatee's claim is in respect of the testator's assets, without which the executor is not liable; and it is very just and equitable for the executor to say that the legatee has so much of the assets already in his own hands, and consequently is satisfied *pro tanto*." In *Courtenay v. Williams*, 3 Hare, 539, a legatee filed a bill to compel the executor to pay over a legacy. The executor claimed to retain out of the legacy the amount of a debt owed by the legatee to the estate. The legatee resisted this claim on the ground that his indebtedness was barred by the statute of limitations. It was held, however, to be equitable to deduct the debt from the legacy notwithstanding the statute. The court said the case might be put to the legatee as follows: "You ask for a portion of the assets of the testator; but you are yourself a debtor to the testator's estate, and his assets are diminished *pro tanto* by your default. It is against conscience that you should take anything out of the estate until you have made good what you owe to it." In *White v. Cordwell*, L. R. 20 Eq. 644, the same principle was applied in an intestate estate between the administrator and an indebted heir. The court said: "Until the debtor discharges his duty to the estate by

paying his debt which he owes to it, he can have no right or title to any part of it under the statute" (the statute of distributions). In *Batton v. Allen*, 5 N. J. Eq. 99, 43 Am. Dec. 630, one of the seven distributees was indebted to the estate. It was held that the amount of his indebtedness should be added to the surplus, and form a part of the amount to be divided; that the debtor's share of the whole amount should be paid *pro tanto* by canceling his indebtedness, and he receive only the residue of his share, if any. *Armour v. Kendall*, 15 R. I. 193, was a case of joint indebtedness like the one before us. A legatee and another party were jointly indebted to the estate of the testator. It was held that the executor could retain the legacy as a *pro tanto* payment of the debt due by the legatee and his partner to the estate. In *Tinkham v. Smith*, 56 Vt. 187, the heir brought an action at law against the administrator for his distributive share of the decedent's estate as determined by the probate court. He was at the same time indebted to the estate in a larger sum. It was held that the administrator could apply the indebtedness in payment of the share, and judgment was rendered for the defendant. It appears, however, in this case, that one of the two indebted heirs died after the recovery of the judgment against him and his coheir. This administratrix now contends that she is entitled to his share in Ann S. Fuller's estate in full to enable her to settle his estate. It must be evident, however, that the heirs, creditors, or administrator of a deceased legatee or distributee can be in no better position than he, and must be content with the residue, if any, after his debt to the estate is paid. It was so held in *Denise v. Denise*, 87 N. J. Eq. 163; *Earnest v. Earnest*, 5 Rawle, 218; *Girard Life Ins. A. & T. Co. v. Wilson*, 57 Pa. 182.

In *Wadleigh v. Jordan*, 74 Me. 488, and *Holt v. Libby*, 80 Me. 329, the statute of limitations had barred the debt of the legatee to the estate, and it was held that under our statutes the executor could not apply the legacy in payment of a debt so barred. Neither case, however, questions the power or propriety of such application where the debt is not barred.

In this case there should be a decree substantially as follows: The amount due on the judgment should be added to the amount of the surplus in the hands of the administrator, and the sum of these should be reckoned as the amount for distribution. The two shares of this whole amount coming to the two indebted distributees should be applied to the payment of the judgment against them. The other two shares should be paid, as far as the cash balance extends, to the other distributees according to their respective interests. It is asked in the briefs that the court order costs and counsel fees for both parties to be paid out of the estate. We do not think it would be equitable to do so. It is not the case of a will or a trust. The case is purely litigious. The two indebted distributees and defendants resisted an equitable right of the plaintiff, and subjected the estate to this litigation by their recalcitrancy. While the plaintiff should be allowed to de-

duct his costs and reasonable counsel fees from the balance in his hands after accounting for taxable costs recovered, we see no reason why the two contesting defendants, who are found to be in the wrong, should not

pay costs as usual. The decree will so order.

Bill sustained.

Peters, Ch. J., and Libbey, Foster, Haskell, and Whitehouse, JJ., concurred.

TENNESSEE SUPREME COURT.

Mary Mildred JOHNSON, Executrix, etc., of
John Cummings Johnson, Deceased, *et al.*,
Piffs. in Err.,

v.

Edwin L. JOHNSON *et al.*

(.....Tenn.....)

1. A devise of land to trustees with power to collect the income for charitable purposes, giving them power to appoint their successors and providing against failure of trustees indefinitely, passes the fee, if the devise is valid.
2. A devise to trustees "for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable as they may elect," is too indefinite to be enforced in equity.
3. A bequest of testator's set of books "and the proceeds of all collections he can make from accounts which were the results of my past oil and cotton business. The accounts against or in favor of" certain of testator's relatives, "as well as accounts of properties, rents, stocks, bonds, and investments to be treated as memorandums only and not to be included in the above bequest," does not pass the accounts against the relatives.

(May 16, 1893.)

ERROR to the Chancery Court for Shelby County to review a judgment holding void a portion of the will of John Cummings Johnson, deceased, for the construction of which this action was brought. *Affirmed.*

The portions of the will, the construction of which by the lower court was adopted by the court on appeal were as follows:

"Clause 8. I give and bequeath to my son, William C. Johnson, my largest iron safe, my set of books, and the proceeds of all collections he can make from accounts which were the results of my past oil and cotton business, with full power to continue suits, to sue or compromise any accounts therein, with freedom from making any report of his action to any person or any authority, state, county, municipal, or otherwise. The accounts against or in favor of Mrs. J. C. Johnson, Mrs. M. M. Johnson, J. C. Johnson, or any of my descendants, as well as accounts of properties. Rents, stocks, bonds, and investments to be treated as memorandums

only, and not to be included in the above bequeath."

"Clause 24. The income from the rentals and rental notes now in bank, and proceeds of Chapman notes, will be used by my wife, Mary Mildred Johnson, for family expenses, as now and heretofore."

The construction given to the above clauses was as follows: "First. That by the eighth item or clause of said will the testator intended to give and bequeath, and did give and bequeath, to William C. Johnson, all accounts, of every kind, nature, and description, that appeared on his set of books, whether said accounts were the result of his past oil and cotton businesses or not, save and except only the accounts appearing on said set of books against or in favor of Mrs. J. C. Johnson, Mrs. Mary Mildred Johnson, J. C. Johnson, or any of testator's descendants, as well as accounts therein of properties, rents, stock, bonds, and investments, all of which excepted accounts are to be treated simply as memorandums, and are not included in the said bequest to the said William C. Johnson. . . . That by the twenty-fourth item or clause of said will the said testator intended to give and bequeath, and does give and bequeath, to his wife, Mary Mildred Johnson, to be used by her in the payment of family expenses in the same manner as before testator's death, such moneys in bank at the time of his death as had been derived from rentals, and such rental notes as were in bank at the time of his death, still uncollected, together with the proceeds of the Chapman notes, as aforesaid, and that outside of the rents given to Mrs. Johnson under the fourteenth and fifteenth items or clauses of said will, which last rentals are given to her absolutely, to be disposed of at her pleasure, she can appropriate no other rentals or properties of the testator's estate to the payment of the family expenses."

Mr. H. C. Warrinner for plaintiffs in error.

Messrs. Smith & Tresevant for defendants in error.

Wilkes, J., delivered the opinion of the court:

This is a bill to construe the several items of the will of John Cummings Johnson, deceased. The testator died July 25, 1892, leaving a widow, complainant Mary Mildred

NOTE.—As to the indefiniteness of charitable trusts which will be fatal, which has been a question of very great public as well as professional interest in several recent cases, see *Crerar v. Williams* (Ill.) 21 L. R. A. 454; *Tilden v. Green* (N. Y.) 14 L. R. A. 23 L. R. A.

38; *Gambel v. Trippe* (Md.) 15 L. R. A. 235, also notes to *Cottman v. Grace* (N. Y.) 8 L. R. A. 145; *Heiskell v. Chickasaw Lodge No. 8* (Tenn.) 4 L. R. A. 600; *Stratton v. Physio-Medical Inst.* (Mass.) 5 L. R. A. 38; *Almy v. Jones* (R. I.) 12 L. R. A. 414.

Johnson, and seven children by a former marriage, and possessed of quite a large estate, of both realty and personalty. The will was written by the testator, and is somewhat artificially drawn. It consists of twenty-six items, and purports to convey and dispose of all the property of the testator. The several items submitted to the chancellor were construed by him, and specific directions were entered in the decree, and a written opinion was filed by him in the court below. The cause has been brought to this court upon writ of error, and it is assigned as error that the chancellor erred in his construction of the eighth, seventeenth, and twenty-fourth items of the will. We have carefully considered these items, and the assignment, and are of opinion that there is no error in the construction placed by the chancellor upon the eighth and twenty-fourth items of the will, and his opinion and decree as to these items are adopted by this court, and need not be more specifically set out.

The main controversy is in regard to the proper construction of the seventeenth item, which is as follows: "17th. I give and bequeath to my wife, Mary Mildred Johnson, and to my daughter, Lillie W. Johnson, jointly, my home lot, of three acres, No. 11, fronting on Poplar street, east of Dunlap, to hold in trust as below cited, with power to lease and sell the same under the terms of this will, and to nominate and elect their successors and other associates in this trust from my descendants, or from their Protestant husbands or wives, not exceeding five, who may in time elect their associates and successors from my descendants. If at any time in the future there should not be as many as two of my descendants able and willing to take charge of this trust, then it shall revert to a board consisting of the elders of the several Presbyterian churches of the city of Memphis, who shall, with the assistance of the Presbyterian pastors, nominate from the bankers or business men of their body an executive committee of five, who, with my descendants, shall have full power and control to manage the trust so it will be productive of most good to the greatest number. It has been my desire to see a grand female college on this lot, and I hope it may yet be accomplished. If the way be clear to that end, the income may be appropriated in that direction; but, if not, then it is my desire and wish that the main income from this property, less the amount needed for repairs, taxes, and insurance, shall be used for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable, as they may elect. The property is never to be mortgaged, nor is the income to be pledged for more than three months in advance, and no sale of it shall be made until five years after the termination of the present lease, when it may be sold for reinvestment for some scholastic or charitable purpose."

The question presented is whether this is a valid devise to a charitable purpose, such as can be upheld under our authorities. The

complainants, who are the executors of the testator's will, are also made by this item the original trustees of this charity; and in their bill they allege that the item made a valid devise to them, as trustees, of the property, in fee; the net rents and income to be applied to charitable purposes, which are rendered sufficiently definite to be valid. The adult defendants answer that they have no desire to obstruct the benevolent and charitable intentions of their father, if they can be legally carried out, and they join in the request to the court to construe the item, and determine, as against the minor defendants and devisees, if effect can be given to the devise as a valid charity.

We are of opinion that, if the devise is valid, then the item passes the fee in the property for the purposes indicated, the net income from which is to be expended and appropriated by the trustees. While there is no specific devise of the property, yet a devise of the rents and profits and income is, in effect, a devise of the property itself. *Polk v. Paris*, 9 Yerg. 241, 80 Am. Dec. 400; *Morgan v. Pope*, 7 Coldw. 547; *Davis v. Williams*, 85 Tenn. 648; *Pilcher v. McHenry*, 14 Lea, 88; 1 Jarman, Wills, 152, note; 3 Washb. Real Prop. 529, 580; *Spofford v. College* (Jan., 1889). In the case last mentioned, Thomas Martin, of Giles county, had set apart \$80,000 in bonds of the state of Tennessee, the interest to be applied to the founding and operating a female school at Pulaski, Tenn. After the school had been founded, and successfully operated for a number of years, Mrs. O. M. Spofford, his only daughter and residuary legatee, filed a bill claiming that only the interest upon the bonds was devoted by the will of her father to the school, and that when the bonds matured, and the interest coupons had all been clipped and exhausted, then the bonds or corpus of the fund would revert to her, as residuary legatee under the will. The court below, as well as this court, held that the gift of the interest of the bonds carried the bonds themselves, and the fund could not be diverted from the charity.

But the question in this case recurs: Is the devise, as made in the seventeenth item of the will, a valid devise for charitable uses? Charitable uses are favored in courts of equity, and will be supported when the trust would fail for uncertainty, were it not for a charity. *Dickson v. Montgomery*, 1 Swan, 848; *Heiskell v. Chickasaw Lodge No. 8*, 87 Tenn. 668, 4 L. R. A. 699. This court has no disposition to abridge this rule, or recede from it, in any way. A charity will always be upheld, where it is created in favor of a person having sufficient capacity to take as donee, or, if it be not direct to such person, where it is definite in its object, lawful in its creation, and to be executed by trustees. *Franklin v. Armfield*, 2 Sneed, 805; *Gass v. Ross*, 3 Sneed, 211; *Cobb v. Denton*, 6 Baxt. 285; *Frierson v. General Assembly of Presby. Church in U. S.* 7 Heisk. 688; *Dickson v. Montgomery*, 1 Swan, 848. There is a broad distinction between a gift direct to a charity or charitable institutions already established, and a gift to a trustee, to be by him applied to a charity. In the first case

the court has only to give the fund to the charitable institution, which is merely a ministerial or prerogative act; but in the latter case the court has jurisdiction of the trustee, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds, in bad faith, to purposes foreign to the charity. 2 Perry, Tr. § 719. Hence, there must be either (1) a trustee capable of taking, and a definite legal purpose declared; (2) a trust so definite and well defined that it can be enforced and executed, if necessary, by a court of chancery.

The chancellor was of opinion that provisions of the will providing for trustees of this charity were sufficient, and in this we think he is well sustained by authority. An executor may be such trustee (*Cobb v. Denton*, 6 Baxt. 236; *Gass v. Ross*, 8 Sneed, 211), or third persons may be such trustees (*Dickson v. Montgomery*, 1 Swan, 348; *Franklin v. Armfield*, 2 Sneed, 346; *State v. Smith*, 16 Lea, 665), or the court may appoint a trustee, if the trusts are definite and valid (*State v. Smith*, 16 Lea, 665; *Vidal v. Philadelphia*, 48 U. S. 2 How. 127, 128, 11 L. ed. 205, 206; Perry, Tr. § 722), or a corporation to be created after the death of the testator may be such trustee. *Inglis v. Trustees of Sailor's Snug Harbor of N. Y.* 28 U. S. 3 Pet. 99, 7 L. ed. 617; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 803, 24 L. ed. 450; *Russell v. Allen*, 107 U. S. 173, 27 L. ed. 401; *State v. Martin Female College* [Tenn.; filed Jan. 1888.] The real difficulty in the devise is the uncertainty of the beneficiary, and the extreme discretion and power vested in the trustee. Unquestionably, under the English law, and the law relating to charitable trusts prevailing in many states of our Union which have adopted the doctrines of the English law, this trust would be good. The doctrines of *parens patriæ* and *cy pres*, as recognized in the English law, have never obtained in Tennessee. Only those powers which in England were exercised by the chancellor by virtue of his extraordinary, as distinguished from his specially delegated, jurisdiction, exist in our chancery court. *Green v. Allen*, 5 Humph. 170; *Dickson v. Montgomery*, 1 Swan, 348. Nevertheless, the courts will sustain a charity when the plan and scheme for its management is left to the discretion of trustees, and will, if necessary, formulate a scheme for the conduct of the charity, or uphold the plan and schemes which the trustees, in their discretion, many adopt and formulate, and prevent any interference therewith. *State v. Smith*, 16 Lea, 670; Perry, Tr. §§ 700, 744; *Dickson v. Montgomery*, 1 Swan, 348; *Gass v. Ross*, 8 Sneed, 211; *State v. Martin Female College* (Tenn.; filed Jan. 1888). In the case last named a bill was filed in the name of the state of Tennessee, on the relation of the Reverend T. J. Duncan, a presiding elder in the Methodist Episcopal Church South, against the trustees of Martin Female College, an educational charity in successful operation at Pulaski, Tenn., seeking to set aside the charter of the college, remove its trustees from office, and enjoin the operation of the school, because it had been founded by Thomas Martin, a prominent Methodist layman, and for

years had been recognized and patronized by the Tennessee conference, and yet the trustees had not conducted it as a sectarian or denominational school, but had placed in charge of it principals of different tenets of faith. The court held that, in the absence of specific instructions in the will of Thomas Martin, the trustees had the power and discretion to place in charge of it such persons as they might deem best, and their discretion could not be controlled by any other persons or organizations.

In the case at bar we have a specific, definite property designated and set apart by the testator, and conveyed to trustees whose identity is fixed, and whose succession is provided for. It is apparent, also, that it was the earnest desire of the testator to devote this property to charitable purposes, and to none other, the principal or corpus to be preserved, and the income to be consumed for the purpose of the charity, and in such manner as might be productive of the greatest good to the greatest number. We think it is also evident that the testator had a primary and a secondary object, the former being to found a charity, and the latter being that, as a matter of preference, the charity should be educational. It is evident, also, that the testator had the utmost confidence in the trustees selected, to wit, his wife and daughter, and he gave to them unlimited power and discretion, not only as to the kind or character of the charity, but also as to the plan for its administration. In all cases of charities founded by wills, broad discretion and ample powers must necessarily be conferred upon the trustees, inasmuch as the testator is attempting to provide for contingencies which will arise after his own death; but at the same time this power and discretion must not go to such extent as that the objects to which the fund is to be devoted, and the kind and character of the charity, will depend, not upon the will and direction of the testator, but upon the choice and preference of the trustee. In *Read v. Williams*, 125 N. Y. 569, it is said: "That cannot well be said to be a disposition by the testator's will, with which the testator has had nothing to do, except to create an authority in another to dispose of the property according to the will of the donees of the power."

The important question which primarily arises is whether the object of the trust, and who are to be its beneficiaries, depend upon the will of the testator, or the choice of the trustee, and is there any one who could demand of the trustee the benefits of the trust, because it was made for his benefit, and others of his class, and if refused, could compel its performance. In the case of *Tilden v. Green*, 130 N. Y. 29, 14 L. R. A. 88, the devise in trust under the thirty-fifth and thirty-ninth items of the will of Samuel J. Tilden was passed upon. Under these items, property was devised to trustees to be held for two lives in being, with requests that they procure an act of incorporation, to be known as the "Tilden Trust," with capacity to establish and maintain a free library and reading room in the city of New York, and to promote such scientific and educational objects

as the trustees might more particularly designate, and authorized them to convey such property to such corporation when formed, and declared that in case it was not formed, or if, from any cause or reason, they should deem it inexpedient to convey to such corporation, then they were directed to apply it to the use of such charitable, educational, or scientific purposes as in their judgment would render such property most widely and substantially beneficial to the interests of mankind. It was said in that case: "The devise does not designate any beneficiary, but, on the contrary, leaves it to the discretion of the trustees whether or not they will or will not convey to the corporation. Hence, there is not, and cannot be, any person, natural or artificial, who is, or will become, entitled to the execution of the trust in his favor." The conclusion of the court was that the bequest could not be maintained because of the complete discretion vested in the trustees,—whether they would give it, or not, to the beneficiary suggested. A charter was actually obtained, and the property was in fact conveyed by the trustees to the corporation thus created, before the suit was brought; but the court held that the invalidity of the trust could not be cured by anything done by the trustees towards its execution. It is also held in that case that a trust without a beneficiary who can claim its enforcement is void, and this objection is not obviated by the existence in the trustees of a power to select a beneficiary, unless the class of persons in whose favor the power may be exercised has been designated with such certainty that the court can ascertain who were the objects of the power, and, when the beneficiary is not designated in the will, such beneficiary cannot be designated by the trustees in pursuance of a discretion vested in them by the will. It is further said: "No trust is enforceable unless there is some person or class of persons who have a right to a part or all of the designated fund, and can demand its

conveyance to them, and, in case of refusal, can sue the trustees in equity, and compel compliance with the demand."

In the case at bar the power and discretion vested in the trustees are more extensive than in the *Tilden Will Case*. Here there is a mere preference expressed for an educational charity by the testator, and a hope that a grand female college may at some time be located on the lot; but absolute power is given to the trustees, at their discretion, to divert the property to any other charitable purpose, even over the preference of the testator himself, as expressed in his will. Under this power and discretion the trustees might at will devote the property to any charity, whether educational, religious, or eleemosynary, and they could at will change and alter the discretion in which the charity should flow. Under this broad discretion and power, the trustees might, instead of a female school, establish a public library or a lecture room, or a church or woman's home, or any other charity; and, if either of these should be selected by these trustees as the object of this devise, certainly it could not be said they had exceeded their powers and discretion, and, if either should be established, it would not be because of directions in the will of the testator, but from choice and preference on the part of the trustees. We are constrained to hold that such a charitable devise cannot be enforced, and is invalid. *Reeves v. Reeves*, 5 Lea, 644; *Rhodes v. Rhodes*, 88 Tenn. 637. The chancellor decreed that the devise must fail, and the property must pass under the nineteenth clause, which he construed to be the residuary clause of the will. As no point or contest is made upon this part of his decree, we are content to affirm his holding on this point. See also *Reeves v. Reeves*, 5 Lea, 650.

The decree of the chancellor is in all things confirmed, and the costs will be paid by complainants out of the estate.

NEW YORK COURT OF APPEALS.

Mary Eliza ROWLAND, *Respt.*,

v.

Charles MILLER, Impleaded, etc., *Appt.*

(139 N. Y. 33.)

1. An undertaking establishment in which human dead bodies are prepared for burial or other sepulture, and sometimes subjected to embalming and post-mortem examination, is a business "injurious or offensive to the neighboring inhabitants," within the terms of a restrictive agreement, although it may not constitute a legal nuisance.

2. Courts can take judicial notice of the

offensive character of an undertaking establishment in a locality used for residences.

3. The fact that most of the premises in the locality are no longer kept for residences will not deprive a person who still resides there and who has done or omitted nothing which would defeat it of the right to enforce a restriction in an agreement against business "injurious or offensive to the neighboring inhabitants."

(October 2, 1893.)

A PPEAL by defendant Miller from a judgment of the General Term of the Superior Court of the City of New York, affirming a

NOTE.—The distinction between a nuisance as such and offensive business in breach of a covenant is clearly shown in the above case.

For nuisance by use of adjoining property, see *Bohad v. Port Jervis Gas Light Co.* (N. Y.) 9 L. R. 22 L. R. A.

A. 711, and note; *Susquehanna Fertilizer Co. v. Malone* (Md.) 9 L. R. A. 737; *Ballentine v. Webb* (Mich.) 13 L. R. A. 321, and note; *Robb v. Carnegie Bros. & Co.* (Pa.) 14 L. R. A. 323; *Fogarty v. Junction City Pressed Brick Co.* (Kan.) 18 L. R. A. 755.

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judgment of the Special Term enjoining defendants from violating a restrictive clause in the title papers to his real estate as to the use to which it could be put. *Affirmed.*

Statement by Earl, J.:

In November, 1865, Miss Burr owned several lots of land in the city of New York, on the easterly side of Madison avenue, extending easterly to Vanderbilt avenue, between Forty-Second and Forty-Fourth streets, all of which were then vacant, and on the 20th day of that month she contracted to sell eight of the lots to Pierson and Cochran. Those lots extended southerly from the southerly line of Forty-Third street half way to the northerly line of Forty-Second street. She still retained title to several lots in the same vicinity, and on the same day she and they entered into a mutual agreement, "for themselves and their representatives, heirs and assigns, owners of any of the said lots above described, that no buildings other than dwelling houses at least two stories high, of brick or stone, or churches, chapels, or private stables of the same material, shall be erected on any of said lots; that no livery or other stable shall be erected on lots fronting on Madison avenue; and that there shall not be allowed or erected on any part of said lots of land any tenement house, brewery, or lager-beer saloon, tavern, slaughter house, butcher's or smith's shop, forge, furnace, steam engine, foundry, carpenter's or carriage or car shop, manufactory of metals, gunpowder, glue, varnish, vitriol, turpentine, ink, or matches, or any distillery, or any establishment for dressing hides, skins, or leather, or any museum, theater, circus, or menagerie, nor shall any other buildings be erected, or trade or business carried on, upon said lots, which shall be injurious or offensive to the neighboring inhabitants; it being expressly agreed that this covenant runs with the land, and is binding on all future owners thereof." This agreement is called the "Restriction Agreement," and the lots have since been conveyed subject thereto. The defendant Miller has become the owner of the lot on the corner of Madison avenue and Forty-Third street, and the plaintiff owns the lot next southerly thereof, which she occupies as her residence; and no question is made that those lots passed into the ownership of the plaintiff and Miller subject to the restriction agreement. On the 1st day of December, 1890, Miller leased his lot, with the house thereon, to the Taylor Company, for the term of ten years, and it entered into the possession thereof. This action was commenced on the 31st day of January, 1891, to restrain the defendants from violating the covenants contained in the restriction agreement, by carrying on a business condemned thereby. The action was brought to trial at a special term, and the trial judge described the business carried on upon the Miller lot as follows: "That the business of said company is, and for many years has been, that of undertakers, and that a part of that business consists in the reception of human dead bodies, their preparation for burial or other sepulture, involving embalment in some

instances, and in the sale of coffins, caskets, shrouds, and other paraphernalia generally used in the final disposition of dead human bodies. That said company, when it obtained said lease, intended to fit up the building on said premises, which for the most part is built and arranged like an ordinary first-class corner dwelling house in that locality, for the purposes of their business, and have fitted up the same, and are now carrying on their said business in said building. That said company keeps and uses fourteen wagons in its business, each of which (save one) is painted and otherwise fitted up after the manner of wagons used by undertakers in transporting dead human bodies or funeral appliances. That it has fitted up a room in said building called by said company a 'chapel,' and intended by it for the use of people who desire to conduct or hold funeral services, and not for religious worship or services, except so far as such worship or services may be incidental to such funeral ceremonies, which use of said chapel is a part of the business of the said company, and from which it expects and intends to make money. That said company has also fitted up the front basement of said building (which hitherto was like the front basement of an ordinary dwelling in that locality) with special reference to, and for the special purpose of, holding autopsies upon, and for the dissection and other post-mortem examination of, dead human bodies, having prepared a marble table for that special purpose, and closed up the windows and other means of looking into their said autopsy room, in order to prevent observation of idle or curious people, who might otherwise be tempted to congregate about and look into the basement windows while dead human bodies were undergoing such dissection or examination. That in order to prevent the escape into other parts of said building of the foul and noxious odors and gases which usually escape from dead human bodies during autopsical or other post-mortem examinations, said company have opened ventilating holes from said dissection room into two chimney flues, and placed gas jets in said flues, in the hope and expectation that such gases and odors would escape from said building into the air above said building by means of such chimney flues; but they have taken no other precaution to prevent the spread of such odors and gases after their expected escape from the chimney flues. That a part of the undertaking business consists in the receipt and temporary storage of dead human bodies, and in affording facilities for autopsical or other post-mortem examinations upon such bodies whenever it is desired or required. That the parlor floors of said building have been elegantly fitted up for funeral purposes, and are designed by said company for that use, not as a matter of charity, but as a matter of business, and for business profit. That said company have extensively advertised their said business, and the use which they propose to make and are making of said building, and that they will furnish professional embalmers, and that their premises will be kept open day and night for the purposes of their busi-

ness, by means of advertisements in newspapers which circulate mainly among undertakers, and by means of circulars addressed to the members of the medical profession generally in New York city and vicinity, in which they offer the use of the said dissecting room and other autopsical facilities free of charge. That already there have been several funerals held at said company's said rooms; one of them, a Chinese funeral. That already there have been held several autopsies and post-mortem examinations of dead human bodies in said dissecting rooms, and it is the hope and expectation of the said company to increase the use of their said premises for the foregoing purposes, as a matter of business in order to make money"—and he found that the carrying on of such business was a violation of the restriction agreement, and he ordered judgment restraining it. 15 N. Y. Supp. 701.

The sixth clause of the judgment is as follows: "Sixth. The action having been tried by the parties on the theory that it involved the question whether the combination of purposes (the one associated with and depending on the other) to which the Taylor Company devoted the building occupied by it under the lease from the defendant Miller violated the covenants aforesaid, and the defendants having made no claim that any one particular use was exempt from the operation of the covenants, it is ordered that upon payment of the costs awarded, and proof that the combination of purposes has ceased, and the use of the premises for the business of holding autopsies or other post-mortem examinations, dissecting, receiving, and storing of dead bodies, and the use of said premises for the business of having funerals therefrom, has been abandoned, the said defendants may at any time apply to the court, on notice, to modify the injunction so as to permit the lessees to run the office and parlors connected with said premises, to solicit orders and sell coffins by sample in the wareroom, and to use the room called a 'chapel' for the legitimate purposes of a chapel,—that is, as a place of worship,—all within such limitations as may be necessary to preserve the integrity of the covenants, and not offend its spirit and purpose."

Subsequent to the rendition of the judgment, the Taylor Company having complied with that clause, and shown that the business complained of by the plaintiff had ceased, upon its application to the court the following order was made: "Ordered, that the injunction contained in the said judgment or decree be, and the same hereby is, modified, in compliance with the provisions of the sixth paragraph of the said judgment or decree, so as to permit the said defendant the Taylor Company, the lessees of the premises mentioned and described in the said judgment or decree, and the said lessees are hereby permitted, to run the office and parlors connected with said premises to solicit orders and sell coffins by sample in the wareroom, and to use the room called a 'chapel' for the legitimate purposes of a chapel,—that is, as a place of worship,—so long as such uses do not impair the integrity of the covenants con-

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tained in the restriction agreement in said judgment or decree more particularly referred to, and so as not to offend the spirit and purposes of the said covenants, or of the said restriction agreement, without prejudice to the right of said plaintiff to apply to the court to prevent or punish any abuses of said injunction as thus modified." The defendant Miller alone appealed from the judgment to the general term, where it was affirmed (18 N. Y. Supp. 798), and then he appealed to this court.

Messrs. George Zabriskie and J. E. Burrill, for appellant:

The facts were on the principle of adjudicated cases insufficient to prove that the business of the Taylor Company was *per se* or in the mode in which it was considered "injurious and offensive" so as to sustain a judgment enjoining the carrying on of said business.

If there was anything in the method in which the business was carried on to render it offensive or injurious and entitle the plaintiff to an injunction, such injunction should have been limited so as to restrain the carrying on the business in a manner calculated to be offensive or injurious.

Crump v. Lambert, L. R. 8 Eq. 409; *Walter v. Selfe*, 4 DeG. & Sm. 315, 4 Eng. L. & Eq. 15; *Gibson v. Donk*, 7 Mo. App. 88.

There was nothing to show that the business of the Taylor Company created offensive odors, or that the air was affected by any disagreeable or offensive smells emanating from the premises in question, or that such business produced a tangible and appreciable injury to the neighboring property, or rendered its enjoyment specially uncomfortable or inconvenient.

Campbell v. Seaman, 68 N. Y. 576, 20 Am. Rep. 567; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 123 N. Y. 28.

The character of a business or use is to be judged by an ordinary and reasonable standard, not merely according to elegant or dainty modes and habits of living, but according to plain, sober, and simple notions among the people.

Walter v. Selfe, *supra*; *Pollock*, Torts, 381.

The trades or occupations which the law regards as injurious or offensive are those which produce physical discomfort, and not those which are merely disagreeable or displease the eye or offend the taste or shock an oversensitive or fastidious nature, or cause unpleasant reflections, no matter how irritating or unpleasant.

Demarest v. Hardham, 84 N. J. Eq. 469; *Cleveland v. Citizens Gas Light Co.* 20 N. J. Eq. 201; *Barnes v. Hathorn*, 54 Me. 124; *Monk v. Packard*, 71 Me. 309, 86 Am. Rep. 815; *Musgrove v. St. Louis Catholic Church*, 10 La. Ann. 481; *Ellison v. Washington Comrs.* 58 N. C. 57, 75 Am. Dec. 480; *Harrison v. Good*, L. R. 11 Eq. 388.

Neither does the law consider as injurious or offensive those trades or occupations which one person or another may be found to dislike, but only those things which are offensive and injurious to reasonable and plain people, everywhere.

St. Helen's Smelting Co. v. Tipping, 11 H. L.

Cas. 642, 4 Best & S. 1093; *Walter v. Selfe*, 4 DeG. & Sm. 822.

In *Westcott v. Middleton*, 48 N. J. Eq. 478, affirmed by 44 N. J. Eq. 297, it was held: (1) That the onus of showing that an "undertaker's establishment in which he keeps coffins, ice boxes, and cases in which he preserves the bodies of the dead, and in the rear of which he cleaves and dries such boxes" is a nuisance is on the complainant; (2) that the business of an undertaker, though carried on in the populous part of a city, is not in law injurious or offensive to the neighbors, even though exciting in them feelings of deep repugnance and disgust; (3) that the only kind of discomfort of which a court can take judicial cognizance is physical, and not such as depends on taste or imagination, and that only those things will be restrained which are offensive physically to the senses and thereby make life uncomfortable.

See *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 816, 56 Am. Rep. 1.

Where no physical injury is shown, tombs, cemeteries, graveyards, and private burial plots, though in close proximity to dwellings, and though they excite the utmost repugnance in the minds of those who inhabit the neighboring houses, and fill them with unhappy reflections, are not in point of law injurious or offensive.

Barnes v. Hathorn, 54 Me. 124; *Mont v. Packard*, 71 Me. 309, 36 Am. Rep. 815; *Musgrove v. St. Louis Catholic Church*, 10 La. Ann. 431; *Ellison v. Washington Cemrs.* 58 N. C. 57, 75 Am. Dec. 480.

If the rule as laid down in the present case were correct the lawfulness of every man's business would depend upon no rule but the condition of his neighbor's sensibilities or tastes.

This would not be law at all but anarchy.

Harrison v. Good, L. R. 11 Eq. 838.

If the dislike of neighbors can in any case affect the question, it must be a reasonable dislike based upon physical discomfort, according to plain, sober, and simple notions among the American people.

Walter v. Selfe, 4 DeG. & Sm. 822; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. ed. 739.

When the injury complained of is to property, mere diminution in value is insufficient (*Wood, Nuisances*, § 8), but there must be "tangible" or as some cases hold "appreciable injury" to property, and such injury must also be substantial and of appreciable magnitude, and be apparent to persons of common intelligence.

St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; *Campbell v. Seaman*, 68 N. Y. 576, 20 Am. Rep. 587; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 122 N. Y. 28; *Owen v. Phillips*, 78 Ind. 284; *Salvin v. North Brancepath Coal Co.* L. R. 9 Ch. 705; *Pollock, Torts*, p. 331; *Ross v. Butler*, 19 N. J. Eq. 294, 97 Am. Dec. 654.

The restriction agreement is in reality a covenant against nuisances, and nothing more, and does not bind the owner of the land any further than he would be bound by the law in the absence of any covenant.

Clement v. Burris, 121 N. Y. 708.

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The expressions used, "injurious and offensive," are the same which are used in defining a nuisance, and in the absence of any covenant the law imposes a duty on the owner of the premises not to use them so as to be injurious or offensive.

Pickard v. Collins, 38 Barb. 444.

In view of the uncontradicted evidence that the character of the neighborhood had been changed, and that it had been converted from a locality of first-class residences into a locality of miscellaneous business, the plaintiff was not entitled to any equitable relief.

Trustees of Columbia College v. Lynch, 70 N. Y. 440; *Trustees of Columbia College v. Thacher*, 87 N. Y. 811, 41 Am. Rep. 365; *Amerman v. Deane*, 182 N. Y. 855.

On questions of specific performance courts of equity are not limited to the language of the covenant itself, but are bound to consider the circumstances of the case with the view to ascertain whether the situation of the parties and of the premises is such that justice would be promoted by enforcing the covenant and may exercise their discretion as to its enforcement.

Conger v. New York, W. S. & B. R. Co. 120 N. Y. 29; *Fitzpatrick v. Dorland*, 27 Hun, 391.

Messrs. Lockwood & Hill, for respondents:

The appellant's contention that this restriction is the simple equivalent of a restriction against nuisances cannot be sustained.

The purpose of this restriction was to preserve this property for residence purposes. Its design was to exclude special trades, business, and buildings, and all other trades, business, and buildings which should be injurious or offensive to the neighboring inhabitants;—a term which necessarily refers to the people who resided—who lived and made their homes—in houses in the neighborhood.

1 Bouvier, Law Dict. 709; *Re Wrigley*, 8 Wend. 140; *Bell v. Pierce*, 48 Barb. 51; *Re Hughes*, 1 Tuck. 88; *Roosevelt v. Kellogg*, 20 Johns. 208; *Frost v. Brisbin*, 19 Wend. 11, 32 Am. Dec. 423; *Houghton v. Ault*, 16 How. Pr. 77; *Foot v. Harrie*, 2 Abb. Pr. 454.

Earl, J., delivered the opinion of the court:

The main contention of the parties is over the meaning and force of the restriction agreement. The claim of the appellant that it simply restrains nuisances cannot be sustained, and hence the numerous authorities cited by his counsel on the argument before us have little or no application. If the agreement was intended simply to restrain any trade or business which was *per se* a nuisance, or which was carried on in such a way as to make it a nuisance, then it was wholly unnecessary. The law will always, upon the application of a party aggrieved, restrain and abate a private nuisance. This case is not governed by the general law as to nuisances, but by the force and effect of the covenants contained in the agreement. When the agreement was made, the parties thereto, desiring to improve, protect, and benefit their lots, and consulting their respective interests, absolutely prohibited the carrying

on of certain kinds of business specified upon the lots. They determined for themselves that those kinds of business were undesirable in the vicinity of residences, and covenants restraining them can be enforced without any proof whatever that they are "injurious or offensive." A person owning a body of land, and selling a portion thereof, may, for the benefit of his remaining land, impose any restrictions, not against public policy, upon the land granted, he sees fit, and a court of equity will generally enforce them. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Hodge v. Sloan*, 107 N. Y. 244.

The business carried on by the Taylor Company is not among those kinds particularly specified in the agreement. But the claim of the plaintiff is that it is prohibited by the general clause in the agreement, as "injurious or offensive to the neighboring inhabitants." This clause enlarges the scope of the agreement. It is a too narrow construction to hold that it prohibits only trades or kinds of business which are nuisances *per se* for reasons already given, and for the further reason that nearly, if not quite, all the trades and business specially named are not such nuisances. Any kind of business may become a nuisance by the manner in which it is carried on from its location, and a business may be offensive to neighboring inhabitants, and yet fall far short of being a legal nuisance, which a court of equity will abate as such. This clause in the agreement must have a reasonable construction. We cannot suppose that the parties had in mind any business which might be offensive to a person of a supersensitive organization, or to one of a peculiar and abnormal temperament, or to the small class of persons who are generally annoyed by sights, sounds, and objects not offensive to other people. They undoubtedly had in mind ordinary, normal people, and meant to prohibit trades and business which would be offensive to people generally, and would thus render the neighborhood to such people undesirable as a place of residence. It cannot be doubted that the business of the Taylor Company was, within this definition, offensive to the neighboring residents. People of ordinary sensibilities would not willingly live next to a lot upon which such a business is carried on. An ordinary person, desiring to rent such a house as plaintiff's, would not take her house, if he could get one just like it, at the same rent, at some other suitable and convenient place. Indeed, her house would be shunned by people generally who could afford to live in such an expensive house. The courts can take judicial notice of the offensive character of such a business. Judges must be supposed to be acquainted with the ordinary sentiments, feelings, and sensibilities of the people among whom they live; and hence, in this case, the learned judge, after the character of the business carried on by the Taylor Company had been proved, could have found, as matter of law, that it was in violation of the restriction agreement, without any further proof. It was therefore unnecessary for the plaintiff, upon the trial, to call witnesses from the

neighborhood to give their opinions that this business was injurious and offensive. Even if such opinions were erroneously secured, they were unnecessary and harmless, as, upon the undisputed evidence as to the character of the business carried on, the legal conclusion of the trial judge must have been the same.

But it is contended that the restriction agreement ought not, in this case, to be enforced, because most of the lots in the block between Forty Second and Forty-Third streets and Madison avenue and Vanderbilt avenue are no longer occupied for residences, and are devoted to business purposes; and the counsel for the appellant cites as an authority on this point one decision, in the case of *Trustees of Columbia College v. Thacher*. The principles of that case are not applicable to the facts of this. There it appeared that the contract which the plaintiff sought to enforce was no longer of any value to it, and that its enforcement would result in great damage to the defendant, without any benefit to any one. Here the plaintiff has the right to occupy her house as a residence, and in such occupation to have the protection of the restriction agreement. She has never violated the agreement herself, or consented to, or authorized or encouraged, its violation by others. In order to have the benefit of the agreement, she is not obliged to sue all its violators at once. She may proceed against them *seriatim*, or she may take no notice of the violations of the agreement by business carried on remotely from her residence, and enforce it against a business specially offensive to her by its proximity. This is not a case where the defendants can ask for immunity in an equitable forum because others are, in a greater or less degree, also violators of the agreement. The plaintiff has done nothing and omitted nothing which should authorize the occupant of an adjoining lot, in violation of the agreement, to make her residence uncomfortable and undesirable. Generally, whether an equity court will refuse to restrain the violation of such an agreement, and leave the parties to their legal remedies, on account of the changed condition affecting the premises to which the agreement relates, rests in the discretion of that court, and such discretion will not be reviewed upon appeal here. The question to be determined in the exercise of such discretion depends largely upon the facts, and mainly whether the enforcement of the agreement would greatly harm the defendant, without any substantial benefit to the plaintiff, so as to make the enforcement inequitable. We cannot say, reviewing all the evidence in this case, that it would be impossible for the plaintiff to enforce the agreement.

The appellant claims that the judgment is too broad in its restraints. But we think all his rights are fully protected by the sixth clause of the judgment, and the subsequent action of the court under that clause upon the application of the Taylor Company.

The matters to which we have thus given attention cover the whole ground of the appeal, and our conclusion is that *the judgment must be affirmed*, with costs.

All concur, except *Gray, J.*, not voting.

WISCONSIN SUPREME COURT.

Patrick F. McQUAID, *Appt.*,

v.

William C. ROSS *et al.*, *Respts.*

(.....Wis.....)

No implied warranty of competency or fitness for breeding purposes is made by stock breeders on the sale of a bull, although a full price is paid and the sellers know that he is bought for breeding purposes, where there is no fraud or misrepresentation and both parties are alike destitute of knowledge or the means of forming an intelligent judgment as to the fitness or capacity of the animal for that purpose.

(June 21, 1893.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Columbia County in

favor of defendants in an action brought to recover damages for an alleged breach of warranty in the sale of a bull. *Affirmed.*

Statement by Pinney, J.:

This case was before this court on a former appeal (77 Wis. 470), where the claims of the plaintiff are stated. Upon the new trial awarded the plaintiff sought to maintain that there was an implied warranty upon the sale by the defendants to the plaintiff of the bull in question, that he was in all respects fit, suitable, and competent to perform the service for which he was purchased, namely, to generate his kind; and the plaintiff produced evidence to show that when he bought the bull he desired him for breeding purposes; that the defendants were breeders of short

NOTE.—*Implied warranty of fitness of property bought for special purpose.*

This note is limited in its scope to cases of articles purchased to answer a specific purpose, and does not include cases of sales by sample and by description. For a note upon the latter question, see *Murchie v. Cornell*, 14 L. R. A. 492.

The principles declared in the principal case are in keeping with the opinion of the court in *Scott v. Benick*, 1 B. Mon. 63, 35 Am. Dec. 177, where the court held, in the case of the sale of a Durham cow, that there was no implied warranty of her breeding fitness though purchased for that purpose, in the absence of fraud or misrepresentation.

The case of *Taylor v. Gardiner*, 8 Man. L. Rep. 310, where a horse was sold for the like purposes, also holds that there is no implied warranty of fitness.

But in *Hutchings v. Cole*, 42 Ill. App. 261, where the seller of a mastiff bitch knowing that she was required for breeding purposes recommended her highly, stating that she was perfect in all respects except "that her teats were too loose for young puppies," the court held there was an implied warranty of fitness for the purposes required.

General principles.

A warranty will not be implied in conflict with the express terms of the agreement. *Blackmore v. Fairbanks*, 79 Iowa, 282.

There is no implied warranty of reasonable fitness where there is an express warranty concerning the quality. *International Pav. Co. v. Smith, B. & R. Mach. Co.* 17 Mo. App. 264.

And an express warranty of title does not exclude an implied one of quality. *Blackmore v. Fairbanks, supra*; *Merriam v. Field*, 24 Wis. 640; *Boothby v. Scates*, 27 Wis. 632; *Roe v. Bachelder*, 41 Wis. 300; *Wilcox v. Owens*, 64 Ga. 601.

Whether there is a warranty or not must depend upon the circumstances of each particular case. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

The relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440.

The question of an implied warranty that the article shall be fit for the purposes intended is limited to sales where the article is understood by both parties to be purchased for a specific use. *Hart v. Wright*, 17 Wend. 267, 273.

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The fundamental inquiry is whether, under the circumstances of the particular case, the buyer had the right to rely, and necessarily relied, on the judgment of the seller and not upon his own. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 80.

Where the purchaser necessarily trusts to the judgment of the seller of an article that it is fit for a particular purpose, there is an implied warranty that the commodity shall be reasonably fit for that purpose. *Omaha Coal, C. & L. Co. v. Fay*, 36 Neb. —; *Morse v. Union Stockyards*, 14 L. R. A. 157, 21 Or. 239; *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276.

But the question of implied warranty upon non-inspection does not apply where the goods are not inspected merely because inconvenient or on account of labor involved. *Hyatt v. Boyle, supra*.

Such a warranty is raised where a party declines an examination upon the ground of his want of experience and judgment, and expressly declares that he relies upon the judgment of the other. *Hanger v. Evans*, 38 Ark. 334.

The warranty will extend to a reasonable performance of all the operations and purposes which the article ought reasonably to perform, but not to the performances and purposes of other kinds of articles which might be constructed for other operations and purposes. *Robinson Mach. Works v. Chandler*, 56 Ind. 575.

Even to extraordinary quality where the article is furnished for a given, specific purpose, and not for ordinary and general use. *Misner v. Granger*, 9 Ill. 60.

But not where the article is such that ordinary skill cannot make a good article, the matter being one of chance and risk. *Ibid*.

The goods must be reasonably fit for the intended purpose when treated as other goods of similar material are usually treated, though it require a different manner of use or treatment, where the necessity of such different treatment is known to the seller and not communicated to the purchaser or known to him. *Omaha Coal, C. & L. Co. v. Fay*, 36 Neb. —.

In such cases the vendors are bound as a condition of the contract to supply an article reasonably fit for the purpose, and a warranty will be implied. *Chapin v. Dobson*, 78 N. Y. 74, 82, 84 Am. Rep. 512; *Ulrich v. Stohrer*, 12 Phila. 190, where sugar was purchased for the express purpose of being used in the manufacture of mustard. *Wilson v. Lawrence*, 139 Mass. 318, 321; *Mason v. Chappell*, 15 Gratt. 572; *Thompson v. Tate*, 5 N. C. 97, 8 Am. Dec. 673; *Murray v. Smith*, 4 Daly, 277.

horn Durham cattle, and knew the purpose for which the plaintiff desired and bought the animal; that he paid the full price of such an animal for breeding purposes, \$125, and examined him at the time of the purchase; that, except for such purposes, the animal would not be worth to exceed \$30. The plaintiff ascertained afterwards and in course of time that the bull was incompetent, impotent, and unable to generate his kind, and was useless for the purposes for which he was purchased and he returned the bull to the defendants at their farm for this reason; but there was no proof tending to show that they accepted him. Evidence was given to show the plaintiff's damages. The circuit court held that there was no implied warranty of the procreative powers of the bull, and granted a judgment of nonsuit against the plaintiff, from which he appealed.

Messrs. W. J. Hooper and Spensley & McIlhenn, for appellant:

The tendency of all the modern cases on warranty, is to enlarge the responsibility of the seller, and to construe every affirmation by him to be a warranty, and frequently to imply a warranty on his part from acts and circumstances, wherever they were relied upon by the buyer.

Story, *Sales*, §§ 359-365.

In certain classes of cases the vendor is held to warrant the existence of those attributes of title and quality to and in the property sold of which he assumes to have knowledge or about which he alone has the means of knowledge, or concerning which it is the policy of the law to charge him with knowledge.

10 Am. & Eng. Encyclop. Law, p. 91.

The doctrine of *caveat emptor* has so many limitations that it must be read in the light of

It is a breach of his contract if it is not so. *Wilson v. Lawrence and Murray v. Smith, supra.*

Where goods were sold as having a particular quality which if possessed would greatly increase their value, and they lacked such quality, the court held there was an implied warranty. *Thompson v. Tate, supra.*

Such a warranty is especially implied where the defect is occasioned by want of skill or care, or is the result of defective manufacture. *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364, where cheese purchased for foreign shipment was infested with maggots.

Where hogs were purchased for market, the vendee relying upon the judgment of the vendor in his selection, and having no opportunity for inspection, there was held to be an implied warranty of fitness for market purposes. *Best v. Flint*, 53 Vt. 543, 56 Am. Rep. 570.

A sale of grain for full market price implies a warranty of its soundness in South Carolina. *Bulwinkle v. Cramer*, 27 S. C. 376.

Upon the purchase of a machine from a dealer there is an implied warranty that it is new and not second hand or the worse for wear, although the latter might fill the terms of a warranty. *Grieb v. Cole*, 60 Mich. 397.

But in the case of the sale of a second-hand article there is no implied warranty of fitness for a particular purpose. *Ramming v. Caldwell*, 43 Ill. App. 175.

Evidence that the machine delivered, and for the price of which action was brought, was not the one contracted for is admissible, as where a second-hand machine was delivered for a new one. *Grieb v. Cole, supra.*

But where the buyer designates the materials out of which the manufacturer is to make the article there will be no implied warranty of quality or fitness if the latter uses the material in the absence of proof of want of ordinary care in selecting it. *Shoenberger v. McEwen*, 15 Ill. App. 496.

A distinction is to be drawn, however, between the purchase of a specific article and that of an article purchased for a specific purpose, as in the former case there is no implied warranty of the purpose. *Mason v. Chappell*, 15 Gratt. 572; *Goulds v. Brophy*, 6 L. R. A. 392, 42 Minn. 109; *Lukens v. Freilund*, 27 Kan. 664; *Walker v. Pue*, 57 Md. 156; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149; *Rice v. Forsyth*, 41 Md. 408.

Although it is stated by the purchaser to be required for a particular purpose, if the known, described, and definite thing be actually supplied. *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837.

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Yet there is an implied warranty as to workmanship and materials. *Goulds v. Brophy, supra.*

The question of fitness is one of fact, determinable by evidence. *Sims v. Howell*, 49 Ga. 623.

Contract executed or executory.

There is no warranty implied in the case of an executed sale of an article for a specified purpose, in the absence of fraud or deception, from the mere fact that the seller knew the purposes for which it was to be used. *Dickson v. Jordan*, 38 N. C. 166, 53 Am. Dec. 408; *Bartlett v. Hoppock*, 34 N. Y. 118, 38 Am. Dec. 428; *Humphreys v. Comline*, 8 Blackf. 516; *Mason v. Chappell*, 15 Gratt. 572; *Kohl v. Lindley*, 39 Ill. 195, 59 Am. Dec. 294; *Deming v. Foster*, 42 N. H. 165.

Where the article sold is designed for a particular market or purpose, and so treated by both parties, it would seem that even in the case of a present sale a warranty would be implied that the article should answer the end in view. *Howard v. Hoey*, 23 Wend. 360, 35 Am. Dec. 572, where ale was sold for a southern market and soured.

Executory contracts do not depend upon the same principles as executed contracts of sale. *Hargous v. Stone*, 5 N. Y. 36.

Where the sale is executory, there is, in the absence of an opportunity for inspection, an implied warranty that the goods will answer the particular purpose for which the vendor knew they were purchased. *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 775; *Flak v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Pacific Iron Works v. Newhall*, 34 Conn. 67; *Overton v. Phelan*, 2 Head. 445; *Donelson v. Young*, Meigs, 155; *Howard v. Hoey and Hargous v. Stone, supra*; *Hart v. Wright*, 17 Wend. 267, 277; *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 560; *Fogel v. Brubaker*, 122 Pa. 7; *Davis v. Sweeney*, 75 Iowa, 45; *Doane v. Dunham*, 65 Ill. 512, 516; *McClung v. Kelley*, 21 Iowa, 508; *Brigg v. Hilton*, 99 N. Y. 517, 53 Am. Rep. 63; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 138; *Best v. Flint*, 53 Vt. 543, 56 Am. Rep. 570; *Kohl v. Lindley, supra*; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 817.

In executory contracts there is an implied warranty of the quality of the article and that it is of the kind ordered. *Fogel v. Brubaker*, *Davis v. Sweeney*, *McClung v. Kelley* and *Doane v. Dunham, supra*.

Such a contract carries with it an obligation that the goods shall be at the least of medium quality or goodness, so as to be merchantable. *Howard v. Hoey, supra*.

And without any material defect. *McClung v. Kelley*, *Fogel v. Brubaker* and *Davis v. Sweeney, supra*.

what are sometimes called exceptions, but which are really independent rules and principles.

Benjamin, Sales, ed. 1888, p. 628, Bennett's note.

The doctrine of implied warranties is so extended as to afford a just protection to the buyer against the seller.

10 Am. & Eng. Encyclop. Law, p. 95; *Jones v. Just*, L. R. 8 Q. B. 202; *Jones v. Bright*, 5 Bing. 532.

If a man sells generally he undertakes that the article sold is fit for something; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose.

Jones v. Bright, *supra*; *Gray v. Coz*, 4 Barn. & C. 108; *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

A sound price implies a sound article, in case of secret defects which the buyer could

not discover on inspection, by the exercise of ordinary care and diligence.

Ross v. Beattie, 2 Nott & McC. 538.

Where there is no opportunity for inspection, there is an implied warranty of quality.

Hyatt v. Boyle, 5 Gill & J. 110, 25 Am. Dec. 276; *Misner v. Granger*, 9 Ill. 69.

A merchant selling guano or supuphosphate to a farmer as a fertilizer, impliedly warrants it to be merchantable and reasonably suited to the use designated.

Gammell v. Gunby, 52 Ga. 504; *Wilcox v. Hall*, 53 Ga. 635; *Biddle*, Warranties in Sale of Chattels, § 167; *Brown v. Edgington*, 2 Mann. & G. 279.

A warranty will be implied against all latent defects, when the seller knew that the buyer did not rely on his own judgment but on that of the seller, who knew, or might have known, the existence of the defect.

When the contract is executory and the defects in the goods patent and obvious, when the purchaser has a full opportunity for examination, and knows of such defects, he must, either when he receives the goods, or within what, under the circumstances, is a reasonable time, notify the seller of his nonacceptance, otherwise there will be a waiver of the defects. *Morehouse v. Comstock*, 48 Wis. 626; *Locke v. Williamson*, 40 Wis. 377.

When the goods are sold under an executory contract, the purchaser does not waive the implied warranty by the acceptance thereof. *Babcock v. Trice*, *supra*.

The acceptance under an executory contract with an opportunity of inspection and without complaint, only raises a presumption that the quality was right. *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 660.

But in an executory contract there is no implied warranty as to fitness or particular degree of quality. *Misner v. Granger*, 9 Ill. 69.

Where a defendant affixed a label to a jar, representing its contents as dandelion, when they were belladonna, he was held liable for the misrepresentation. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

So there is an implied warranty in a contract for the building of a gin house, running-gear and cotton press, that the machinery answers the purpose, and if wholly worthless or it imperfectly answers the purpose of its construction, the plaintiff cannot pretend that he performed his contract. *Brown v. Murphee*, 81 Miss. 91.

Again where hams were sold, knowing them to be purchased for a particular market, there was held to be an implied warranty of their fitness for that market as good, sound, and well prepared hams in the absence of the purchaser's being informed to the contrary. *Leopold v. Van Kirk*, 27 Wis. 152.

And where hay was bought for a particular use and the defendant knew plaintiff would not buy an inferior quality, it was held that the sale of the hay for the particular purpose ordinarily implied a certainty that it was fit for use. *Beals v. Olmstead*, 24 Vt. 114, 58 Am. Dec. 150.

So in *Babcock v. Trice*, 18 Ill. 420, 68 Am. Dec. 660, where there was an executory contract to deliver corn, the court held it must be fair and merchantable.

Where paris green was purchased for the purpose of killing worms in cotton, the court held that though there was no warranty, yet a contract for the sale of an article of the kind contracted for was implied. *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280.

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Again where wool was sold in sacks and marked and described in the invoice with the seller's knowledge as of a specific quality, the court held there was an implied warranty of quality. *Richmond, T. & Mfg. Co. v. Farquar*, 8 Blackf. 89.

And where the purchaser wrote, offering a certain percentage for good salable corn, and the offer was accepted, the court implied a warranty as to the salability of the corn. *Holloway v. Jacoby*, 120 Pa. 588.

So where the contract was for two carloads of "beef cattle," selected and shipped by the seller without the purchaser's inspection, the court held that there was an implied warranty. *Morse v. Union Stock Yards*, 14 L. R. A. 157, 21 Or. 289.

In the case of a commercial contract for the sale of a cargo of ice to be shipped there is an implied warranty that the article shall be merchantable. *Murchie v. Cornell*, 14 L. R. A. 492, 155 Mass. 60.

Where seed was sold upon the understanding that it was to raise a crop, there was an implied warranty of fitness for that purpose. *Shaw v. Smith*, 11 L. R. A. 661, 45 Kan. 284.

In the case of a contract for the purchase of straw to be used by the purchaser in the manufacture of "horse collars," a use known to the seller, the court held that, the straw being purchased for a specified purpose known to the seller, there was an implied warranty of its being reasonably fit for the purpose. *Lee v. J. R. Sickles Saddlery Co.* 28 Mo. App. 201.

Where wheat was sold as "genuine Sasatchewan Fife wheat" the court held that there was no breach of warranty, even though there were some impurities there being no warranty of its being pure. *Shatto v. Abernethy*, 36 Minn. 538.

So where the plaintiffs, dealers in iron, bought a quantity to be shipped to their customers who required it to be "strictly neutral," from the defendants who knew the purposes and character required, the court held that there was an implied warranty as to the character and quality. *Philadelphia & R. Coal & Iron Co. v. Hoffman* (Pa.) Feb. 1, 1886.

In the case of a sale of a certain crop of corn, the court held the agreement executory and an implied warranty of merchantable quality. *Hamilton v. Ganyard*, 34 Barb. 204.

There was held to be no implied warranty in the sale of guano by one not himself the manufacturer thereof, that it was reasonably fit for the uses for which it was purchased, and the seller would only be liable for fraud. *Farrow v. Andrews*, 69 Ala. 96.

Manufacturer.

If a person not himself skilled in manufacture,

Story, Sales, § 374; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 186; *Hoe v. Sanborn*, 21 N. Y. 557, 78 Am. Dec. 168; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 18; *Murray v. Smith*, 4 Daly, 277; *Fisk v. Roseberry*, 22 Ill. 288; *Jones v. George*, 56 Tex. 149, 42 Am. Rep. 689; *Getty v. Rountree*, 2 Pinney, 879, 54 Am. Dec. 138. See also *Ketchum v. Wells*, 19 Wis. 25; *Merriam v. Field*, 24 Wis. 640; *Flick v. Wetherbee*, 20 Wis. 393; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 488, affirmed in 38 N. J. L. 496, 20 Am. Rep. 435; *Shaw v. Smith*, 11 L. R. A. 681, 45 Kan. 884.

It may be claimed that there was no implied warranty of breeding qualities in the bull because he was bought by the plaintiff on inspection.

From the nature of the case there could be no inspection to determine whether the animal was a breeding bull or not, by merely looking

at him and examining him as the plaintiff did.

As was said in reference to the copper sheathing in *Jones v. Bright*, 5 Bing. 532, an inspection would have availed nothing, as the defects could not be discovered on inspection.

The same may be said in reference to the "Bristol cabbage seed" in *White v. Miller*, *supra*, the "black" in *Murray v. Smith*, *supra*, the lumber in rafts in *Merriam v. Field*, *supra*, the turnip seed in *Wolcott v. Mount*, *supra*, and the flax seed in *Smith v. Shaw*, *supra*.

A mere casual view or examination of a chattel by a purchaser does not defeat the warranty which the law would otherwise imply, on the sale of such chattel, when such view or examination would determine nothing as the qualities which the law implies, under the circumstances of such sale.

Boothby v. Scales, 27 Wis. 638; *Jones v. Bright*, *supra*; *Jones v. Just*, L. R. 3 Q. B. 202;

wants an article for any particular purpose, and applies to one professing skill in its manufacture, and the latter furnishes what he alleges to be suitable, the purchase is made upon the judgment and responsibility of the seller. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

He is presumed by his skill and art, to understand the construction of his machine, and its adaptation to the purpose for which it was designed. *Walton v. Cody*, 1 Wis. 420.

The manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86.

If the buyer relied, and under the circumstances of the case had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use. *Ibid*.

There is an implied warranty in the case of manufactured articles purchased for a particular use, made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased. *French v. Vining*, 103 Mass. 122, 3 Am. Rep. 440; *Dickinson v. Gay*, 7 Allen, 20, 81, 63 Am. Dec. 656; *Swett v. Shumway*, 103 Mass. 365, 3 Am. Rep. 471; *Hight v. Bacon*, 126 Mass. 10; *Howard v. Emerson*, 110 Mass. 320; *Hoe v. Sanborn*, 21 N. Y. 553, 78 Am. Rep. 163; *Waring v. Mason*, 18 Wend. 425, 439; *Howard v. Hoey*, 23 Wend. 350, 35 Am. Dec. 572; *Hargous v. Stone*, 5 N. Y. 86; *Freeman v. Clute*, 3 Barb. 424; *Bagley v. Cleveland Roll Mill Co.* 21 Fed. Rep. 159; *Port Carbon Iron Co. v. Groves*, 68 Pa. 149; *Downing v. Dearborn*, 77 Me. 457; *Gilson v. Bingham*, 43 Vt. 410; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 200; *Byers v. Chapin*, 28 Ohio St. 306; *Dayton v. Hooglund*, 39 Ohio St. 671; *Eagan v. Call*, 34 Pa. 236, 75 Am. Dec. 653; *Williams v. Slaughter*, 3 Wis. 347; *Chicago Pkg. & Prov. Co. v. Tilton*, 37 Ill. 547; *Dawes v. Peebles*, 4 Fed. Rep. 856; *McClamrock v. Flint*, 101 Ind. 278; *Brenton v. Davis*, 8 Blackf. 317, 44 Am. Dec. 769; *Page v. Ford*, 12 Ind. 46; *Street v. Chapman*, 29 Ind. 142; *Getty v. Rountree*, 2 Pinney, 879, 2 Chand. 23, 44 Am. Dec. 138; *Wolcott v. Mount*, 36 N. J. L. 262, 13 Am. Rep. 488; *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 325; *Hood v. Bloch Bros.* 29 W. Va. 244; *J. I. Case Threshing Mach. Co. v. Smith*, 18 Or. 381; *Smith v. Hightower*, 76 Ga. 629; *Fisk v. Tank*, 12 Wis. 277, 78 Am. Dec. 737; *Ottawa Bottle & Flint Glass Co. v. Gunther*, 31 Fed. Rep. 208; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86; *Breen v. Moran* 23 L. R. A.

(Minn.) Dec. 14, 1892; *Hauser v. Curran*, 26 Ohio L. J. 52; *Conant v. National State Bank of Terre Haute*, 121 Ind. 323; *Union Hide & Leather Co. v. Reissig*, 48 Ill. 75; *Kohl v. Lindley*, 39 Ill. 195, 39 Am. Dec. 294; *Archdale v. Moore*, 19 Ill. 555; *Mienner v. Granger*, 9 Ill. 69; *Robinson Mach. Works v. Chandler*, 56 Ind. 575; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 775; *Ketchum v. Wells*, 19 Wis. 26; *Woodie v. Whitney*, 23 Wis. 55, 99 Am. Dec. 102; *Walton v. Cody*, 1 Wis. 420; *Kimball & A. Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558; *Robson v. Miller*, 12 S. C. 538, 32 Am. Rep. 518; *Snow v. Schomacker Mfg. Co.* 69 Ala. 111, 44 Am. Rep. 509; *Field v. Kinnear*, 4 Kan. 478; *Ulrich v. Stohrer*, 12 Phila. 199; *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Herring v. Skaggs*, 68 Ala. 180, 34 Am. Rep. 4; *Deming v. Foster*, 48 N. H. 165; *Dickson v. Jordan*, 38 N. C. 168, 53 Am. Dec. 413; *Overton v. Phelan*, 2 Head, 445; *Donelson v. Young*, 1 Meigs, 155; *Brown v. Murphee*, 31 Miss. 91; *Cunningham v. Hall*, 1 Sprague, 404; *Leopold v. Van Kirk*, 27 Wis. 152; *Philadelphia & R. Coal & Iron Co. v. Hoffman* (Pa.) Feb. 1, 1889; *Whitmore v. South Boston Iron Co.* 2 Allen, 58; *Taylor v. Cole*, 111 Mass. 363; *Coagrove v. Bennett*, 22 Minn. 371.

Wherever the vendor has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing must be enforced, a warranty must be implied. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

So the manufacturer of such goods impliedly warrants them to be made in a workmanlike manner. *Union Hide & Leather Co. v. Reissig*, *Kohl v. Lindley* and *Archdale v. Moore*, *supra*; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Waring v. Mason*, 18 Wend. 425, 439.

Yet he does not warrant that it will manufacture articles of a peculiar grade and quality. *Conant v. National State Bank of Terre Haute*, *supra*.

So where the manufacturer knows that the article is for use in a particular place, the law implies a warranty of fitness for the place. *McClamrock v. Flint*, 101 Ind. 278.

But if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the purpose, there is no warranty. *Hoe v. Sanborn*, *supra*.

And it has been held that a manufacturer was entitled to the same protection as any other vendor of the goods of such manufacturer would be, the rule as to implied warranties in the case of a manufacturer being abolished in Pennsylvania. *Matthews v. Harston*, 3 Pittsb. 86.

Where the party ordered a machine or other article from a manufacturer and designated the particular kind of material from which it was to be

2 Kent, Com. p. 479; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987.

Messrs. Orton & Osborn and J. M. Smith for respondents.

Pinney, J., delivered the opinion of the court:

There is no ground for contending that the plaintiff in purchasing the animal in question either asked the opinion or judgment of the vendors in respect to its procreative capacity, nor is there any reasonable or rational ground for imputing to them any information or knowledge on that subject not possessed by the plaintiff, although they had raised the bull, and were stock breeders. The plaintiff saw and inspected the animal before he made the purchase, and it was of the kind he desired to purchase. It is a well-understood principle of the common law in England, and

almost universal in this country, that in sales of personal property in the absence of express warranty, where the buyer has an opportunity to inspect the commodity or thing sold, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the thing he sells, the maxim *caveat emptor* applies. This is the rule laid down in *Benjamin on Sales*, § 644; *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383, 19 L. ed. 987; *Jones v. Just*, L. R. 8 Q. B. 202. In *Eagan v. Call*, 84 Pa. 236, 75 Am. Dec. 653, it was held that where the buyer has had opportunity of examining the thing sold there is no implied warranty by the seller against latent defects unknown alike to himself and to the purchaser. The doctrine of implied warranty appears to be founded on an actual or presumed knowledge by the vendor, as manufacturer, grower, or producer, of the

made such material not being made by the manufacturer himself, there was held no implied warranty of quality or fitness in the absence of proof of want of reasonable and ordinary care on the manufacturer's part in the selection of the material. *Shoenberger v. McEwen*, 15 Ill. App. 493.

In *Ricketts v. Sisson*, 9 Dana, 353, 35 Am. Dec. 141, the court held that an artificer of any sort was not to be considered as undertaking that any machine, instrument, or vessel, which he made for the use and by the direction of another, and according to specifications furnished by his employer, should answer the purposes for which it was designed by the projector.

Where the article is to be of a particular design, pattern, or model, defined and understood between the parties, the article conforming to the design, there is no implied warranty of fitness but only of the materials and workmanship. *Cosgrove v. Bennett*, 22 Minn. 371.

But in the case of the sale of a specific article by a manufacturer, where the purchaser relies upon his own judgment there is no warranty of fitness for the required purposes implied. *Olivant v. Bayley*, 5 Q. B. 238; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Whitmore v. South Boston Iron Co.* 2 Allen, 53; *Archdale v. Moore*, 19 Ill. 565; *Howard v. Emerson*, 110 Mass. 330; *Port Carbon Iron Co. v. Groves*, 68 Pa. 143.

There must be an undertaking, in some form, that the article shall be sufficient for the purpose, otherwise there is no responsibility, even though the vendor knows the purpose for which the purchaser intends to use the article. *Wilson v. Lawrence*, 139 Mass. 313, a case of a piano sold by a manufacturer to a dealer, the case of which checked, the court holding there was no implied warranty as to quality.

In *Sanborn v. Herring*, supreme court of New York, 6 Am. L. Reg. N. S. 457, it was held that a manufacturer who has his goods ready for sale to his customers places himself in the same position as other merchants with respect to any implied warranty, none being implied from the mere fact that he is the maker also.

Where a bridge company having partly executed a contract to construct a bridge, assigned their contract to another who agreed to complete the same within a given time for a stipulated price, and during the progress of the work under such agreement the deficiency of the work of the company, which could not otherwise have been discovered, became apparent, the court held that there was an implied warranty that the original work was reasonably sufficient for the purposes for which it was performed. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 103, 23 L. ed. 86.

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Where the contract was to deliver a pump for the specific purpose of exhausting water from a mine, a warranty was implied as to its form and structure. *Getty v. Rountree*, 2 Chand. 22, 54 Am. Dec. 133.

Where there was a contract to exercise skill and labor in the making of shingles for the purpose of covering defendant's house, the court implied a warranty of fitness for the purpose. *Thomas v. Simpson*, 30 N. C. 4.

Where there was a contract to manufacture and furnish bottles as "export beer bottles" without any express warranty the court held that there was an implied one that they should be conformable, as to kind, condition, and quality to that which would be understood by the trade from the term "export beer bottles." *Ottawa Bottle & Flint Glass Co. v. Gunther*, 31 Fed. Rep. 203.

Where rags were sold for the purpose of being manufactured into paper, it was held that the warranty was broken if they could not be used for that purpose without killing or sickening the employees engaged in such manufacture. *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810.

Where the seller knows that the goods are to be used for a particular purpose there is an implied warranty of fitness. *Charles Baumbach Co. v. Gessler*, 79 Wis. 567, wherein the purchaser requested the plaintiff by telephone to procure for him from the manufacturers in Europe catobet wafers of a certain quality suitable for holding patent "Headache Wafers."

Where the contract was to supply brick of a particular size and quality for a specified building according to specifications, the court held there was an implied warranty entitling the purchaser to damages in a cross-action. *Bushman v. Taylor*, 2 Ind. App. 12.

So in a contract for the sale and delivery of machinery for the purpose of working a corn mill known to the seller, the court held, there having been no opportunity to inspect, that there was an implied warranty of reasonable fitness for the purpose for which it was to be used and that it was in merchantable condition, unless the terms of the order excluded such warranty. *Blackmore v. Fairbanks*, 79 Iowa, 233. *William A. Wood Mower & Reaper Co. v. Thayer*, 50 Hun, 516, to the same effect.

Where the offer was for the purchase of "good salable corn," and the seller accepted the offer for one carload of corn, the court implied a warranty that the corn was good and salable. *Holloway v. Jacoby*, 120 Pa. 533.

In *William A. Wood Mower & Reaper Co. v. Thayer*, *supra*, where the defendant was the factor of the plaintiffs for the express purpose of making

qualities and fitness of the thing sold for the purpose for which it was intended or is desired, so far as such knowledge is reasonably attainable. The rule must be held to have a rational foundation, and to be not of a purely arbitrary character. It does not impute to the seller knowledge as to qualities or fitness

which no human foresight or skill can attain, and raise an implied warranty in respect to them, when the vendor and purchaser are in equal condition as to the means of knowledge, or the latter must have understood from the nature of the case that the information, experience, and knowledge of the vendor are

sales of their machines, the court held that it was of the very essence of the contract that the machines they made should be salable.

So where a boiler and fireplace were sold by a manufacturer for the purpose of running a grist mill the court implied a warranty of sound material and workmanship. *Beers v. Williams*, 16 Ill. 69.

So where the iron used in the repair of a machine by the manufacturer proved worthless the court implied a warranty of fitness of material and workmanship. *Union Hide & Leather Co. v. Reissig*, 48 Ill. 75.

So where a manufacturer engaged "to furnish a steam boiler suitable to the engine" the court implied a warranty as to the boiler delivered. *Street v. Chapman*, 29 Ind. 142.

Again where the contract was for the manufacture and sale of whiskey barrels, the court implied a warranty of reasonable fitness for the use intended excepting only patent defects. *Poland v. Miller*, 25 Ind. 387, 48 Am. Rep. 730.

Where tobacco boxes were agreed to be furnished for the season for packing purposes, the dealers relying, according to custom, upon the manufacturer as to the nature of the material, and not testing the same, the court held, the boxes being unseasoned and causing mold, that there was an implied warranty as to fitness. *Gerst v. Jones*, 22 Gratt. 518, 34 Am. Rep. 775.

So in the case of varnish sold for the manufacture and finish of carriages by a manufacturer, the law implied a warranty that the article so manufactured and sold was adequate to the purpose for which sold. *Bird v. Mayer*, 8 Wis. 362.

In the case of a sale by a manufacturer of leather for the particular purpose of the manufacturer, there is an implied warranty of soundness for those purposes. *Downing v. Dearborn*, 77 Me. 457.

So in the case of a piano sold by a manufacturer to the dealer for resale, there is an implied warranty as to the material and workmanship, and fitness for use, and that it is reasonably fit as a good instrument of its class and price, and if below its standard a breach ensues. *Snow v. The Schomacker Mfg. Co.*, 69 Ala. 111, 44 Am. Rep. 508.

Where the defendants had contracted to manufacture for the plaintiffs an iron kettle for the purpose of making iron liquors, and to deliver it to the plaintiffs, the same being found to leak, the court refused to allow exceptions to the instructions in the court below that the defendants having undertaken to deliver the kettle, if the leak was caused by the defendants before it was set up either by careless workmanship or transportation the defendants were liable. *Taylor v. Cole*, 111 Mass. 368.

Where a manufacturer or dealer contracts to supply an article which he manufactures, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied warranty that the article is reasonably fit for the purpose to which it is to be applied. *Hight v. Bacon*, 123 Mass. 10, 30 Am. Rep. 639.

Where a manufacturer who had previously supplied goods of a certain quality to the plaintiff subsequently filled another order for the same quality of goods, with goods of an inferior nature, the 23 L. R. A.

court held him liable even though the purchaser did not test them before using, having a right to rely upon the goods being of such quality. *Bagley v. Cleveland Roll Mill Co.*, 21 Fed. Rep. 159.

Where leather was sold by a manufacturer to a shoe manufacturer, for the purpose of manufacturing shoes, the court held there was an implied warranty of the soundness and suitability of the leather. *Downing v. Dearborn*, 77 Me. 457.

So in a contract for the sale of oil barrels not fit for use until prepared by a certain gluing process the court held that there was an implied warranty that the work was suitable, sufficient to constitute a defense in an action for their price. *Ryers v. Chapin*, 28 Ohio St. 305.

Where a manufacturer of bolts and nuts purchased of a consumer a ton of a superior brand of iron under the advice of the manufacturer of the iron with a view to inducing a larger sale by the first-mentioned manufacturer the court held in a contract between the iron and the bolt and nut manufacturer a warranty implied that the iron sold and delivered should be equal to that tried by the latter. *Dayton v. Hooglund*, 39 Ohio St. 671.

Where the manufacturer was to deliver a pump for the purpose of pumping water from a mine the court implied a warranty of form and structure suitable to that purpose. *Getty v. Rountree*, 2 Pinney, 379, 64 Am. Dec. 128.

In the case of a sale of a piano by a manufacturer to a dealer, where the case of the instrument checked, the court held that there was no implied warranty as to quality, and that the defendant was only bound to furnish one merchantable and salable as a piano at some price. *Wilson v. Lawrence*, 129 Mass. 318.

In *Ketchum v. Wells*, 19 Wis. 25, where stave bolts were to be manufactured and delivered to the defendants, manufacturers of barrels and staves, the court implied a warranty of fitness for the purpose.

So in the case of fire brick knowingly sold for a particular purpose, the court implied a warranty of fitness for that purpose. *Tacoma Coal Co. v. Bradley*, 2 Wash. 600.

In the case of the manufacture of a steam engine with a cut-off known as "Greens' Patent Cut-Off," for the defendant, and represented as of particular usefulness, the court held, in an action for the price, it appearing that it was claimed by another as his patent, that there was a failure of consideration to the extent of the value of the cut-off in connection with the engine. *Pacific Iron Works v. Newhall*, 34 Conn. 67.

In such a case there was a warranty that the defendant would have a right to use the patent. *Ibid.*

Upon the sale of tobacco to a manufacturer to be manufactured, the court held that the words "sound order," meant to insure the sound condition at the time of arrival at the factory and for a reasonable time afterwards. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

Where plaintiffs, manufacturers of steel, with full knowledge of the uses to which the steel was to be applied, wrote defendants, manufacturers of axes, offering best axe cast steel equal to any brand of English cast steel, the court held there was an implied warranty that the steel made articles as good as the best English in quality. *Park v. Morris Axe & Tool Co.*, 4 Lana. 103.

not superior to his own. The case we are considering is not one where the buyer can be said necessarily or at all to have trusted to the judgment or skill of the manufacturer, grower, producer, or dealer, instead of his own. *Jones v. Just*, L. R. 3 Q. B. 202. Because the defendants raised the bull they sold

to the plaintiff they are not chargeable with any knowledge, or opinion even, in respect to a matter beyond the reasonable scope of human knowledge, namely, whether the bull would prove impotent, and to be wholly destitute of the power of procreating his kind; and hence the ground of presumed or

Where the contract was for the manufacture of a steam engine and boiler which proved, after fair trial, not to accomplish the end for which designed, the court held, the contract being executory, that the article might be returned within a reasonable time upon the implied warranty. *Freeman v. Clute*, 3 Barb. 424.

Where ice was sold to a retail dealer with a knowledge that it was for resale to customers, without disclosing its known impure condition, the court held there was deceit which exempted the purchaser from payment of the full price even though he had sold the same and no representations were made as to quality even though the purchaser inquired of others. *Joplin Water Co. v. Batha*, 41 Mo. App. 235.

Where the plaintiffs contracted with the defendant for the manufacture of articles described as "all the horn chains they manufacture," the question was, whether the words "horn chains manufactured" implied a warranty that the chains were wholly of horn, the court ruled that if there was an article called and known by that name made partly of horn and partly of hoof, and such an article was intended, it was sufficient. *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471.

In *Troy Laundry Mach. Co. v. Henry (Or.)* Nov. 28, 1892, the contract was for a roll body ironer and machinery and pulley to operate the same, the court held that the fact that the machine did not work right by reason of the pulley being unfit was due to a breach of the implied warranty as to the pulley and not of the machine so as to bar an action for the price of the latter.

Where the sale was of sweet pickled pork shoulders deliverable at Dubuque for shipment to the plaintiff without an opportunity of examination or knowing of its qualities, which upon inspection on delivery showed nothing wrong except that the pickle was not as pure as it might have been, the bad qualities only appearing upon smoking it, the court held that there was no implied warranty of quality. *Ryan v. Ulmer*, 108 Pa. 382, 56 Am. Rep. 210.

Where the order called for "1 No. 4 safe with combination lock," and the plaintiffs shipped one of their make "No. 4 with combination lock," the court held there was a strict compliance with the order and that there was no implied warranty as to the merit or usability of the lock. *Tilton Safe Co. v. Tiedale*, 48 Vt. 83.

Depreciation of article.

A warranty will not be implied against a necessary and likely depreciation in quality between the date of the contract and the delivery of the article. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

Where a manufacturer contracts to deliver a manufactured article at a distant place he must stand the risk of any ordinary or unusual deterioration, but the vendee is bound to accept the article if only deteriorated to the extent that it is necessarily subject to in its course of transit from one place to the other; he must bear the risk of the deterioration necessarily consequent upon the transmission. *Bull v. Robinson*, 10 Exch. 342; *Mann v. Everston*, 22 Ind. 365; *Leggat v. Sandsale Brewing Co.* 60 Ill. 158; *English v. Spokane Commission Co.* 37 Fed. Rep. 451, a case of shipment of eggs and potatoes.

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In the case of goods purchased for shipment for a particular trade, the warranty only extends to the condition of the goods (hams) at the time of sale, the question as to their unsoundness at the end of the voyage being for the jury to find whether the defects were latent and existed prior or subsequent to shipment. *Leopold v. Van Kirk*, 27 Wis. 152.

Where goods were shipped from a distance without any opportunity of examination of quality, the court allowed evidence of bad quality when received together with expert evidence to show that if properly packed and good when shipped the goods ought not to have spoiled by the way. *Ryan v. Ulmer*, 108 Pa. 382, 56 Am. Rep. 210.

Where corn meal was purchased as kiln-dried corn meal, for shipment, the court held that there was an implied warranty that it was properly packed and fit for such shipment, but that such warranty did not extend to any length of time. *Mann v. Everston*, 22 Ind. 365.

But where ale was sold for transportation and resale the court refused to imply a warranty of quality so as to cover transportation for a considerable distance or as to its quality at the end of such a voyage. *Leggat v. Sand's Ale Brewing Co.* 60 Ill. 158.

Latent defects.

The universal doctrine is, that whenever the article sold has some latent defect which is known to the seller, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

The fact that one dealer knows the purposes for which the other dealer purchased does not render him liable for unknown defects which make the article unfit for use. *Howard v. Emerson*, 110 Mass. 320.

Upon the sale of a chattel by a manufacturer, a warranty is implied that the article is sold free from any latent defects growing out of the process of manufacture the knowledge of the vendor being presumed superior. *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 18; *Hoe v. Sanborn*, *supra*; *Leopold v. Van Kirk*, 27 Wis. 152; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Hoult v. Baldwin*, 67 Cal. 610.

Yet if the defect is in the materials employed, such liability only attaches in case of knowledge of the defect. *Hoe v. Sanborn*, *supra*.

The fair presumption is that the maker or manufacturer understands the process of its manufacture, and is cognizant of any latent defects caused by such process and against which reasonable diligence might have guarded. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 56.

The doctrine of *caveat emptor* does not apply to the case of a latent defect in goods purchased for a specific purpose, known to the plaintiffs and concealed by them from the defendant. *Downing v. Dearborn*, 77 Me. 457.

The same conclusion was arrived at in the case of sales for a particular purpose known to the seller in *Boothby v. Scales*, 27 Wis. 623.

If there is no opportunity to inspect the article, or if from the situation inspection is impracticable or useless, it is unreasonable to suppose that the purchaser bought on his own judgment or that he did not rely on the judgment of the seller as to la-

reasonably imputed knowledge as a foundation in this case of an implied warranty wholly fails. In the case of *White v. Miller*, 71 N. Y. 118, 131, 27 Am. Rep. 13, it is said in relation to the case of a manufacturer that the rule of implied warranty "is based on the presumed superior knowledge of the vendor,"

and that, in the case of a producer or grower of seeds, there seems to be the same reason for implying a warranty on a sale of seeds by the grower that they are not defective from improper cultivation as to imply a warranty of freedom of defects in manufacture on a sale by a manufacturer of the

tent defects of which the latter, if he used due care, must have been informed during the process of manufacture. *Kellogg Bridge Co. v. Hamilton*, *supra*.

Where the contract was to manufacture and deliver steam boilers for the purpose of running engines at a rolling mill, the court held that there was an implied warranty that they should be free from defects of material and workmanship, latent or otherwise, as rendered them unfit for the uses required of them. *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 280.

Under the Louisiana law there is an implied warranty against latent defects. *Bulkley v. Honold*, 60 U. S. 19 How. 390, 15 L. ed. 663; *Civil Code*, arts. 2450, 2451, a case of the sale of a vessel decayed and rotten in the hull, to discover which it would have been necessary to strip and bore.

Knowledge of purpose.

It is a doctrine of the civil law that there is an implied warranty of fitness of an article for a specific purpose, from the knowledge on the seller's part, that the article is required for that purpose. *Bartlett v. Hoppock*, 84 N. Y. 118, 88 Am. Dec. 428.

The scienter is not only a material but a vital point of the case. *French v. Vining*, 102 Mass. 132, 8 Am. Rep. 440.

It is, in the absence of a warranty, the gist of the action. *Kingsbury v. Taylor*, 29 Me. 508, 50 Am. Dec. 607.

The question is one of fact as to the actual contract between the parties. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

If the vendor can be proved to have had knowledge of the defect, and failed to disclose it, he is liable. *Ibid*.

When the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. *Ibid*; *Kingsbury v. Taylor*, *supra*.

An implied warranty in respect to quality rests upon a presumption, in the particular case, that the vendor knew of the defect. *Hoe v. Sanborn*, *supra*; *Moses v. Mead*, 1 Denio, 378, 48 Am. Dec. 673; *Hauser v. Curran*, 25 Ohio L. J. 52.

The manufacturer of a machine who knows that it is to be used for a specified purpose, impliedly warrants its fitness for that purpose. *Hauser v. Curran*, *supra*; *McClamrock v. Flint*, 101 Ind. 278; *Brenton v. Davis*, 8 Blackf. 817, 44 Am. Dec. 769; *Page v. Ford*, 12 Ind. 46; *Street v. Chapman*, 29 Ind. 142; *Gerst v. Jones*, 32 Gratt. 518, 34 Am. Rep. 775; *Conant v. National State Bank of Terre Haute*, 121 Ind. 823; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 23 L. ed. 86; *Ottawa Bottle & Flint-Glass Co. v. Gunther*, 31 Fed. Rep. 208; *Pease v. Sablin*, 38 Vt. 432, 91 Am. Dec. 364; *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136; *Chapin v. Dobson*, 78 N. Y. 74, 32, 34 Am. Rep. 512; *Lee v. J. B. Sickles Saddlery Co.* 38 Mo. App. 201; *Chester Steel Castings Co. v. Browncombe*, 7 Kulp, 136.

Where the purchaser has no opportunity to exercise his own judgment, and therefore relies upon that of the vendor, a warranty of fitness will be implied. *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Chester Steel Castings Co. v. Browncombe*, *supra*; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570.

Where the vendor is not the manufacturer, and

where the vendee has equal knowledge and opportunity of knowledge of the character or quality of the article sold, the vendor is only liable upon an express warranty. *Bartlett v. Hoppock*, 84 N. Y. 118, 88 Am. Dec. 428; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 23 L. ed. 86.

It has been held that even though the vendor has knowledge of the purposes for which the purchaser intends to use the article, yet there must be an undertaking, in some form, that the article shall be sufficient for the purpose. *Wilson v. Lawrence*, 139 Mass. 318, where a piano was sold by a manufacturer to a dealer, the case of which checked, the court holding there was no implied warranty as to quality.

Knowledge will not be inferred where the vendor presumes the purposes for which the goods are to be used, in the absence of fraud. *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639.

Thus where the plaintiff purchased "xx pipe-iron" for a specific purpose requiring the iron to be soft, and tough, that purchased being hard and brittle, and unfit for the purpose, the court held the vendor not being the manufacturer, that it was not enough to show that the plaintiff knew the purpose, and that a specific warranty should have been exacted and his knowledge could not be presumed. *Dounce v. Dow*, 64 N. Y. 411.

In strong cases, however, the court will presume the knowledge on the part of the vendor without proof and hold him responsible upon an implied warranty. *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163.

Effect of inspection.

If the purchaser inspects for himself the specific goods sold, and there is no express warranty, and the seller is guilty of no fraud, and is not himself the manufacturer of the goods sold, the doctrine *caveat emptor* applies even though the seller presumed the purposes for which the goods were required. *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Dounce v. Dow*, 64 N. Y. 411; *Cunningham v. Hall*, 4 Allen, 288; *Lindley v. Hunt*, 22 Fed. Rep. 52.

Where the means of knowledge are at hand, and equally available to both parties, and the subject is open to the inspection of both parties alike, there is no implied warranty. *Rocchi v. Schwabacher*, 38 La. Ann. 1364.

On the sale of an article by a specific description not inspected, but known to the parties, there is an implied warranty of the particular description, but not of quality or value. *Catchings v. Hacke*, 15 Mo. App. 51; *Whitaker v. McCormick*, 6 Mo. App. 114.

An opportunity to inspect the goods must be given before the maxim *caveat emptor*, can apply. *Hood v. Bloch Bros*, 29 W. Va. 244.

A warranty of kind may be inferred upon a sale of seed from a bona fide statement of the vendor as to kind in cases where an inspection will not help the purchaser. *Wolcott v. Mount*, 38 N. J. L. 496, 20 Am. Rep. 425.

Where the goods are in transit and the purchaser has had no opportunity of examining them, they must be merchantable in quality. *Newbery v. Wall*, 3 Jones & S. 103, where fute was found to be inferior in quality. *Cleu v. McPherson*, 1 Bosw. 489; *Reed v. Randall*, 29 N. Y. 358, 36 Am. Dec. 305; and *Peck v. Armstrong*, 38 Barb. 215, followed.

article made by him. "The grower of seeds must be presumed to be cognizant of any omissions or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use;" as, in the case cited, in relation to a sale of cabbage seed which had been crossed with other varieties, and ren-

dered impure by being raised in close proximity with them. In *Van Wyck v. Allen*, 69 N. Y. 61, 25 Am. Rep. 136, cited by appellant's counsel, the article sold was represented to be of a particular kind, when it was not, and there was, therefore, an express warranty. In *Flick v. Wetherbee*, 20 Wis.

Where the purchaser has no opportunity of examining the goods, there is an implied warranty as to quality for the purposes desired and also that they are merchantable. *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 325; *Getty v. Rountree*, 2 Pinney, 379, 2 Chand. 28, 54 Am. Dec. 138; *Hood v. Bloch Bros.*, *supra*; *J. I. Case Threshing Mach. Co. v. Smith*, 16 Or. 361; *Smith v. Hightower*, 76 Ga. 629; *Wolcott v. Mount*, 30 N. J. L. 262, 13 Am. Rep. 438; *Dawes v. Peebles*, 6 Fed. Rep. 856, a case of soda water apparatus; *Kohl v. Lindley*, 39 Ill. 196, 30 Am. Dec. 294, as to quality and condition; *Best v. Flint*, 58 Vt. 543, 56 Am. Rep. 570, where hogs were sold for market relying upon the vendor's judgment; *Osgood v. Lewis*, 2 Harr. & G. 496, 18 Am. Dec. 317; *Merriam v. Field*, 24 Wis. 640, where lumber in rafts was sold, its inspection being incapable of performance. *Chicago Pkg. & Prov. Co. v. Tilton*, 87 Ill. 547.

Such a rule however would not seem to apply to the case of a sale of a dealer not himself the manufacturer. *Ibid*.

Such a warranty has been held to exist in the case of executory contract, even where there is an opportunity to inspect. *Misner v. Granger*, 9 Ill. 62.

So where the vendee does not inspect the property but relies upon the seller, the former is not bound by defects which would have been noticed upon inspection. *Hanks v. McKee*, 2 Litt. (Ky.) 227, 13 Am. Dec. 265.

The doctrine of an implied warranty from the fact of no opportunity to inspect applies only to cases where such inspection is impracticable and not to cases where it is merely inconvenient or laborious. *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276.

Articles of food, etc.

In the case of the sale of articles of food to be consumed directly in domestic uses, there is as between the dealer and consumer an implied warranty that such articles are sound and wholesome. *Winsor v. Lombard*, 18 Pick. 61; *French v. Vining*, 108 Mass. 183, 3 Am. Rep. 440; *Howard v. Emerson*, 110 Mass. 320; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 336; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 673; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Hart v. Wright*, 17 Wend. 267, 272; *Hyland v. Sherman*, 2 E. D. Smith, 234; *Divine v. McCormick*, 50 Barb. 116; *Burch v. Spencer*, 15 Hun, 504; *Hoover v. Peters*, 18 Mich. 51; *Goad v. Johnson*, 6 Helsk. 240; *Lukens v. Freund*, 27 Kan. 664; *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 337; *Ryder v. Neitge*, 21 Minn. 70; *McNaughton v. Joy*, 1 W. N. C. 470; *Osgood v. Lewis*, 2 Harr. & G. 495, 18 Am. Dec. 317; *Jones v. Murray*, 3 T. B. Mon. 88; *Moore v. McKinlay*, 5 Cal. 471; *Getty v. Rountree*, 2 Pinney, 379, 2 Chand. 28, 54 Am. Dec. 138; *Fairbank Canning Co. v. Metzger*, 43 Hun, 71; *Copas v. Anglo-American Provision Co.* 73 Mich. 541; *Williams v. Slaughter*, 3 Wis. 847; *Humphreys v. Comline*, 8 Blackf. 516.

Such purchases being usually made with a reliance upon the supposed skill of the seller. *French v. Vining*, *supra*.

Warranty of fitness is implied in such cases from the payment of a sound price. *Van Bracklin v. Fonda* and *Hart v. Wright*, *supra*.

Where there was some evidence that the defendant knew the animal to be diseased before it was slaughtered, the court held that in the sale of provisions for domestic use, the vendor was bound to

know that they were sound and wholesome at his peril. *Van Bracklin v. Fonda*, *supra*.

Where the plaintiffs, buyers and packers of pork for shipment for market for food, purchased a hog from defendant who knew the same to be boar meat unfit for food, that it was intended to be used for food, and not for manufacture into grease or tallow, and that they concealed and denied the facts, the court implied a warranty of fitness for food. *Burch v. Spencer*, *supra*.

Where a heifer was sold, the vendor knowing it to be for immediate consumption, and having knowledge or reason to suspect that it is diseased and unwholesome, the vendor was held bound to make his knowledge known even though the disease was not externally visible. *Divine v. McCormick*, *supra*.

In *Goad v. Johnson*, 6 Helsk. 240, the court held that the rule making the seller responsible for defects unknown, applied to provisions only and was founded upon statutory enactment and not upon any implied warranty.

In *Sinclair v. Hathaway*, 57 Mich. 60, 58 Am. Rep. 327, where a baker sold bread at a discount to a peddler, for sale, not as a wholesale dealer but as a mere middleman and acting as his agent in his employ, the court held that a baker impliedly warranted the wholesomeness of his bread.

It has, however, been denied that anything can be inferred from the sale of provisions, which may not be inferred from a like purpose in other cases. *Wright v. Hart*, 18 Wend. 464; *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. 57.

Where hams were purchased from a wholesale dealer and manufacturer without an opportunity of inspection, and packed by a process unknown to the purchaser, there was held to be an implied warranty of their fitness for food. *Copas v. Anglo-American Provision Co.* 73 Mich. 541.

But where the question arises as between one dealer and another, as where such articles are sold as merchandise and not as food or provisions, the courts have held that there is not, in the absence of fraud, any such implied warranty of fitness. *Howard v. Emerson*, 110 Mass. 320; *Emerson v. Brigham*, and *Winsor v. Lombard*, *supra*; *Hart v. Wright*, 17 Wend. 267; *Wright v. Hart*, 18 Wend. 449; *Moses v. Mead*, 1 Denio, 378, 43 Am. Dec. 673; *Burnby v. Rollitt*, 16 Mees. & W. 644; *Giroux v. Stedman*, 145 Mass. 439; *Rinschler v. Jelliffe*, 9 Daly, 469; *Goldrich v. Ryan*, 3 E. D. Smith, 324; *Miller v. Scherder*, 3 N. Y. 268; *Ryder v. Neitge*, 21 Minn. 70; *Mattoon v. Rice*, 102 Mass. 226; *Hyland v. Sherman*, 3 E. D. Smith, 234; *Goad v. Johnson*, 6 Helsk. 240; *Jones v. Murray*, 3 T. B. Mon. 88; *Humphreys v. Comline*, 8 Blackf. 516; *Fairbank Canning Co. v. Metzger*, 43 Hun, 71.

So in *Humphreys v. Comline*, *supra*, where molasses was sold in barrels as merchandise, the court holding that an inspection was not impracticable.

And where a farmer killed a hog and sold it with a knowledge that it was to be used for food, the court held there was no implied warranty as to fitness for human food, the sale not being made by common dealers or marketmen, and only a casual one without any guilty knowledge of the defect. *Giroux v. Stedman*, *supra*.

In *Emerson v. Brigham*, 10 Mass. 197, a case of a sale of barrels of unwholesome beef, purchased by the plaintiffs from the defendants and shipped by the latter to a certain market for sale, the court

893, the decision went not upon the ground of implied warranty, but that the defendant covenanted to supply all the seed corn for the year's cultivation, which it was held required him to furnish good seed corn, and there was, besides, evidence of an express warranty. The case of *Scott v. Kenick*, 1 B.

Mon. 63, 35 Am. Dec. 177, in which it was held that the law implies no warranty, in a sale of a Durham cow, that she will prove suitable for breeding purposes, although the price paid for her indicated that it was for that purpose she was bought; and this is in accord with what was said in *White v. Steel*.

held that in the absence of a willful false affirmation or representation, or fraud or artifice, an action for deceit was not maintainable.

Where cattle were sold at market by a drover to a butcher, no implied warranty was raised in the absence of misrepresentation, concealment, or knowledge of injury. *Goldrich v. Ryan*, 3 R. D. Smith, 324.

Where hogs were sold to be used in the plaintiff's meat market, and were examined by him and found not to be in the best condition, the defendant stating, however, that they were healthy as far as he knew, there being no perceptible disease, the court held, the hogs having died from cholera and become worthless by disease existing at the time of purchase, that in the absence of an express warranty there was no implied warranty of their fitness for slaughter. *Needham v. Dial* (Tex. Civ. App.) Sept. 20, 1893.

In such cases in the absence of fraud or misrepresentation as to quality or an express warranty, there is no implied warranty as to latent defects in the absence of knowledge (*Rinschler v. Jelliffe*, 9 Daly, 469), where the buyer made all the examination he required.

Yet it has been held such a warranty would be implied in such sales whether the sale was by a retail dealer or any other person. *Hoover v. Peters*, 18 Mich. 51.

Where hay upon which white lead was known to have been spilt was sold for feeding a cow which died from the poison, the court held the vendor liable for the loss, placing the liability upon the ground of deceit, or knowledge of the bad condition of the article. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440.

But in *Lukens v. Frelund*, 27 Kan. 664, the court held that there was no implied warranty in the case of food sold for the express purpose of feeding cattle.

There is an implied warrant upon a sale of drugs that they are of the character asked for. *Jones v. George*, 56 Tex. 149, 43 Am. Rep. 689.

Provisions of the state codes and statutes.

Under section 1192 of the Civil Code of Alabama, there is an implied warranty by the planter of cotton sent to a factor for sale with such factor or the purchaser of the cotton that it is not fraudulently packed.

Under section 1769 of the Civil Code of California, one who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defects, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein. *Hoult v. Baldwin*, 67 Cal. 610.

By section 1770 of the same Code, a manufacturer of an article under an order for a particular purpose warrants it reasonably fit for that purpose. *Ibid.*

Where a steel rope or cable was to be manufactured for the operation of street cars, which upon trial failed in its purpose and was returned, the court refused an action by the plaintiff for the price of the rope. *Hallidie v. Sutter Street R. Co.* 63 Cal. 575.

But it has been held that firewood is not within 22 L. R. A.

section 1770 of such Code. *Correto v. Lynch*, 65 Cal. 273.

And section 1771 of the same Code provides an implied warranty in case of the sale of merchandise inaccessible to the examination of the buyer. *Moore v. McKinlay*, 5 Cal. 471, a case of sale of goods at sea.

And under section 1775 of the same Code there is a warrant of soundness and wholesomeness in the sale of provisions for domestic use, and actual consumption.

By section 1008 of the Civil Code of Dakota, in the case of merchandise not in existence there was a warranty of soundness and merchantable quality at the place of production contemplated by the parties, and as nearly so at the place of delivery as can be secured by reasonable care.

Section 1009 of the same Code implies warranties against latent defects in the case of a sale of an article of one's own manufacture, not disclosed, arising from process of manufacture, and that neither he nor his agent has used improper material.

And by virtue of section 1010, a manufacturer of an article for a particular purpose warrants it reasonably fit for that purpose. *Sycamore Marsh Harvester Co. v. Sturm* (Neb.) Aug. 30, 1892.

So by section 1011 of the same Code the seller of merchandise inaccessible to the examination of the buyer, warrants it sound and merchantable.

Under section 1015 of such Civil Code the seller of provisions for domestic use warrants to the purchaser for actual consumption, and not to the purchaser for sale, that they are sound and wholesome.

Under section 2651 of the Code of Georgia, ed. 1882, p. 655, there is an implied warranty that the article is merchantable, and reasonably suited to the use intended, and further, against latent defects undisclosed.

The seller warrants that the article is merchantable and reasonably fit for the use intended, and that he knows of no latent defects. *Williams v. Wyllie*, 45 Ga. 590; Code, § 2609.

Under sections 2708, 3421, of the Georgia Code, a partial apportionment must be made upon a failure of consideration, and pleaded by way of defense to a latent defect. *Ibid.*

Under the code of this state it has been held that in the sale of a fertilizer there is an implied warranty of its reasonable fitness for the purposes intended where sold at market value of the sort contracted for. *Radcliff v. Gunby*, 46 Ga. 484; *Sims v. Howell*, 49 Ga. 620; *Gammell v. Gunby*, 52 Ga. 504; *Wilcox v. Cunningham*, 54 Ga. 490.

There is an implied warranty that it is manure, and will increase the quality of the land. *Wilcox v. Hall*, 53 Ga. 635.

And the fact that a declaration that "this fertilizer is sold under the inspection and analysis of Dr. A. Means, Inspector at Savannah, and the department of agriculture at Atlanta," has been held not to affect the implied warranty of quality. *Austin v. Cox*, 60 Ga. 620. To the same effect *Wilcox v. Owens*, 64 Ga. 601; *Allen v. Young*, 63 Ga. 617.

The fitness of such article is not proved conclusively by evidence that the manufacturers made an article containing fertilizing ingredients. *Sims v. Howell*, *supra*.

The fact that the manufacturers of a fertilizer make an article containing such ingredients is not

loh, 74 Wis. 485, 429, on the subject of implied warranty in a similar case. *Barnes v. Burns*, 81 Wis. 235. If the plaintiff desired to guard against loss from the contingency which occurred, he should have exacted an express warranty as a condition of his pur-

chase. Where, as in this case, both parties were alike destitute of knowledge or the means of forming an intelligent judgment whether the bull would be able or not to generate his kind, and there was no misrepresentation or fraud, and no express warranty,

conclusive proof of its fitness for the use intended. *Ibid*.

There is, however, no warranty that such fertilizer is suited to the land nor against the seasons. *Wilcox v. Hall*, 53 Ga. 635.

Where patent defects in the machine were pointed out, the statement of the seller that they can be repaired implies a warranty under the Code, section 2651, that after such repairs are made the machine will be reasonably fit for the purposes for which intended. *Cochran v. Jones*, 85 Ga. 678.

By section 3245 of the Revised Statutes of Idaho, one making a business of selling provisions for domestic use warrants them sound and wholesome.

English doctrine.

A term is implied in every contract to furnish manufactured goods, that they shall be merchantable. *Laing v. Fidgeon*, 6 Taunt. 106, 4 Camp. 160; *Morgan v. Gath*, 3 Hurlst. & C. 748.

In *Jones v. Just*, L. R. 3 Q. B. 197, the court held that where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied.

In such a case the buyer trusts to the manufacturer or dealer and relies upon his judgment and not upon his own. *Jones v. Just*, *supra*.

Where the defendant, a manufacturer, supplied copper sheathing for the plaintiff's vessel which turned out to be defective in a short time after use, and the jury found that there was some intrinsic defect in the value of the copper, the court held that as the defendant manufactured the copper and knew the purposes for which it was supplied, there was an implied warranty of fitness. *Jones v. Bright*, 3 Moore & P. 155, 5 Bing. 533.

If the purchaser relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed. *Brown v. Edgington*, 2 Mann. & G. 279.

If an order is given for the manufacture or supply of an article to answer a required purpose, the purpose and not the specific article being the essential matter, the seller is bound to supply an article reasonably fit for the purpose and impliedly warrants its fitness. *Olivant v. Bayley*, 5 Q. B. 238, 1 Dav. & M. 373.

In the case of a sale of goods by a manufacturer thereof not otherwise a dealer in them, there is, in the absence of usage in the particular trade or as regards the particular goods to supply those of other makers, an implied warranty that they are the manufacturer's own make. *Johnson v. Raylton*, L. R. 7 Q. B. Div. 438.

Where the vendor undertook that copper sheathing should be sound, good, substantial, and serviceable copper, and there was no proof of a warranty such as declared upon, the court held that there was no implied warranty against latent defects, although sold as "copper sheathing." *Gray v. Cox*, 6 Dowl. & R. 200, 8 Dowl. & R. 220.

Where the written instrument containing the terms of the sale by the builder of a barge was

silent as to any warranty, the court implied a warranty of fitness for the purposes for which he knew it to be purchased. *Shepherd v. Pybus*, 4 Scott, N. R. 434, 3 Mann. & G. 68.

Where a crane rope was ordered by a wine merchant from a dealer who held himself out as the manufacturer of ropes, and who upon being told of the purposes for which it was required stated that one would have to be made specially, the court held there was an implied warranty of fitness even though the rope was not manufactured by such dealer but made by another under his orders. *Brown v. Edgington*, 2 Mann. & G. 279, 2 Scott, N. R. 496.

Where a safe was bought of the manufacturer, under an alleged warranty that it was strong enough to resist all attempts that might be made to force it open, it being broken open easily more than six years after the sale and delivery, the court held there was an absolute warranty of security at all times, and was so extensive that it was cogent evidence alone of express warranty to that extent, and was not sustained by proof of mere representations that the safe would resist burglars. *Walker v. Milner*, 4 Post. & F. 745.

Where the contract was to take a certain steam tug towing sailing barges a certain distance in a given time, and the engines of the tug proved defective, of which fact neither party had notice, and delay was occasioned thereby and caused loss of profit to the hirer, the court held that the contract being for a specific vessel, there was no implied warranty of reasonable efficiency, and that the plaintiff was without remedy the engines not being shown to be in a worse condition at the time possession was taken than when the contract was made. *Robertson v. Amazon Tug & Lighterage Co.* L. R. 7 Q. B. Div. 596, 51 L. J. Q. B. 68.

From this decision *Bramwell, L. J.*, dissented, holding that there was an implied undertaking that the engines were not defective. *Ibid*.

Where refuse oil was sold to graziers without description or knowledge that it was to be used for feeding cattle, the court held there was no implied warranty of fitness. *Jackson v. Harrison*, 2 Post. & F. 782.

Where port wine was sold without sample, as fit to be laid down, and shipped and delivered as "superior old port," but proved sour owing to a deficiency of spirit in bottling, *Kelly, C. B.*, held that there was a warranty of fitness, and *Martin Pigott & Cleasby, BB.*, that there was evidence thereof. *Osborne v. Hart*, 23 L. T. N. S. 851.

In this last case, however, *Martin, B.*, held that the maxim *caveat emptor* applied, the sale being of specific goods which might have been examined. *Ibid*.

In *Bigge v. Parkinson*, 7 Hurlst. & N. 565, the court held that an express warranty that troop stores would "pass survey of the East India Company's officers" did not do away with the implied warranty of the fitness of the stores for the intended purpose.

Where an article is sold at the market price for a particular purpose, and turns out to be defective, there is an implied warranty of fitness. *Gray v. Cox*, 6 Dowl. & R. 200, 8 Dowl. & R. 220.

In the sale of an article for a specific purpose there is a warranty that it is reasonably fit for the purpose even as to latent defects. *Randall v. Newson*, L. R. 2 Q. B. Div. 102.

On a sale of food there is an implied warranty of

we think no warranty can be implied in that respect merely because a full price was paid for a bull for breeding purposes, and the seller knew he was being purchased for that

purpose. The plaintiff was rightly nonsuited.

The judgment of the Circuit Court is affirmed.

fitness. *Beer v. Walker*, 46 L. J. C. P. 677, where rabbits were bought to be shipped to the purchaser which on arrival were found to be putrid, the court holding that there was an implied warranty that the rabbits should be in a merchantable condition and fit for consumption within a reasonable time after reaching the purchasers, in the absence of anything exceptional in the transit.

Where meat sold in a public market was found to be unfit for human food, of which fact the salesman had no means of knowledge or reason to suspect, the court held that there was no implied warranty though the market was within the city of London. *Emmerton v. Mathews*, 7 Hurlst. & N. 580.

Where there is no discoverable defect in meat detectable by ordinary inspection, and the meat is found unfit for food, there is no implied warranty in the case of the salesman who sells it to a pur-

chaser who selects the same. *Smith v. Baker*, 40 L. T. N. S. 261.

Where there was a contract to purchase all the liquor consumed upon certain premises from one party the law implied a warranty on the part of the seller that it should be fit to drink. *Clarke v. Stancliffe*, 7 Exch. 439.

It has been held that all victualers, brewers, and other common dealers in victuals selling provisions in their trade impliedly warrant the wholesomeness thereof, and are liable for unsoundness. *Burnby v. Rollitt*, 16 Mees. & W. 644.

Aliter, in the case of a sale by a private party not following such trade. *Ibid.*

Where articles are sold for resale as eatable or drinkable, there is no implied warranty, and the purchaser cannot recover against the seller. *Herman v. Bennett*, 1 Fost. & F. 460. E. W.

INDIANA SUPREME COURT.

Nancy E. WOODRUFF, Admr., etc., of
Henry D. Woodruff, Deceased, Appt.,

v.

Silas T. BOWEN.

(.....Ind.....)

1. A fireman who goes into or upon a burning building for the purpose of extinguishing the fire acts under a license given by the law, and not by invitation of the owner, so as to bring himself within the rule as to the owner's duty to have the building safe for those whom he invites there.

2. Keeping a building in a populous city safe for firemen is not a duty of the owner at common law, independent of any statute or ordinance.

3. An ordinance requiring the owner of a dangerous or insecure wall or building to make it safe within twelve hours after notice, does not apply to a building which is safe for the purpose of commerce and trade, but fails by reason of the large quantities of water thrown into and upon it in extinguishing a fire, while it was stored with stationery by a tenant, thus putting it to an extraordinary strain.

(October 20, 1893.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Henry N. Spaan and William A. Ketcham, for appellant:

"Every man is required to so use his own that he shall not injure another."

Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

5 Walt. Act. & Def. § 2, p. 563.

Ordinarily a man may use his own as he pleases; but when he unlawfully works an injury his neighbors have the right to redress.

The cases in which actions have been sought to be maintained for violation of this rule are various, viz.:

a. The most common are those where injuries have been inflicted upon passers-by upon a public highway, for those are the instances in which injuries are most frequently sustained.

b. The next in order are probably those where property or property rights in the vicinity are invaded or injured, and those cases usually come under the head of nuisances.

c. Are the instances where persons have gone upon another's premises by his invitation, express or implied, for the mutual benefit of both parties.

d. Those cases where persons have gone upon another's premises simply by permission, express or implied, without any invitation, and solely for their own accommodation, benefit, or convenience.

These several instances are of parties who, at the time of the injury, are at the place at which they are injured: (1) as a matter of right; (2) not as a matter of right, but as mere licensees; (3) wrongfully.

Decedent was on the building as a matter of right; he was a part of the police power of the city of Indianapolis in the employ of a particular sub-division of the state represented by the city of Indianapolis and in the capacity

NOTE.—The above case seems to be one of first impression on the common-law liability of owners of buildings to keep them safe for firemen who enter in the exercise of their duties for the purpose of extinguishing fire. This is, based on the doctrine of *L. R. A.*

trine that firemen enter under an implied license, and not under an implied invitation, and while the distinction given by the law is a fine one, the difference in the result is very great.

of a fireman. As such he owed a triple duty : (1) to the public to subdue and prevent the spread of fire to adjacent property to the general injury of the citizens of the city ; (2) to attempt to extinguish, for the protection and benefit of the defendant, the fire which was then raging in his building, and which threatened the entire destruction of the improvements on his ground ; (3) to perform the same office in the interest and for the benefit of the tenant, the Bowen-Merrill Company, as to the stock of goods which it then had on the premises owned by the defendant.

With reference to the Bowen-Merrill Company, he was there exclusively for its benefit, and impliedly at its invitation. Considered with reference to his duty to the public, he was there, first, as a matter of right, and second, as a matter of duty.

From the standpoint of the property holder whose property is being destroyed by the ravages of fire, the fireman comes there for the particular benefit of the particular property holder.

The fireman owed to him personally as the owner of the property the duty of being at such point, either on, in, or about the building as in his judgment or because of the command of his superior officer, was most conducive to a successful effort to subdue and extinguish the fire.

He was there as a matter of right.

Luddington v. Miller, 4 Jones & S. 1; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Ryan v. Thomson*, 6 Jones & S. 133; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Leahey v. Godfrey*, 138 Mass. 315.

Being there as a matter of right, there was owing to him the duty that the places at which he was, should be ordinarily and reasonably safe so far as an ordinarily reasonable and prudent man could make and keep them so, except and except only as to those dangers which he was conclusively presumed to have accepted by engaging in the particularly dangerous employment in which he was occupied. *Lafayette v. Allen*, 81 Ind. 166; *Turner v. Indianapolis*, 96 Ind. 51.

The property holder owes a duty to third parties who come upon his premises not as trespassers, or as mere licensees, but as a matter of right and duty.

Walsh v. Mead, 8 Hun, 387; *Church of the Ascension v. Buckhart*, 3 Hill, 193; *Whalen v. Gloucester*, 4 Hun, 24; *Vincett v. Cook*, Id. 818; *White v. Phillips*, 15 C. B. N. S. 245; *Todd v. Flight*, 9 C. B. N. S. 377; *Myers v. Malcolm*, *supra*; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530; *Lamparter v. Wallbaum*, 45 Ill. 444, 92 Am. Dec. 225; *Hydraulic Works Co. v. Orr*, 83 Pa. 332; *Schilling v. Abernethy*, 112 Pa. 457, 56 Am. Rep. 320; *Durant v. Palmer*, 29 N. J. L. 544; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 348; *Donaldson v. Wilson*, 60 Mich. 86; *House v. Metcalf*, 27 Conn. 631; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Larue v. Farren Hotel Co.* 116 Mass. 67; *Knauss v. Brua*, 107 Pa. 85; *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *Bennett v. Louisville & N. R. Co.* 103 U. S. 577, 26 L. ed. 235; *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322; *Helwig v. Jordan*, 53 22 L. R. A.

Ind. 21, 21 Am. Rep. 189; *Parker v. Macon*, 39 Ga. 725, 99 Am. Dec. 486; *Vale v. Bliss*, 50 Barb. 353; *Conklin v. Phœnix Mills of Seneca Falls*, 62 Barb. 299; *Ackart v. Lansing*, 43 How. Pr. 374; *Wallace v. Lent*, 29 How. Pr. 289; *Jennings v. Van Schaick*, 13 Daly, 438; *Staub v. Soderer*, 53 Mo. 38; *Owings v. Jones*, 9 Md. 108; *Kimmell v. Burfeind*, 2 Daly, 155; *Murray v. McShane*, 52 Md. 217, 36 Am. Rep. 367; *Indermaur v. Dames*, L. R. 2 C. P. 311; *Eakin v. Brown*, 1 E. D. Smith, 38.

Proximate cause is that cause which alone or in connection with other agencies ordinarily and reasonably to be expected produces the result complained of.

Proximate cause would seem to be more a question of fact than of law to be decided in each individual case as it may arise, upon which the law is to be laid down by the court but the application should be made by the jury.

Vincett v. Cook and Myers v. Malcolm, *supra*; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 289; *Lane v. Atlantic Works*, 111 Mass. 136; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Hill v. Winsor*, 118 Mass. 251; *Pastens v. Adams*, 49 Cal. 87; *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Maddox v. Cunningham*, 68 Ga. 421, 45 Am. Rep. 500; *Tarry v. Ashton*, L. R. 1 Q. B. Div. 314.

An ordinarily reasonable and prudent man would regard the danger of fire in a building that he was erecting as so liable to happen as that he should take it into consideration.

The fact that the defendant took out a fire insurance policy was the highest possible declaration that he recognized and conceded the possibility of fire; in the coming of fire he was bound to know that if the fire should attain a sufficient headway, a sufficient amount of water would be thrown upon his feeble building to endanger the life of any one in the vicinity of the fire and he should have made as careful provision for others as he did for himself, and failing to do so, ought not to be heard to insist that it was so remote and impossible as that it could not be regarded as a proximate cause of the injury.

The ordinance duly passed by a municipality is as to the property within the jurisdiction of the municipality and the residents of that city as binding and conclusive as would be a general law of the state enacted by the General Assembly.

The erecting and maintaining of the building upon which the injury was occasioned in the manner in which it was shown to have been erected and maintained was a direct positive violation of the law, and whatever might be the ruling in the absence of any such enactment where a law, whether statute or ordinance, requires a certain thing to be done which has been omitted, and an injury is occasioned thereby, this constitutes actionable negligence for which the party injured may recover.

Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; *Sisk v. Crump*, 112 Ind. 507; *Mississinewa Min. Co. v. Patton*, 129 Ind. 472.

Messrs. Duncan & Smith and Howland & Howe, for defendant:

If the facts alleged are such as imply an in-

vation or impose a duty, that is sufficient without more; if the facts alleged do not imply an invitation or impose a duty, the mere fact that it is alleged that such invitation was extended or such duty existed adds nothing whatever to the force of the pleading.

Gibson v. Leonard, 87 Ill. App. 844; *Seymour v. Maddox*, 16 Q. B. 326; *White v. Phillips*, 15 C. B. N. S. 245.

We must first ascertain what duty the defendant in the action owed to the injured party, for where there is no duty, or, if one, it has been performed, there can be no negligence, nor any liability.

Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555.

1. The appellee was not guilty of any actionable breach of duty to the decedent, imposed by statute or by municipal ordinance.

It is not claimed that appellee violated any statute, but it is claimed that he was guilty of neglect of a duty imposed upon him by the ordinance referred to.

The ordinance is of an entirely different character from those construed in each of the cases cited by appellant. The duty here is not a certain specific duty like the erection of railings around an opening, the construction of trap doors or fire-escapes.

The city, by this ordinance, has conferred upon the chief fire engineer the duty of determining whether walls are unsafe or not, and of notifying the owner of the repairs to be made, specifying the object of such repairs with reasonable certainty. And it is expressly said that the duty of the owner is to act upon receiving such notice.

2. Whether appellee be regarded as owner or occupant, and whether or not he be deemed to have "invited" the decedent to enter the building in question, he was not guilty of any actionable breach of duty to such decedent.

What is negligence? It is a relative term signifying the absence of due care.

What care is it the duty of one to use in respect to another? It is such care as an ordinarily reasonable and prudent man, under the circumstances of the particular case, as they existed at the time to which the inquiry relates, would be expected to use to avoid the dangers, if any, to be reasonably apprehended.

What dangers should an ordinarily reasonable and prudent man be supposed to apprehend? They are such only as such a man ought reasonably to expect to be, not merely the possible, but the natural and probable, results of the act or omission charged as negligence.

What results ought an ordinarily reasonable and prudent man to expect as the natural and probable results of any particular act or omission? Those which, according to the common experience of mankind, and, in the ordinary course of events, are the natural and usual consequences of similar acts and omissions.

Pollock, Torts, Negligence, *352.

The conduct of the individual charged with negligence must be determined, not in the light of subsequent events, but in the light of the circumstances as they existed at the time of the act or omission charged as negligence. To hold otherwise would be, as declared by

an eminent judge, "to say that whenever the world grows wiser it convicts those that came before of negligence."

Carstairs v. Taylor, L. R. 6 Exch. 217; *Terre Haute & I. R. Co. v. Clem*, 7 L. R. A. 568, 123 Ind. 15; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404.

Men must regulate, and we must judge, their conduct, not by speculations as to what may possibly happen, but by considering what may naturally and reasonably be expected to occur.

Pollock, Torts, *36; *Pearson v. Cox*, L. R. 2 C. P. Div. 369; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 347, 33 Am. Rep. 167; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

The duty of the owner of property to a visitor or guest is the same as that of a master to a servant.

Southcote v. Stanley, 1 Hurlst. & N. 247.

The duty of a master to his servant is that he shall use ordinary care to provide a reasonably safe place in which the servant shall exercise his employment, and to provide him with machinery and appliances reasonably calculated and fitted to perform the work for which they are designated.

Sjogren v. Hall, 53 Mich. 274; *Hutchinson v. Boston Gas Light Co.* 123 Mass. 219; *Blythe v. Birmingham Water Works Co.* 11 Exch. 781.

Not only is a man not negligent in not anticipating and providing against events extraordinary in and of themselves; but further, he is not negligent in not foreseeing and providing against an unusual and extraordinary combination and collocation of circumstances, no one of which is in and of itself uncommon, the combination of them alone being out of the ordinary.

Cleveland v. New Jersey S. B. Co. 68 N. Y. 306, 89 N. Y. 627, 125 N. Y. 399; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 33 Am. Rep. 533; *Laffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 433; *Egan v. Berkshire Apartment Assn.* 81 N. Y. S. R. 545; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133.

Appellee was not guilty of negligence in not taking precautions to avoid the consequences of a fire not occurring by reason of his own negligence, although he may be presumed to have contemplated the possibility of a fire occurring, and that if a fire should occur loss of life might result.

Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661.

3. Whether appellee be regarded as owner or occupant of the building, and whether or not he be deemed to have "invited" the decedent to enter it, the appellee's negligence, if he was guilty of any, was not the proximate cause of the injuries sued for.

In cases involving mere negligence the general rule is that the party guilty of it is only responsible for such consequences as, according to the experience of mankind, are natural and usual and ought, therefore, to have been foreseen.

Louery v. Western U. Tel. Co. 60 N. Y. 198, 19 Am. Rep. 154; 1 Sedgw. Damages, (7th ed.) 123, 129; *Cooley, Torts*, 69; *Durham v. Musselman*, and *Wabash, St. L. & P. R. Co.*

v. Locke, supra; Louisville, N. A. & C. R. Co. v. Nitsche, 9 L. R. A. 750, 126 Ind. 229.

Even with respect to positive wrongs, the law is not an avenging Nemesis, relentlessly pursuing the wrongdoer for all time and to the ends of the earth to punish him for the remote consequences of his fault.

Sharp v. Powell, L. R. 7 C. P. 258; *Putnam v. Broadway & S. A. R. Co.* 55 N. Y. 106, 14 Am. Rep. 190.

In such a case as this, we determine whether the defendant's act or omission was or was not the proximate cause of the accident, not by determining whether it contributed in some degree to the accident, nor by determining whether it, in connection with other events, produced the accident, nor by determining whether, without it, the accident would not have happened, nor by determining whether the intervening events were of an extraordinary character, nor by determining whether they were few or many; but, considering all the events that intervened, we determine whether or not the defendant at the time of his act or omission, which is charged as negligence, ought, as a reasonably prudent man, to have foreseen that such other events would probably intervene and combine with his act or omission to produce the result which followed.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469-475, 24 L. ed. 256-259; 20 Solicitors' Journal, 72. See also *Cooley*, Torts, 69, 70; *Henry v. Southern Pac. R. Co.* 50 Cal. 176; 2 Thomp. Neg. 1093; *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Derry v. Flitner*, 118 Mass. 131; *Phairbanks v. Kerr*, 70 Pa. 86, 10 Am. Rep. 664; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Alexander v. Newcastle*, 115 Ind. 51; *Louisville, N. A. & C. R. Co. v. Nitsche*, 9 L. R. A. 750, 126 Ind. 229; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. New York Cent. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Memphis & O. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176, 19 L. ed. 309.

4. Whether appellee be regarded as owner or occupant of the building, the decedent entered it as a mere licensee and appellee was not guilty of any actionable breach of duty to such licensee.

A license given by law imposes no greater liability upon either landlord or tenant, and especially upon the former, than would be imposed by an express or implied license given by either.

Gibson v. Leonard, 87 Ill. App. 344.

A mere licensee has some rights. The landowner cannot shoot him. He cannot lawfully set spring guns and traps for him. The licensor is liable, even to a licensee, if he is guilty of what in the civil law is termed "*dolus*." But beyond this the licensor owes the licensee no duty, certainly not the duty of active diligence, to see that no harm come to him, and when the latter, without any invitation and pursuant to a mere license, enters the former's premises, he takes the risk of whatever dangers may be there.

Reardon v. Thompson, 149 Mass. 267; *Pollock, Torts*, *426; *Gautret v. Egerton*, L. R. 2 C. P. 22 L. R. A.

371; *Ray, Neg.* 23-25; *Mathews v. Bensel*, 51 N. J. L. 80; *Parker v. Portland Pub. Co.* 69 Me. 178, 81 Am. Rep. 262; *Pittsburgh, Ft. W. & O. R. Co. v. Bingham*, 29 Ohio St. 369, 23 Am. Rep. 751; *Larmore v. Crown Point Iron Co.* 101 N. Y. 891, 54 Am. Rep. 718; *Victory v. Baker*, 67 N. Y. 866; *Thiele v. McManus*, 8 Ind. App. 132; *Lary v. Cleveland, O. C. & I. R. Co.* 78 Ind. 823, 41 Am. Rep. 572; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Indianapolis v. Emmelman*, 108 Ind. 580, 58 Am. Rep. 65; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399.

5. The building in question being in the exclusive occupation and control of appellee's tenant,—the Bowen-Merrill Company—the decedent cannot be deemed to have entered by appellant's invitation or license, and hence appellee is not liable.

There are authorities of great weight expressly holding that even where the defects complained of constitute a nuisance and existed at the date of the lease, the landlord is not liable to a third person injured thereby unless he has covenanted to repair.

Wood, Land. & T. 2d ed. § 536, p. 1290; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnett v. Eamer*, L. R. 10 C. P. 658; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76.

The tenant may stand, if he chooses, upon his strict legal right as virtual owner during his term, and refuse to let the landlord enter.

Butler v. Cushing, 48 Hun, 521; *Stocker v. Planet Building Soc.* 27 Week. Rep. 877.

It is the occupier who is *prima facie* liable to third persons for damages arising from any defect.

Kirby v. Boylston Market Assn. 14 Gray, 249, 74 Am. Dec. 682.

Nor could the appellant maintain this action against the landlord even if he had covenanted with his tenant to repair. Third parties are strangers to the covenants between the landlord and the tenant, and cannot maintain an action based upon such covenants either against the landlord (*Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Robbins v. Jones*, 15 O. B. N. S. 221-240), or against the lessee.

Olancy v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391; *Odell v. Solomon*, 99 N. Y. 635.

A landlord, not being in possession, and not having the right to enter himself, there can be no such thing as an implied invitation or license from him.

Mellen v. Morrill, 126 Mass. 545, 30 Am. Rep. 695; *Odell v. Solomon, supra*; 2 Wood, Land. & T. 2d ed. § 536, p. 1292; 1 Taylor, Land. & T. 8th ed. § 175a; *Robbins v. Jones, supra*; *Keates v. Cadogan*, 10 C. B. 591; *Bois v. Hunking*, 185 Mass. 380, 44 Am. Rep. 471; *Lucas v. Coulter*, 104 Ind. 81; *Purcell v. English*, 86 Ind. 84, 44 Am. Rep. 255; *Ward v. Fagin*, 10 L. R. A. 147, 101 Mo. 669.

Where a tenant is in the exclusive occupation and control of the premises, there is no legal ground upon which the landlord can be held liable for injuries to third persons, unless he has himself held out some invitation, express or implied, or has been guilty of some fraudulent concealment of the defects.

Pollock, Torts, pp. 427, 428; 2 Shearm. & Redf. Neg. 4th ed. § 711; 1 Taylor, Land. & T. 8th ed. § 175a; *Robbins v. Jones and Mellen*.

v. Morrill, supra; Sweeney v. Old Colony & N. R. Co. 10 Allen, 368, 87 Am. Dec. 644; *Carlton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Moore v. Logan Iron & Steel Co. (Pa.)* Oct. 4, 1886; *O'Brien v. Capwell*, 59 Barb. 497; *Nicholson v. Erie R. Co.* 41 N. Y. 529; *Jaffe v. Harteau*, 56 N. Y. 898, 15 Am. Rep. 438; *Perez v. Raybaud*, 7 L. R. A. 620, 76 Tex. 191; *Akerley v. White*, 58 Hun, 362; *Deller v. Hofferberth*, 127 Ind. 414; *Armstrong v. Medbury*, 67 Mich. 250; *Willson v. Treadwell*, 81 Cal. 58; *Burdick v. Cheadle*, 26 Ohio St. 398, 20 Am. Rep. 767.

Colley, J., delivered the opinion of the court:

This was an action in the Marion county circuit court, brought by the appellant against the appellee, for actionable negligence resulting in the death of the appellant's decedent. The suit was brought for the benefit of the widow and children of the deceased. The complaint is in two paragraphs, to each of which the court sustained a demurrer. This ruling of the circuit court is assigned here as error. The able counsel for the appellant has prepared a synopsis of the complaint, the correctness of which is not disputed by the appellee, and for that reason we adopt it as a correct statement of the contents of the complaint. It is as follows: The first paragraph alleges that the decedent, Henry D. Woodruff, was in the employ of the city of Indianapolis as a fireman, and as such belonged to the organization known as the fire department of the city, which in turn was composed of a body of men duly appointed and acting under a code of rules, whose duty it was to put out any and all fires occurring within the limits of the city, the apparatus therefor being furnished by the city, and the compensation to the firemen and the cost of the apparatus being paid out of the city treasury. That as such firemen the deceased and his comrades were bound, whenever the alarm of fire was sounded, to attend and do all in their power to put out the fire, and while so doing were under the direction of the officers of the fire department. That on the 17th of March, 1890, a fire broke out in a building owned by the defendant, situate on Washington street, and deceased, with other firemen, in response to the alarm, went to the building to put it out. In attempting to so do, under the control and command of the chief of the fire department and his assistants, in the discharge of his duties as fireman, and under the orders of the officers of the fire department, he had gone upon the roof of the building, and while there in the course of his employment, it being a proper place for him to be at the time when the accident occurred, and while he believed, and had reason to believe, that it was reasonably safe for him to be on the roof in company with the other firemen, the roof and other portions of the building, without warning, gave way, and precipitated the deceased and eleven other firemen into the basement of the building, midst the falling and burning debris of the roof, which caused the death of the deceased and his eleven comrades. That he was killed without any fault or negligence on his part, but because of the

negligence of the defendant, as follows: The defendant, for a long time prior to the 17th of March, had been a resident of the city, had owned the building, and, in common with other citizens of the city, enjoyed the benefits and protection afforded by the fire department. At the time, and for a long time before that, he knew and had known that it was the duty of the deceased and his comrades to respond to alarms of fire, and to attempt to put out any fire that might break out in his building. The building was situate in the business center of the city, and in its most frequented portion, and defendant knew that it was in constant danger of catching fire, either by accident or design. The defendant as a resident of the city, and as a constituent part of the government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building. That at some time prior to the fire the defendant, as the owner of the building, had leased the same to the Bowen-Merrill Company, who were in possession at the time of the fire under the lease, but long before then, and before the execution of the lease, the defendant had changed, enlarged, and repaired his building; but when he built it, and at the time of the accident, it had a substantial-appearing iron front, and the deceased believed, and had reason to believe, that the building was as substantial as it appeared, but in fact it was a remodeled building, made much larger and higher than it was originally, and when defendant remodeled and rebuilt it he did not increase the strength of the foundation walls, and the whole building, back of the imposing iron front thereon, was insufficiently built and insecure, while having the outward appearance of strength to the deceased and others whose duty called them to the same. During the time while the building was being occupied by the Bowen-Merrill Company as a tenant of the defendant, the defendant was the president and chief executive officer of the company, and owned \$35,000 out of the total capital of \$80,000, and during the entire continuance of the lease the right was conceded to him by the company to come upon the premises, and to make thereon such improvements and repairs as he might deem necessary for the protection and preservation of the building. That in remodeling the building it was built unsafely,—the walls not strong enough, the foundation not sufficient to meet the exigencies and requirements for which the building was intended and used. That defendant knew when he leased the building that the company would place, and did place, in it a stock of stationery, books, etc., and he also knew that the building was not strong enough to bear the weight of such stock. He also knew at the time when he executed the lease and at the time when the deceased was killed, that the building was not strong enough, and was so insecurely built that it would not stand the weight of the stock and any additional strain that might be put upon it in case of fire by the weight of the water which would be thrown upon the stock to put out the fire,

and at the time of the fire the weight of the stock and the weight of the water because of the weak and insufficient character of the building and foundation walls, gave way. That the building was so weak, insecure, and unsafe as to be dangerous to all who might go about it in case any additional weight might be placed upon the same as in case of fire. At the time of the death of the deceased, defendant was receiving rent for the building. Deceased did not know of the unsafe and negligent construction and condition of the building at and before it fell. That deceased left a widow and four children under nineteen years of age. The second paragraph thereof states substantially the same facts as the first, with the following additions: The building was 35 feet in front and 120 in depth. That it had been on fire several times during the last ten years, and to secure himself from loss by fire at the time of the occurrence of the fire, and for a long time before that, defendant had carried \$12,000 fire insurance on the building. That on the 28th of April, 1873, the city of Indianapolis passed an ordinance in which it was provided, among other things: "It shall be unlawful for any person to construct, erect, or maintain any unsafe, insecure, and dangerous wall, building, or structure within the limits of this city, and it shall be the duty of all persons owning premises upon which there is any dangerous, unsafe, and insecure wall or building, to make the same safe and secure, either by properly repairing the same or by rebuilding the same within twelve (12) hours after receiving notice from the chief fire engineer.

Each and every day in which such wall or building is permitted to remain unsafe, dangerous, and insecure after the receipt of notice as herein provided, shall be held and taken as a separate and distinct violation of this ordinance, and as such punished. . . . Sec. 6. Any wall, structure, or building likely to fall, or to take fire, shall be taken and deemed to be unsafe and insecure within the meaning of this ordinance. All brick walls less than one foot in thickness, and which form a part or are intended to form part of a building more than two stories in height, shall be deemed unsafe and insecure." This ordinance was in force from its passage until after the fire, and deceased in his lifetime, and the defendant, knew that it was in force. When the defendant became the owner of the premises, they were occupied by two store-rooms, two stories in height, with walls on either side, and a continuous wall in the center contributed to the support of the roof and floors sufficiently to support the building in its then condition. After defendant became the owner, and after the building had been in existence for over forty years as originally built, the defendant, being desirous of increasing the capacity and area of his premises without materially increasing the expense, added two stories to the two stories then existing, taking out the center wall above the basement, and without strengthening or adding to the capacity or strength of the east and west walls, or without adding anything to the foundation under

the center walls, and supporting the new building thus erected in the center with iron and wooden pillars, upon which, in connection with the side and end walls, the floors of the second and third stories rested, and by which they were all supported. That by the manner of construction the smaller weight before had been distributed throughout the entire length of the foundation of the center wall, but was very greatly increased by the additional size and weight of the building, and, by the substitution of columns for a solid wall, the added weight, instead of being distributed along the entire length, as it had been theretofore, was concentrated upon a few spots upon which the pillars rested, thus producing an unequal pressure at these places, and diminishing the bearing strength of the foundation upon which the pillars rested. That in making this improvement the defendant took away the original front wall, which indicated to the observer the character of the building, and substituted a substantial, strong, and imposing iron front for the entire height of the four stories, and thus gave to the building, which was in fact weak and insufficient to bear any great weight, the appearance of being a sound, substantial, and permanent improvement, capable of sustaining not only the building and its contents, but of being safe in case of fire or other accident which would cause unusual weight to be borne by the building. That it was known to the defendant at the time of the fire that the building and its walls, more especially the foundation under the center columns, was unsafe, insecure, and dangerous, and likely to fall and take fire, but that was not known to, but was concealed from, the deceased and the officers of the fire department, and they were prevented from ascertaining the defective, insufficient, insecure, unsafe, and dangerous character of the foundation because of the fact that it was underneath the floor, and not to be seen by any one entering the premises in the ordinary course of business, and the deceased and the officers of the fire department were thrown off their guard, and prevented from ascertaining the condition of the building, walls, and foundation, by the outward appearance of strength and sufficiency given to it by the iron front; and ever since the remodeling, rebuilding, and enlargement of the building upon his premises the defendant had continued to maintain it in the unsafe, insecure, and dangerous manner named, contrary to the provisions of the ordinance, well knowing that with any extra weight as in case of any accident, or in case of fire, it would be insufficient to stand the strain, and so fall. When the fire broke out in the building, water was thrown upon the stock in order to put out the fire; and the weight of the stock, together with the weight of the water, and the unsafe, insufficient, insecure, and dangerous character of the building walls, and especially the foundation walls, caused it to give way without being weakened or impaired at all in their bearing strength by the fire which was burning.

It is contended by the appellant: First, that the owner of a building in the heart of

a populous city owes it as a duty at common law, independent of any statute or municipal ordinance, to keep such building safe for purposes other than the requirements of trade and commerce; that such duty is comprehensive enough to embrace the safety of firemen and other officers whose duty, in the event of a contingency, may require them to be in and about the building; and that the complaint in this case shows a breach of this duty on the part of the appellee, resulting, proximately, in the death of the appellant's decedent. Second, that it appears from the allegations in the complaint that the appellee maintained the building therein described in violation of the ordinance of the city of Indianapolis therein set out, the immediate result of which was the death of the appellant's decedent, and that he is for that reason liable for the resulting damages. On the other hand, it is contended by the appellee Bowen—First, that, whether he is to be regarded as the owner or occupant of the building described in the complaint, the decedent entered it as a mere licensee, and that he was not guilty of any actionable breach of duty to him; second, that whether he be regarded as the owner or occupant of such building, and whether he be deemed to have invited the decedent to enter the building, he was not guilty of any actionable breach of duty to him; third, that he was not guilty of any actionable breach of duty to the decedent imposed by any municipal ordinance; fourth, that the negligence set up in the complaint was not the proximate cause of the death of the appellant's decedent; fifth, that, the building described in the complaint being in the exclusive possession of the appellee's tenant, the decedent cannot be deemed to have entered by his invitation or license, and hence he is not liable.

It is conceded that the decedent, at the time of his death, was lawfully in the appellee's building. It is important, however, to determine whether he was there under an invitation from the appellee, either express or implied, or whether he was there as a mere licensee. This is important for the reason that the appellee would own him a much higher duty if he was there by invitation than he would owe him if he entered under no other authority than that of a licensee. It is true, the complaint alleges that the appellant, "as a resident of the city, and as a constituent part of this government, and as entitled to the protection of the fire department, invited the decedent and his comrades, in their capacity as firemen, into and onto the building." But we do not understand this allegation as intending to convey the idea that any personal or express invitation was given. The pleader evidently intended, we think, to charge that there existed a general implied invitation from the citizens of the city, including the appellee, to the firemen belonging to the fire department, to enter their houses in case of a conflagration, for the purpose of extinguishing the fire. This allegation, therefore, does not enable us to determine whether the deceased was in the house of the appellee by invitation or as a licensee. Judge Cooley, in his valuable

work on Torts, divides licensees into three classes. Of the third class he says: "The third class of licensees comprehends those cases in which the law gives permission to enter a man's premises. This permission has no necessary connection with the owners' interest, and is always given on public grounds. An instance is where a fire breaks out in a city. Here the public authorities, and even private individuals, may enter upon adjacent premises, as they may find it necessary or convenient in their efforts to extinguish or arrest the spread of the flames. The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders, and exclude those who would use his premises as vantage ground to stay the conflagration. Indeed, it sometimes becomes necessary to destroy whole blocks of buildings to stop the spread of fire, and the sufferer, instead of looking to the officials who command it, or the parties who execute their commands, must seek redress at the hands of the state itself, and accept what the state awards." Cooley, Torts, 2d ed. p. 367. We think Judge Cooley, in the above extract, states the law correctly. It does not appear from the complaint before us that the deceased entered the house of the appellee, where he lost his life, by invitation, either express or implied, but it does appear that he entered under a license given by law for the purpose of extinguishing a fire raging therein at the time. It is unnecessary, under this state of facts, to inquire what duty the appellee would have owed the deceased had he entered the building under an invitation, or to inquire whether the premises were in the sole possession of a tenant of the appellee, as the case must turn upon the duty which the appellee owed the deceased at the time he entered under a license given by the law. We do not believe it can be successfully maintained that the appellee owed to the deceased, who entered his premises under a license created by an overruling necessity, a higher duty than if he had entered under an express license granted by him. In the case of *Reardon v. Thompson*, 149 Mass. 267, it was said: "No doubt a bare licensee has some rights. The landowner cannot shoot him." He cannot lawfully set spring traps for him. The licensor is liable, even to a licensee, if he is guilty of what the civil law terms "*dolus*." But beyond this the licensor owes the licensee no duty,—certainly not the duty of active diligence to see that no harm come to him; and when the latter, without any invitation, and pursuant to a mere license, enters the former's premises, he takes the risk of whatever dangers may be there. The law is so laid down in the text-books, and is established by a multitude of decisions. Mr. Pollock, in his work on Torts, (*426.) says: "In the language of continental jurisprudence there is no question of *culpa* between a gratuitous licensee and the licensor, as regards the safe condition of the property to which the license applies. Nothing short of '*dolus*' will make the licensor liable." To substantially the same effect are Ray, Neg. 28; *Parker v. Portland Pub. Co.* 69 Me. 178, 31 Am. Rep. 262; *Pittsburgh*,

Fr. W. & C. R. Co. v. Bingham, 29 Ohio St. 869, 23 Am. Rep. 751; *Larmore v. Crown Point Iron Co.* 101 N. Y. 391, 54 Am. Rep. 718; *Victory v. Baker*, 67 N. Y. 866; *Thiele v. McManus*, 3 Ind. App. 182; *Lary v. Cleveland, C. C. & I. R. Co.* 78 Ind. 323, 41 Am. Rep. 572; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65; *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399.

The question of the liability of the property owner to a mere licensee was very recently fully considered by this court in the case of *Paris v. Hoberg* (Ind. Sup.) 33 N. E. Rep. 1028. In that case, after a careful review of the authorities, the conclusion was reached that one entering a store on his own private business, by a way not used by customers, was a mere licensee, and that the owner of the store owed him no duty. We think that the authorities fully establish the rule that the licensor owes to the mere licensee no duty except that of abstaining from any positive wrongful act which may result in his injury, and that the licensee takes all risks as to the safe condition of the premises upon which he enters. To the question now under discussion, decisions based upon express statutes or ordinances, as well as decisions based upon the fact that the injured party entered the premises under an invitation, express or implied, are not applicable. We are of the opinion that the owner of a building in a populous city does not owe it as a duty, at common law, independent of any statute or ordinance, to keep such building safe for firemen, or other officers who in a contingency may enter the same under a license conferred by law. It seems to be settled, however, that such duty may be imposed either by statute or by an ordinance adopted for that purpose. *Willy v. Mulledy*, 78 N. Y. 810, 34 Am. Rep. 536; *Parker v. Barnard*, 185 Mass. 116, 46 Am. Rep. 450; *Ryan v. Thomson*, 6 Jones & S. 133; *Luddington v. Miller*, 4 Jones & S. 1.

It remains, therefore, to inquire whether the appellee is liable for the injury of which complaint is made, by reason of the ordinance of the city of Indianapolis set out in the complaint. In the case of *Willy v. Mulledy*, *supra*, a statute provided that the owners of a designated class of buildings in the city of Brooklyn should provide the same with fire escapes. It was held that this statute was intended for the benefit of tenants, and the owner of a building of the class named who failed to comply with the statute was liable to a tenant who was injured by reason of such failure. In the case of *Parker v. Barnard*, *supra*, there was a statute which provided that, in any store or building in the city of Boston in which there was placed a hoistway or elevator hole, such hoistway or elevator hole should be protected by a good and substantial railing, and good and sufficient trapdoors with which to close the same, and that the trapdoors should be kept closed at all times except when in actual use by the occupant of the building. It was held that this statute was intended for the benefit of all persons lawfully entering such a build-

ing, and that for this reason a police officer who entered after night in the discharge of his official duty, and was injured by reason of a failure to comply with the statute, might recover, although he was a mere licensee. In the case of *Ryan v. Thomson*, *supra*, there was an ordinance of the city of New York similar to the statute mentioned in the case of *Parker v. Barnard*, and it was held that such ordinance was intended for the benefit of firemen, police officers, and others who in the performance of their duties might be called upon to enter such houses after night, and that a policeman injured by reason of a failure to comply with the ordinance might recover. In the case of *Luddington v. Miller*, *supra*, a statute of the United States provided for private bonded warehouses. The statutes and the regulations of the treasury department place such warehouses under the control and management of the warehousemen who owned the same, so far as the supervision and management of the hatchways were concerned. It was held that if such warehouseman negligently left open a hatchway in a passageway over which a custom officer would pass in the discharge of his duties at such house, by reason of which the officer was injured, he might recover for such injury. The ordinance under immediate consideration is fully set out in the complaint, a synopsis of which is above set forth. There is nothing in the ordinance to indicate that the common council, at the time it was adopted, had in mind the safety of firemen in case of a fire occurring in the city. It was evidently its purpose to protect the citizens and those whose business required them to be in the vicinity of walls and buildings liable to fall and do them injury, and also to protect the city against fire by reason of structures liable at any time to take fire. That the common council did not have in mind the kind of wall described in the complaint is evidenced by the fact that the ordinance in question requires the owner of any dangerous, unsafe, or insecure wall or building to make the same safe and secure either by properly repairing the same, or by rebuilding the same within twelve hours after receiving notice from the chief fire engineer. Such provision, together with other provisions in the ordinance, indicate, we think, that the common council was legislating with reference to walls and buildings in immediate danger of falling, or in immediate danger of taking fire. In this case, so far as it appears from the facts alleged in the complaint, the appellee had erected a building which, under ordinary circumstances, was reasonably safe for the purposes of commerce and trade. It became unsafe only by reason of the fact that it was stored with stationery by a tenant, and by reason of the fact that in an extraordinary emergency large quantities of water were thrown into and upon the building, thus putting it to an extraordinary strain. We do not think the ordinance before us was intended to apply to a building of this character. The appellee, in the construction of his building, was not, in our opinion, bound to anticipate extraordinary events, but, if he constructed a building

which was ordinarily safe under ordinary circumstances, he was not acting in violation of the terms of this ordinance. This case has been ably argued orally, in open court, and briefed on both sides with unusual care and ability; and after a careful consideration of all that has been said, and a careful examination of all the authorities cited, we have been forced to the conclusion that the complaint

before us does not state facts sufficient to hold the appellee liable for the injury set up in the complaint, either under the common law or the ordinances of the city of Indianapolis. It follows from this conclusion that the circuit court did not err in its ruling, and that its judgment should be affirmed.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James AYLWARD

v.

John O'BRIEN.

(.....Mass.....)

- 1. A conveyance of a pew prior to Stat. 1855, chap. 122, except in Boston, was required to be by deed, as the pew was real estate.**

NOTE.—The rights of pew holders.

- I. *The nature of their right and title.*
 - a. *English doctrine.*
 - b. *United States doctrine.*
 - c. *In Pennsylvania.*
 - d. *Conditions attached.*
- II. *Rights of the parish or society.*
- III. *Rights of the pew owner.*
 - a. *Compensation upon removal.*
 - b. *Action for disturbance.*
- IV. *Free church.*
- V. *Attachment.*
- VI. *Assessment and taxation.*
- VII. *Relief under the English law.*

I. *The nature of their right and title.*

a. *English doctrine.*

The word "pew" is said to be derived from the Dutch "puye," and to signify "a seat enclosed in a church." *Brumfitt v. Roberts*, L. R. 5 C. P. 224; *Johnson's Dict.*

The right to separate seats or pews in a church did not exist in England, except in the case of the favored few, before the Reformation, all parishioners having the right to use the body of the church; subsequently, however, the right to them was granted by the bishop or ordinary by means of a faculty the rights under which were heard in the spiritual courts alone. 1 *Burn's Eccl. Law*, title *Church*, chap. 7; *Crabbe, Real Prop.* § 4, pl. 90, § 10, pl. 481, 482.

Corven's Case, 2 *Coke*, 105, *Frazer's ed.*, was about the earliest case upon this question. There the court held that any person having a house or land in the parish time out of mind, and a seat in an aisle of the church maintained at his own charges might have a writ of prohibition against the bishop if the latter dispossessed him. But that the ordinary could decide all questions arising out of seats in the body of a church.

In 10 Jac. it was resolved in the Star Chamber, that if a man had a house in any parish, and time out of mind he and all those whose estate he had had used to have a certain pew in the church, if the ordinary displaced him he had a prohibition; but he must claim it as belonging to the house. *Ibid.*

At common law there was no property in, nor right to sell or let, a pew or seat in the body of a parochial church or chapel. *Brumfitt v. Roberts*, *supra*.

By the general law and of common right, pews

- 2. A conveyance of a pew sufficient in every respect to convey real estate except in the want of seals, or words calling for seals, is a basis of adverse possession, if the grantees occupied under it, believing their title good.**

- 3. The methods and usages of the Roman Catholic Church do not seem to touch**

in a parish church were held to be the common property of the parish. *Fuller v. Lane*, 2 *Add. Eccl. Rep.* 425.

All parishioners are entitled to be seated, orderly and conveniently, so as best to provide for the accommodation of all. *Ibid.*; *Re Cathedral Church of St. Columb, Londonderry*, 8 L. T. N. S. 861.

But every parishioner has not a right to a pew in the parish church. *Re Cathedral Church of St. Columb, Londonderry*, *supra*.

The freehold is generally in the parson, the inhabitants having the right to use the church for Divine worship. *Brumfitt v. Roberts*, *supra*.

The pew owners' interest is not such as to vest the freehold in any portion of the soil in him so as to give him the right to vote; but only an easement, or qualified right to occupy and enjoy the pew for the purpose of attending service. *Ibid.*; *Hinde v. Charlton*, L. R. 2 C. P. 104.

It is essentially a right to use it for the services of the church, and at times when it is open for use, subject to the regulations of the church; and there is no right of access to it or to use it for other purposes or in any other manner. *Brumfitt v. Roberts*, L. R. 5 C. P. 224.

It may be annexed to a house by a faculty, or by prescription, which supposes a faculty, and may be transferred with the messuage. *Stocks v. Booth*, 1 T. R. 432; *Yard v. Ford*, 2 *Saund.* 175; *Brumfitt v. Roberts* and *Corven's Case*, *supra*; *Morgan v. Curtis*, 3 *Mann. & R.* 389; *Phillips v. Halliday*, *App. Cas.* [1891] 223; *Mainwaring v. Giles*, 5 *Barn. & Ald.* 353. The ownership of a house may legally carry with it the right to a pew in the chancel. *Parker v. Leach*, 4 *Moore*, P. C. C. N. S. 180; *Mainwaring v. Giles*, *supra*.

But it cannot be annexed by prescription to anything but a house or messuage; the occupier of the house and not the owner of the estate being alone entitled to its use. *Woollocombe v. Ouldrige*, 3 *Add. Eccl. Rep.* 1.

So the mere occupancy of a house did not of itself give the right to a pew as they were not appurtenant to the land. *Pettman v. Bridger*, 1 *Phillim.* *Eccl. Rep.* 516.

Where the right to a pew exists as annexed to a messuage by prescription it runs with the occupancy of the house and cannot be severed from it. *Re Cathedral Church of St. Columb, Londonderry*, 8 L. T. N. S. 861.

The possessory right is only coextensive with actual possession, abandonment causing the right to cease and determine. *Woollocombe v. Ouldrige*, *supra*.

the question of the rights of a pew holder who has a title to his pew.

4. **The owner of a pew in a church is entitled to payment**, if the pew is destroyed by taking down the building, or otherwise, when it is a matter of expediency merely, and is not made necessary by the ruinous condition of the building.
5. **The archbishop, who has title to the soil on which a Roman Catholic Church stands, has no greater rights** in respect to the demolition of a pew, owned by an individual, therein than an organized religious corporation of any other denomination would have by reason of its ownership of the church.

(November 28, 1893.)

REPORT by the Superior Court of Middlesex County for the opinion of the Supreme Judicial Court after verdict in favor of defendant in an action brought to recover dam-

ages for the alleged wrongful destruction of certain pews in the St. John's Roman Catholic Church at East Cambridge, which were the property of the plaintiff. *Verdict set aside.*

In March, 1842, property was conveyed to the Roman Catholic bishop of Boston, upon which the church in question was erected. The bishop afterwards executed the following unsealed instrument:

"Know all men by these presents, that in consideration of the sum of one hundred and seven, 50-100 dollars, paid by John McGinley for the use of the Roman Catholic Church of St. John's, East Cambridge, the receipt of which is hereby acknowledged, we, the undersigned, do hereby sell and convey unto the said John McGinley a pew in the above church, in the north aisle, No. 58, to have and to hold to the said John McGinley and his heirs forever, on the following conditions, to wit: that he and they shall regularly pay, or cause to be paid, a quarterly contribution of two dollars fifty

A person having a possessory title only, claiming the right as annexed to the house by prescription, must prove repairs at his own expense if they have been necessary. *Pettman v. Bridger, supra; Fuller v. Lane, 2 Add. Ecol. Rep. 419; Walter v. Gunner, 1 Hagg. Consist. Rep. 822; Kenrick v. Taylor, 1 Wils. 826; Stocks v. Booth, 1 T. R. 481; Woolloombe v. Ouldrige, supra; Crisp v. Martin, L. R. 2 Prob. Div. 15; Churton v. Frewen, L. R. 2 Eq. 684, 85 L. J. Ch. 682; Knapp v. St. Mary, Willesden, 2 Hob. Ecol. Rep. 368.*

Aliter, in an action against a stranger. *Kenrick v. Taylor, supra.*

When a person has a pew annexed to his house, he may have an action on the case against any one disturbing him. *Griffith v. Matthews, 5 T. R. 298; Husey v. Leyton, Eastern Term, 10 Jac.*

The distribution of seats rests with the church wardens as the officers, and subject to the control, of the ordinary, neither the minister nor the vestry having any right whatever to interfere with them in seating and arranging the parishioners as often erroneously supposed. *Fuller v. Lane, supra*; even though a cathedral. *Re Cathedral Church of St. Columb, Londonderry, supra.*

Church wardens have a discretionary power to appropriate the pews in the church among the parishioners, and may remove persons intruding upon seats already appropriated. *Raynolds v. Monkton, 2 Mood. & R. 864.*

A faculty of a pew to a man and his heirs is bad, as it may belong to a party not a parishioner. *Byerley v. Winduss, 7 Dowl. & R. 564, 5 Barn. & C. 1.*

The right to a pew in the body of a church cannot be acquired otherwise than by prescription by a nonparishioner, whether extra-parochial or resident in another parish. *Ibid.*

But a pew in the body of a church may be apportioned to a house out of the parish by prescription. *Lousley v. Hayward, 1 Younge & J. 569; Davis v. Wt. Forrest, 14.*

Presumptive evidence of a prescriptive right to a pew may arise from the uninterrupted possession of a pew in the chancel for thirty years, as against a wrongdoer, but is subject to rebuttal by proof of its non-existence those many years back. *Griffith v. Matthews, 5 T. R. 298.*

Where the plaintiff claimed possession of a pew for thirty-six years, as appurtenant to a messuage acquiesced in by the defendant, the court held there was good presumptive evidence of a faculty. *Rogers v. Brooks, 1 T. R. 481, n; Phillips v. Halliday, App. Cas. [1891] 228*, where the plaintiff had repaired, occupied, and kept it locked for several 22 L. R. A.

years, even though the original possession was acquired in a manner giving no legal title.

In case of an interrupted prescription, a faculty, by reason of long undisturbed possession, will not be presumed by the jury. *Morgan v. Curtis, 3 Mann. & R. 889.*

A pew door hung upon hinges and removable without interfering with the staple is not part of the freehold. *Mant v. Collins, 15 L. J. Q. B. 248.*

In *Woolloombe v. Ouldrige, 3 Add. Ecol. Rep. 1*, the court held that ordinaries were bound not to issue faculties appropriating pews to individuals, except under special circumstances.

It does not, however, create such a right in the freehold as will create a right to vote or to be placed upon the county register of voters. *Hinde v. Charlton, L. R. 2 C. P. 104; Greenway v. Hockin, L. R. 5 C. P. 235; Brumfit v. Roberts, Id. 224.*

Where trustees were empowered by statute to remove and rebuild a chapel and appropriate the pews to subscribers to the building who were deemed proprietors, the pews being vested in them and their heirs forever, the court held, in the absence of proof as to who the real owners of the freehold were, that the proprietors had not such a title as gave them a right to a county vote. *Greenway v. Hockin, supra.*

No action can be maintained in an ecclesiastical court for the allotment of pews except the building be duly consecrated. *Battiscombe v. Eve, 9 Jur. N. S. 210.*

It would seem, however, that in the case of a cathedral which is not a parish church the seat can alone be allotted by the bishop. *Re Cathedral Church of St. Columb, Londonderry, 8 L. T. N. S. 861.*

Where it was proved that the pew in question had been one of three adjoining ones, used under one claim in respect of an ancient messuage, proof of repairs to one pew was held sufficient evidence of repairs. *Pepper v. Barnard, 12 L. J. Q. B. 861.*

But each case must be governed by its own circumstances in relation to the amount of evidence required. *Ibid.*

The right to a pew may be apportioned as where the pew was granted by faculty in respect of a dwelling house which was afterwards divided into two houses, the court holding that the occupier of one part had a right to some part of the pew and might maintain an action against a wrongdoer. *Harris v. Drowe, 2 Barn. & Ad. 164.*

In the Roman Catholic Church, the bare possession of a pew, without title, will justify the occupier in defending, by force, the possession against

cents at least. And in case of a default of payment of the said contribution, during more than one year, then thirty days after notice given, the said pew may be entered, and taken from said grantee, his heirs or assigns, by said grantors, their assigns, or any person or persons acting under them, and shall be sold and disposed of, as said grantors or their assigns shall think fit, the present deed and conveyance notwithstanding, which shall thenceforth be void and of no effect. And the residue of the amount of the sale, after having deducted the sum due and charges, shall belong to the said John McGinley, Felix McClurt, or his heirs."

The title to this pew subsequently became vested in the plaintiff, and the plaintiff's title to the other pew was derived under a similar instrument. Defendant is a Roman Catholic priest and was placed in charge of the St. John's Parish, with special directions from the bishop to build a new church, the old edifice

having become too small for the needs of the congregation. Ground was secured and the church was built, after which it was decided to use the old edifice for general purposes connected with the church work, and to hold no more services in it. For the purpose of making the changes necessary to fit the building for its new use, the pews were removed therefrom and the woodwork was sold or destroyed.

Further facts appear in the opinion.

Messrs. M. M. Weston and R. D. Weston-Smith, for plaintiff:

The nature of the property acquired by the plaintiff, and his title thereto, must be determined by the laws of the land. The laws of the Roman Catholic Church are mere matters of discipline which cannot be enforced in our courts.

Sohier v. Trinity Church, 109 Mass. 1; *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1; *Currier v. Trustees of Trinity Soc. of M. E. Church in Charles-*

the entry of one without title. *Brett v. Mullarkey*, 7 Ir. C. L. Rep. 120.

b. United States doctrine.

The English ecclesiastical law forms the basis for the law regulating the affairs of the Episcopal Church in this country, and is in force except so far as it has been modified and changed by the usages and canons of the church. *State v. Trinity Church in Trenton*, 45 N. J. L. 230; *Lynd v. Menzies*, 38 N. J. L. 162.

In these states pews are said to be held by very peculiar titles. *Sohier v. Trinity Church*, 109 Mass. 1; *Church v. Wells*, 24 Pa. 249; *O'Hear v. De Goesbriand*, 38 Vt. 593, 30 Am. Dec. 653; *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1.

In the absence of statutory provisions declaring them personal, they are considered as real estate. *Trustees of First Baptist Church in Ithaca v. Bigelow*, 16 Wend. 23; *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103; *St. Paul's Church in Syracuse v. Ford*, 34 Barb. 16; *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, *supra*; *Bates v. Sparrell*, 10 Mass. 323; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159; *Gamble's Succession*, 23 La. Ann. 9; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *Trustees of Third Presby. Church in Newark v. Andrews*, 21 N. J. L. 226; *State v. Trinity Church in Trenton*, *supra*; *Johnson v. Corbett*, 11 Paige, 276, 5 L. ed. 184; *McNabb v. Pond*, 4 Bradf. 1; *Viclie v. Osgood*, 8 Barb. 130; *Kelloog v. Dickinson*, 18 Vt. 236; *Hodges v. Green*, 23 Vt. 358; *Howe v. Stevens*, 47 Vt. 232; *Barnard v. Whipple*, 29 Vt. 401, 70 Am. Dec. 422; *Deutsch v. Stone*, 27 Ohio L. J. 20.

And as such, incorporeal hereditaments or easements. *Barnard v. Whipple*, *supra*; *Perrin v. Granger*, 38 Vt. 101; *Trustees of Third Presby. Church in Newark v. Andrews*, *supra*; *First Baptist Soc. in Leeds v. Grant*, 59 Me. 245; *Proprietors of Union Meeting-house in Hartland v. Rowell*, 66 Me. 400; *Gamble's Succession*, and *McNabb v. Pond*, *supra*.

So that a husband cannot convey immediately to his wife. *Voorhees v. Presbyterian Church of Amsterdam*, *supra*.

Neither are they considered as real estate so as to give the holder or owner the legal right to election as sheriff as possessing the requisite real and personal estate. *Hatcheson v. Tilden*, 4 Harr. & McH. 279.

It is not considered as personal estate unless created by a lease of a pew for a term of years. 22 L. R. A.

Johnson v. Corbett, and *McNabb v. Pond*, *supra*. In Massachusetts the right to a pew is regarded as real property, except in Boston where it is personal property. *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1; *Stat. 1796*, chap. 53, § 1; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347.

But by the Massachusetts Statutes of 1855, chap. 122, the pews of all houses of public worship were made personal property; and see the Pennsylvania doctrine, *infra*.

The interest in a pew created by a lease in perpetuity is an interest or estate in realty and the lessees or pew owners take title of their pews as real estate, with all its incidents. *St. Paul's Church in Syracuse v. Ford*, 34 Barb. 16.

Pew holders have merely a limited usufructuary interest under which they have a right to occupy a particular portion of the church edifice for the purpose of attending worship and for other customary uses. *Re New South Meeting-House in Boston*, 18 Allen, 497; *Sohier v. Trinity Church*, 109 Mass. 1; *Gamble's Succession*, 23 La. Ann. 9; *Trustees of Third Presby. Church in Newark v. Andrews*, 21 N. J. L. 325; *Freligh v. Platt*, 5 Cow. 494; *White v. Trustees of First Soc. of M. E. Church*, 3 Lans. 477; *Kincald's App.* 68 Pa. 411, 5 Am. Rep. 377.

The right of pew owners in their pews is not absolute. *Daniel v. Wood*, 18 Mass. 102, 11 Am. Dec. 151; *Freligh v. Platt*, *supra*.

It is a qualified property. *Daniel v. Wood* and *Sohier v. Trinity Church*, *supra*; *Jones v. Towne*, 58 N. H. 462, 48 Am. Rep. 602; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *Wentworth v. First Parish in Canton*, 3 Pick. 344; *First Baptist Soc. in Leeds v. Grant*, 59 Me. 245; *Trustees of Third Presby. Church in Newark v. Andrews*, *supra*; *Van Houten v. McKelway*, 17 N. J. Eq. 123; *White v. Trustees of First Soc. of M. E. Church*, *supra*; *Trustees of First Baptist Church in Ithaca v. Bigelow*, 16 Wend. 23; *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1.

The right extends only to an exclusive occupation of the pew for the purposes of public worship by virtue of the pew owner's individual right of property therein. *Shaw v. Beveridge*, 3 Hill, 23, 38 Am. Dec. 618; *Sohier v. Trinity Church*, *supra*; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159; *Daniel v. Wood*, 18 Mass. 102, 11 Am. Dec. 151; *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1; *Howe v. Stevens*, 47 Vt. 232; *Kelloog v. Dickinson*, 18 Vt. 236; *White v. Trustees of First Soc. of M. E. Church*, 3 Lans. 477; *Abernethy v. Society of the Church of Puritans*, *supra*; *First*

town, 109 Mass. 165; *O'Hear v. De Goesbriand*, 38 Vt. 593, 80 Am. Dec. 658. See also *Chase v. Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *Calkins v. Cheney*, 92 Ill. 463.

No one has a right to injure or take down the wood or other material of which the pew, as a visible object, consists; the owner has an exclusive right to occupy it, whenever the church is used for public worship, and it would seem that this is the owner's strict legal right whenever the building is used for purposes other than that of public worship.

Jackson v. Rounseville, 5 Met. 127; *Re New South Meeting-House in Boston*, 13 Allen, 497.

It also appears that, as necessarily incident to his ownership of a pew, he has certain rights in all the rest of the building, because "the purchasers must be supposed to take with the pews that which renders them valuable," and "the sellers can have no right to take away the windows of the meeting-house, or the walls, or the pulpit, or the singers' loft."

Baptist Church in Hartford v. Witherell, 3 Paige, 296, 3 L. ed. 159, 24 Am. Dec. 223; *Freligh v. Platt*, 5 Cow. 494; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222; *Re Reformed Dutch Church in Saugerties*, 16 Barb. 237; *Wheaton v. Gates*, 18 N.Y. 395; *O'Hear v. De Goesbriand*, 38 Vt. 593, 80 Am. Dec. 658; *Curry v. Trustees First Presby. Church of Erie*, 2 Pittsb. 40; *Perrin v. Granger*, 33 Vt. 101; *Wentworth v. First Parish in Canton and Jones v. Towne*, *supra*.

The interest is one in the use of the particular seat or seats in the building and not in the land. *Re Brick Presby. Church*, 3 Edw. Ch. 155, 6 L. ed. 607.

It gives no right to remove the pew. *Jones v. Towne*, *supra*.

But only when the house is used for the purposes for which it was erected. *Kellogg v. Dickinson*, 18 Vt. 266.

And is necessarily limited. *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1; *Trustees of First Baptist Church in Ithaca v. Bigelow*, 16 Wend. 28; *Heeney v. Trustees of St. Peter's Church*, 3 Edw. Ch. 608, 6 L. ed. 622; *Trustees of Third Presby. Church in Newark v. Andruss*, 21 N. J. L. 525; *Fisher v. Glover*, 4 N. H. 180; *White v. Trustees of First Soc. of M. E. Church*, 3 Lans. 477; *Re Brick Presby. Church and Freligh v. Platt*, *supra*.

Even though held under valid leases, the title to the freehold being in the corporation. *Re Reformed Dutch Church in Saugerties*, 16 Barb. 237.

Being subject to the paramount right of the parish, the trustees, society, or corporation. *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *First Baptist Soc. in Leeds v. Grant*, 69 Me. 245; *Bronson v. St. Peter's Church*, 7 N.Y. Legal Obs. 361; *Shaw v. Beveridge*, 3 Hill, 23, 38 Am. Dec. 616; *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222; *Erwin v. Hurd*, 13 Abb. N. C. 91; *Perrin v. Granger*, 33 Vt. 100; *Kellogg v. Dickinson*, *supra*.

A pew holder, or owner, has no legal interest in the church edifice, or in the land upon which it stands, the same being in the corporation, society or trustees and the possession in the trustees. *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1; *Heeney v. Trustees of St. Peter's Church*, 3 Edw. Ch. 608, 6 L. ed. 622; *Re Brick Presby. Church*, 3 Edw. Ch. 155, 6 L. ed. 607; *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1; *Re New South Meeting-House in Boston*, 13 Allen, 497; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159; *Trustees of Third Presby. Church in Newark v. 22 L. R. A.*

Revere v. Gannett, 1 Pick. 169.

Consequently even if we assume that Archbishop Williams, as ordinary, was absolute owner of the Church of St. John, the defendant cannot justify the destruction of the plaintiff's pews and dismantling of the church, as a place of public worship, by showing that he acted under the archbishop's orders.

Gay v. Baker, 17 Mass. 435, 9 Am. Dec. 159; *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 151; *Revere v. Gannett*, *supra*; *Wentworth v. First Parish in Canton*, 3 Pick. 344; *Howard v. First Parish in North Bridgewater*, 7 Pick. 188; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *Fassett v. First Parish in Boylston*, 19 Pick. 361; *Jackson v. Rounseville*, *supra*; *Gorton v. Hadsell*, 9 Cush. 503; *Re New South Meeting-House in Boston*, *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, and *Sohier v. Trinity Church*, *supra*.

The proprietors of a meeting-house, either by the common law or by statute, generally have

Andruss, 21 N. J. L. 525; *Wheaton v. Gates*, 18 N.Y. 395; *Re Reformed Dutch Church in Saugerties* and *Cooper v. Trustees of First Presby. Church of Sandy Hill*, *supra*; *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103; *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 298; *Kincaid's App.* 66 Pa. 411, 5 Am. Rep. 377; *Church v. Wells*, 24 Pa. 249.

Even though he claim under an absolute conveyance he has no legal interest in the "old church." *Re Reformed Dutch Church in Saugerties*, 16 Barb. 237.

And the grant of a pew in perpetuity does not give the owner any absolute right of property, as in a grant of land in fee. *First Baptist Church in Hartford v. Witherell*, 3 Paige, 296, 3 L. ed. 159, 24 Am. Dec. 223.

Neither has he a separate or individual right in the timber or materials of which the church is constructed. *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222.

The pew owner is not a tenant in common of the estate whereon it stands. *Atty-Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 3 Gray, 1.

Neither is he an equitable owner of an aliquot part or share in the property, the entire beneficial interest being in the stockholders. *Re New South Meeting-House in Boston*, 13 Allen, 497.

He owns neither the soil beneath nor the space above, and cannot alter or convert the pew to any other use. *Trustees of Third Presby. Church in Newark v. Andruss*, 21 N. J. L. 525.

The conveyance of a right to use the pew as a seat in a place of religious worship as long as the house might stand passes a limited estate, subject to the more general right of the corporation in the soil and freehold. *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 103.

In *Second Cong. Soc. in North Bridgewater v. Waring*, 24 Pick. 304, land was conveyed to parties mostly members of an incorporated religious society to hold to the use of the pew holders, the grantees becoming proprietors under the Act of 1788, chap. 39. The court held that the legal title was in the proprietors in trust for the pew holders.

His rights can create no bar to a sale of the church and grounds. *Re Brick Pres. Church*, 3 Edw. Ch. 155, 6 L. ed. 607.

And if the church edifice should be sold at the expiration of the lease the pew owner's interest ceases. *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1.

The destruction of the building by fire or other

the power to take down pews, whenever they deem it necessary, for the purpose of building a new house, or of repairing, altering, enlarging, removing, or rebuilding a house already built, in order to make it more suitable and convenient for public worship (*Wentworth v. First Parish Church in Canton* and *Sohier v. Trinity Church, supra*); and in all such cases the pew holders are entitled to compensation. They can be deprived of their pews without compensation only when the meeting-house has become so old, decayed, or ruinous as to be unfit for use.

Kimball v. Second Cong. Parish in Rowley and *Gorton v. Hadsell, supra*.

Mearns. E. R. Hoar and C. J. McIntire, for defendant:

The plaintiff had no property in the altar, pulpit, woodwork of the pews, the statues, pictures, and other sacred fixtures distinct from the right of enjoying the house for public worship.

Reters v. Gannett, 1 Pick. 169; *Locke v. Belmont Cong. Soc.* 157 Mass. 589; *Kellogg v. Dickinson*, 18 Vt. 266.

Not the pew holders, but the persons who usually attended worship at the church, constituted the society; and the latter had power to authorize the discontinuance of worship there, and to remove to the new house.

Silsby v. Barlow, 16 Gray, 329; Pub. Stat. chap. 88, § 22.

The church building being abandoned for public worship, and the society removing to a different building, no one is subjected to liability to the proprietor of a pew in the old building, it not appearing that there was any wanton action in the abandonment, or attempt to injure the plaintiff or other pew holders.

Wentworth v. First Parish in Canton, 8 Pick. 344; *Fassett v. First Parish in Boylston*, 19 Pick. 361; *Wheaton v. Gates*, 18 N. Y. 395.

If the plaintiff had property in his pews to be treated as real estate, his right is subject to

casualty destroys his rights. *Kincaid's App.* 66 Pa. 411, 5 Am. Rep. 377; *Freligh v. Platt*, 5 Cow. 494.

Pews may be leased and held distinct from the fee. *Woodworth v. Payne*, 74 N. Y. 199, 30 Am. Rep. 236.

A pew holder may be only a tenant at will or from year to year. *First Parish in Quincy v. Spear*, 15 Pick. 144, *infra*, head "Conditions attached."

The holders of a pew under a lease are tenants in common, having several and distinct freeholds, each being solely and severally seised of his share. *St. Paul's Church in Syracuse v. Ford*, 34 Barb. 16.

The pew holder cannot compel the corporation to maintain divine service or even to open the house for that purpose. *Re Reformed Dutch Church in Saugerties*, 16 Barb. 237.

A pew holder if a corporator will be one still even after a change of location. *Re Brick Presby. Church*, 3 Edw. Ch. 155, 6 L. ed. 607.

The owners of the pews hold them in severalty. *Shaw v. Beveridge*, 3 Hill, 23, 38 Am. Dec. 616; *O'Hear v. De Goesbriand*, 33 Vt. 593, 30 Am. Dec. 658.

The ownership in or the control over, a pew is forbidden to a layman by the canon law of the Roman Catholic Church, yet where a church was erected by means of a subscription expressed to be for the building of a "Catholic chapel," it was held to be a question of fact and not of law whether the signers to such paper recognized or adopted such law upon which parol evidence was admissible to show their intention to have the choice of pews as their own property in severalty. *O'Hear v. De Goesbriand, supra*.

It is transferable in the same manner as other real estate. *Barnard v. Whipple*, 29 Vt. 401, 70 Am. Dec. 422; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *Mass. Stat.* 1796, chap. 53; 1881, chap. 59.

A contract for the sale thereof is within the provisions of the statute of frauds. *Trustees of First Baptist Church in Ithaca v. Bigelow*, 16 Wend. 28; *Price v. Lyon*, 14 Conn. 280; *Hodges v. Green*, 23 Vt. 358; *Vielle v. Osgood*, 8 Barb. 130.

And is void under the statute of frauds unless in writing, signed by the party to be charged. *Vielle v. Osgood, supra*.

As real estate it comes within the provision of the first section of the New Jersey act constituting courts for the trial of small causes and cannot be tried before a justice of the peace. *Trustees of Third Presby. Church in Newark v. Andrus*, 21 N. J. L. 326.

The sale of a pew in a church is not a sale of real estate, however, within the meaning of the Act 22 L. R. A.

Respecting Religious Societies, 2 R. L. 216, which declares that the chancellor may make an order for the sale of any real estate belonging to the corporation. *Freligh v. Platt*, 5 Cow. 494.

Where the auctioneer's memorandum of sale of a pew was lost the court refused parol evidence establishing a different contract from that contained in such memorandum. *Stoddert v. Vestry of Port Tobacco Parish*, 2 Gill & J. 227.

It descends to the heirs as an uncorporeal hereditament, and the executor is not liable for the proceeds of the sale thereof. *McNabb v. Pond*, 4 Bradf. 1.

If it is sought to be made liable for the testator's debts, the creditors must take steps to have it sold as part of his real estate liable for debts. *Ibid*.

A widow has a right in action merely in a pew, and until dower is assigned her second husband has no interest therein. *Branson v. St. Peter's Church*, 7 N. Y. Legal Obs. 561.

Where a pew was "granted and sold" to the deceased owner his heirs and assigns forever, the court held that as under the statute the deed would be void as an absolute conveyance in fee, the trustees not having the power to create such an estate, it operated as a conveyance of the right to occupy for the purposes of divine service an estate in the nature of a leasehold. *Ibid*.

In *Gamble's Succession*, 23 La. Ann. 2, the court applied the rule laid down in article 470 [462] of the Code. Incorporeal things, consisting only in a right, are not of themselves strictly susceptible of the quality of movables or immovables; nevertheless, they are placed in one or the other of these classes, according to the subject to which they apply and the rules hereinafter established.

In *Colby v. Northfield & Tilton Cong. Soc.*, 68 N. H. 63, where the meeting house had been repaired and altered with the assent of the society and the location of the pews changed by the holders, the court held that an equitable assignment by a committee, of the new pews among the holders, pursuant to a vote of the society, was valid.

c. In Pennsylvania.

The interest or title in or to a pew can hardly be said to be property at all in the strict sense of the term, it being a mere easement enjoyed for a particular purpose. *Curry v. Trustees of First Presby. Church of Erie*, 2 Pittsb. 40.

It is a right that is entirely peculiar, yet a sort of interest in real estate. *Church v. Wells*, 24 Pa. 249.

In its nature it is scarcely divisible among heirs, and can scarcely be said to be the subject of an as-

all the conditions and limitations incident to such property. If the edifice becomes useless by dilapidation, or is destroyed by fire, or if from age, decay, or other injury the house has to be rebuilt in the same place, or from some necessary cause the location be changed, the pew holder has no claim either in law or equity.

Kincaid's App. 66 Pa. 411, 5 Am. Rep. 377; *Abernethy v. Society of the Church of Puritans*, 8 Daly, 1; *Freigh v. Platt*, 5 Cow. 494; *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 108; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 849; *Sohier v. Trinity Church*, 100 Mass. 21.

The extent of the right to occupy these pews was the right of sitting in, them at the time of public worship so long as the building should be used as a Catholic church.

Kincaid's App. supra.

The papers signed by Bishop Fenwick and Bishop Fitzpatrick in legal effect amounted to no more than a revocable license.

Wood v. Leadbitter, 18 Mees. & W. 838; *Mo-Crea v. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Ruggles v. Lesure*, 24 Pick. 190; *Morse v. Copeland*, 2 Gray, 805; *Curtis v. Noonan*, 10 Allen, 409; *Bronson v. Coffin*, 108 Mass. 186, 11 Am. Rep. 835.

Allen, J., delivered the opinion of the court:

The plaintiff's rights must be determined independently of the statutes relating to the power of parishes or proprietors of meeting houses to take down meeting houses and destroy pews. Those statutes apply to proprietors of meeting houses who have organized as corporations, and the powers given therein are to be exercised by the corporations. Pub. Stat. chap. 88, § 27 *et seq.* There are also statutes providing specially how Roman Catholic churches may become incorporated (Pub. Stat. chap. 88, §§ 48, 50; Stat. 1879, chap. 108); but it does not

tion of partition or ejectment, or of a decree of sale by the orphans' court for the payment of debts. *Ibid.*

As property, it is so conditional and impermanent that it cannot be called real estate, and must pass to the personal representatives. *Ibid.*

Yet from its nature it would not pass to the personal representatives for use. *Ibid.*

It passes to the personal representatives merely for sale, as part of the assets, and they sell it subject to its burdens. *Ibid.*

A pew rent is not a rent in the usual legal application of the term, for it does not issue out of a corporeal hereditament, and is no charge upon the property, except by virtue of the very ordinary provisions made by the congregation, that the pew may be sold for rent. *Ibid.*

Rent accruing due after the owner's decease can only be obtained by the remedy provided by the church itself in the sale of the pew, or by resort to those who actually occupy it. *Ibid.*

The executor is not personally bound to pay pew rent except according to his contract. *Ibid.*

The family may hold it together, and if they do, the executor cannot be charged with a devastavit in not selling it. *Ibid.*

Where a church charter which provided that subscribers and others thereafter admitted or subscribing should form the corporation, and that any member contributing to the support of the church, a year prior to the election about to be held, a certain sum for a pew or a portion of a pew was entitled to vote, and subsequently the pews were made free by proclamation from the pulpit the church expenses being afterwards defrayed out of the congregation's contributions, the court held that the renting or holding of a pew was not essential to membership the change being no infraction of the constitution. *Com. v. Morrison*, 18 Phila. 126.

The right does not give the holder the privilege of changing and decorating the pew according to his fancy, or of cutting it down and carrying it away. *Church v. Wells, supra.*

The same principles are declared in *Craig v. First Presby. Church of Pittsburgh*, 88 Pa. 51, 32 Am. Rep. 417; and in *Kincaid's App.* 66 Pa. 411, 5 Am. Rep. 377.

It cannot be used for purposes outside of those prescribed by the resolutions, by-laws, and regulations of the association under which it is held. *Curry v. Trustees First Presby. Church of Erie*, 2 Pittsb. 40.

A pew right is not of such a character as to prevent an absolute sale of the church edifice, either by contract or by judicial process. *Church v. Wells, supra.*

d. Conditions attached.

The doctrine, that conditions against alienation in a conveyance in fee simple are void, has never been held to be applicable to conveyances of pews. *French v. Old South Soc. in Boston*, 106 Mass. 479.

Where, upon a sale of pews, a clause in the conditions restrained the sale or gift thereof, and provided that the same was to descend in right only to such relation as would be his heir-at-law, provided the latter belonged to the church, the court held that the purchaser became entitled to a qualified fee. *Heeney v. Trustees of St. Peter's Church*, 2 Edw. Ch. 603, 6 L. ed. 623.

So where the conditions of sale provided for payment of an amount down, and extended the balance in certain portions with a forfeiture of the first amount in case of default, the court held that the defendant purchasing thereunder and not making the subsequent payments, acquired no title, but only a right to obtain one by deed on complying with the terms. *First Parish in Quincy v. Spear*, 15 Pick. 144.

In such a case the pew holder is only a tenant at will or from year to year. *Ibid.*

Where, by the conditions of the deed, the pew was forfeited for nonpayment of taxes due for more than a year, it was held that the corporation had the right, upon a sale, to deduct the taxes due at that time including those that had been due for a less period. *Mussey v. Bulfinch Street Soc.* 1 Cush. 148.

Again where the by-laws of an incorporated religious society composed exclusively of pew holders, who held the freehold, prescribed a condition in the deeds of the pews forfeiting them upon the members leaving without offering them at a given price, the court held it was valid, not repugnant to the grant nor against perpetuities. *French v. Old South Soc. in Boston, supra.*

And it is a breach of such a condition if such pew owner ceases to worship or to attend the meetings of the society or to act and regard himself as a member, and joins another, without making or offering to sell at such fixed price, even if section 4, chap. 20, of Rev. Stat., is not applicable to the case. *Ibid.*

A pew holder who, without any apparent reason or explanation, uninterruptedly and for a long space of time ceases to worship at the society, manifests no intention of returning, and habitu-

appear that the church or society in question ever became incorporated under these statutes. Under the 11th Amendment of the Constitution, adopted in 1833, the Roman Catholic denomination stands on the same footing before the law as other religious sects and denominations; and in the present case, there being no statutes having a special application, the rights of the parties depend on general principles of law as applied in Massachusetts, and on the usages which have prevailed here. Not much light is to be got from decisions as to the rights of pew holders in England or elsewhere, where different laws, usages, and systems of religious administration have been established. *Atty. Gen. v. Proprietors of Federal Street Meeting-House in Boston*, 8 Gray, 1, 64.

The first question is, What was the plaintiff's title? There was evidence as to this, and the report states that at the trial no question was made as to the plaintiff's title to

the pews; but the defendant contended that they were owned only as pews are owned in the Roman Catholic church, according to the laws and usages of that denomination. We have therefore to look into the report to see what sort of a title the plaintiff had. The title to the soil stood in the archbishop. Prior to Stat. 1855, chap. 123, pews except in Boston were real estate. Trespass would lie for interference with the pew owner's right to his pew. *Jackson v. Rounseville*, 5 Met. 127. A conveyance of the pew, therefore, should be by deed. The conveyances under which the plaintiff claims title were executed in 1843 and 1852 by the archbishop, who owned the soil. These two conveyances were in the form of deeds, except that neither of them was under seal, nor called for a seal. This omission would render the conveyances ineffectual as deeds of real estate. But the plaintiff claims title by adverse possession. The conveyances ran to the grant-

ally worships with, and apparently attaches himself to, another religious society, abandons his pew within the meaning of such a condition. *Crocker v. Old South Soc. in Boston*, 106 Mass. 499.

II. Rights of the parish or society.

The rights of the pew owner and of the trustees are distinct and separate, and are not in conflict with each other. *Shaw v. Beveridge*, 3 Hill, 26, 38 Am. Dec. 616.

The absolute ownership is in the corporation, or in the trustees, who can incur such title, alter the pews, raise and rebuild the church, without the consent of the pew holder, and without an invasion of his right. *Trustees of Third Presby. Church in Newark v. Andrus*, 21 N. J. L. 325.

It is not necessary to consult the pew holders, as such, when the corporation determines to make a sale or alteration, the right to property in pews giving no authority to object to such proceeding. *Sohler v. Trinity Church*, 109 Mass. 1.

A church corporation has power to regulate and order the renting of the pews, but not to make an absolute sale thereof except by order of the court. *Re Reformed Dutch Church in Saugerties*, 16 Barb. 237.

The only power that church trustees had under the New York Statute of March 27, 1801, relating to the incorporation of religious societies, was limited to a demise or lease of the real estate, or to the renting of the pews. *Montgomery v. Johnson*, 9 How. Pr. 232, where the pew was sold under an assessment sale made under a resolution by the church trustees to raise funds for repairing, the defendant claiming title under a prior sale, the court holding that neither had any title the trustees having no power to sell under the Act of March 27, 1801, relating to the incorporation of religious societies.

An absolute deed in fee, without reserving rent, of a pew in a church under the general act to incorporate religious societies was held void in *Vielie v. Osgood*, 8 Barb. 180.

Where a conveyance of land for church purposes provided that the seats "should be free," and that if they should be "rented or sold" the land should revert, the court held that the sale of the land for payment of the debts of the church was not a violation of the condition. *Woodworth v. Payne*, 74 N. Y. 196, 30 Am. Rep. 296.

The rights of the society are impliedly reserved in every grant of a pew. *Fisher v. Glover*, 4 N. H. 180.

The property right of the pew holder or owner is 22 L. R. A.

subject to the right of the majority of the parish society or corporation to take down and destroy the house, wholly or only in part, if necessary for the purposes for which erected, and to repair, enlarge, or rebuild the same when decayed or useless. *Wentworth v. First Parish in Canton*, 3 Pick. 344; *Re Rick Presby. Church*, 3 Edw. Ch. 155, 6 L. ed. 607; *Church v. Wells*, 24 Pa. 249; *Heeney v. Trustees of St. Peter's Church*, 2 Edw. Ch. 608, 6 L. ed. 622; *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1; *White v. Trustees of First Soc. of M. E. Church*, 3 Lans. 477; *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222; *Jones v. Towne*, 58 N. H. 462, 43 Am. Rep. 602; *Erwin v. Hurd*, 18 Abb. N. C. 91; *Daniel v. Wood*, 1 Pick. 108, 11 Am. Dec. 151; *Gay v. Baker*, 17 Mass. 485, 9 Am. Dec. 159; *Sohler v. Trinity Church*, 109 Mass. 1; *Fisher v. Glover*, *supra*; *Van Houten v. McKelway*, 17 N. J. Eq. 126; *Trustees of Third Presby. Church in Newark v. Andrus*, 21 N. J. L. 325.

If the act is done by the corporation in the exercise of its legal rights it gives rise to no constitutional question. *Cooper v. Trustees of First Presby. Church of Sandy Hill*, *supra*.

The presumption is that the trustees, in performing such act, are carrying out the legal and reasonable will of the corporation. *Ibid.*

If, however, the authority is exercised in an arbitrary and despotic manner, the pew owner's rights will not be affected or concluded. *Ibid.*

No right of such holder is invaded or taken from him when the pew is destroyed from necessity or for the purposes of expediency or convenience. *Ibid.*

The right to change or take down pews rests, however, in necessity or propriety. *Ibid.*; and cases *supra*.

Where the dilapidated state of the edifice or the increasing congregation makes it proper for the trustees to rebuild, they may do so, and cannot be restrained by the pew holders. *Heeney v. Trustees of St. Peter's Church*, 2 Edw. Ch. 608, 6 L. ed. 622.

In *Wentworth v. First Parish in Canton*, 3 Pick. 344, the court held that the right of the parish to pull down the building for the purpose of rebuilding existed without complying with the terms of the Statute of 1817, chap. 139, which only extended its provisions to proprietors of churches other than parishes.

By the Revised Statutes of Massachusetts, chap. 20, §§ 37, 38, the parish has power when necessary for altering, repairing, or rebuilding a meeting-house to take down any pews therein, the pews

ees and their heirs forever; subject, however, to a condition. They also described the terms on which the grantees might lose their rights as owners. The conveyances were in form adapted to convey a good title to real estate in all respects, except in the want of seals or words calling for seals; and the grantees occupying under them, if they understood their title to be good, as they may have done, had a basis upon which to begin an adverse possession. Whether the plaintiff had gained a title by adverse possession was a question of fact. The court could not rule against him as matter of law as to his title, and we think did not intend to do so. Certainly, the plaintiff had a sufficient case for the jury as to his title, unless the title to pews in a Catholic church is different from the title to pews in other churches. There is nothing in the facts of the case to show that in 1843 or 1852 the title to pews in Catholic churches, when conveyed to individuals, was held by

them in any different way, or that it conferred any different rights upon the pew owners, than in the churches of other religious denominations. The various pieces of testimony introduced to show the methods and usages of that denomination do not seem to touch the question of the rights of a pew holder who has a title to his pew.

The decrees of the council held in 1868 go to show that many of the ordinary corporate powers of proprietors of meeting houses are vested in certain ecclesiastical officers; but they do not reach the question what rights a pew holder acquires by virtue of his ownership of a pew. In respect to these rights, the plaintiff, as pew holder, stood in the same position as a pew holder in a church of any other denomination, under the general rules or principles of law. The general right of a pew holder, as between himself and the parish or the proprietors of the meeting house, is settled by a course of decisions.

being first appraised and the appraised value being payable to the owner, but no compensation is payable when the pews are taken down owing to the unfitness of the house for public worship.

By this statute, however, the provisions of the Act of 1817 were extended to parishes as well as societies. Mass. Rev. Stat. chap. 20, § 37.

And equity will not interfere, by way of injunction, with the pulling down and rebuilding or removal of such church when expedient and proper. *Van Houten v. McKelway*, 17 N. J. Eq. 123; *Re Brick Presby. Church*, 3 Edw. Ch. 155, 6 L. ed. 607; *Heeney v. Trustees of St. Peter's Church*, 2 Edw. Ch. 608, 6 L. ed. 622.

Where a meeting house was erected solely for the use of a certain society, the court held that such society could not maintain an action *quare clauum fregit* against a pew holder for occupying the pulpit and preventing the society from performing service. *Religious Cong. Soc. in Bakersfield v. Baker*, 15 Vt. 119, 40 Am. Dec. 668.

III. Rights of the pew owner.

a. Compensation upon removal.

Upon the question of the right to compensation the decisions would appear to discord.

The point would seem, however, in the majority of cases to turn upon the question of the necessity for such alteration or removal, and a distinction would seem to be made between cases of the entire removal or demolition of the edifice and those of the removal or demolition of pews only.

The pew owner cannot be despoiled of his property. *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 847.

If necessity exists the right may be exercised without compensation to the pew holder. *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 22 Barb. 222.

In some respects his rights are superior to those of the parish, and they must exercise their general ownership in subordination to them and be restricted to the general purposes for which churches are erected and parishes created. *Revere v. Gannett*, 1 Pick. 168; *Kimball v. Second Cong. Parish in Rowley*, *supra*.

The society has the right, where necessary, to remove or destroy a pew paying or tendering to the pew owner compensation for the loss. *Jones v. Towne*, 68 N. H. 462, 43 Am. Rep. 602.

There is no right to compensation where the removal is caused by the dilapidated condition of the building, or in case of its destruction by fire or other casualty, or in case of a necessary rebuilding

through decay. *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 108; *Wheaton v. Gates*, 18 N. Y. 305; *Church v. Wells*, 24 Pa. 248; *Kellogg v. Dickinson*, 18 Vt. 266; *Mayer v. The Temple Beth El*, 52 N. Y. S. R. 638; *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1.

The parish has a right to take it down, rebuild upon the same spot, or alter its form and shape so as to make it more convenient, and if this be done for useful purposes and the pews are destroyed the pew holders must be indemnified, the nature of a pew being such that it is subject to the regulations of the parish. *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159.

No tort is committed in the exercise of legal discretion. *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 847; *Gay v. Baker*, *supra*; *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 181.

It is only in cases where the meeting house has become so old, decayed, or ruinous as to be unfit for use, and when in fact the pew has ceased to be of any use or value as a pew, that the parish can deprive him of it without compensation. *Kimball v. Second Cong. Parish in Rowley*, *supra*; *Howard v. First Parish in North Bridgewater*, 7 Pick. 138.

Where the meeting house is so old and ruinous that the jury find it necessary to take it down, there can be no compensation to the pew holder. *Howard v. First Parish in North Bridgewater*, *supra*.

In cases of necessity there can be no complaint even if a different plan or arrangement of the pews is adopted. *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 108.

In *Howe v. Stevens*, 47 Vt. 262, however, it was held that where the edifice was ruinous so as not to be occupied for worship the court held the pew owner could only recover nominal damages.

It has been held, however, that not only must the house be decayed, old, and ruinous so as to be unfit for worship, but that it must also be in such a state as to render its entire demolition necessary in order to bar the pew owner's right to compensation. *Gordon v. Hadsell*, 9 Cush. 508; *Wentworth v. First Parish in Canton*, 8 Pick. 844; *Howard v. First Parish in North Bridgewater*, *supra*.

Where the edifice is pulled down by the resolution of the majority of the pew holders, the minority, in the absence of proof of malicious or wanton abuse of power, have no remedy. *Wentworth v. First Parish in Canton*, *supra*.

If the meeting house of a parish is abandoned although fit for public worship, and a new house is built in another location, the parish is not liable to

The parish or the proprietors may abandon the meeting house as a place of public worship without any liability to pew holders, although the pews may thereby be rendered nearly or quite useless; and the fact that the meeting house is still fit to be used does not render the parish or the proprietors liable. *Fassett v. First Parish in Boylston*, 19 Pick. 361. It is within the power of the parish or

the proprietors to determine whether to take down a church or to make alterations and repairs. The pew holder cannot prevent them from doing this. The parish or the proprietors are the owners of the soil, and they may determine all matters relative to the structure to be maintained thereon. *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 151; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159;

the pew holders in the old edifice provided the acts are not done wantonly or for the purpose of injury. *Fassett v. First Parish in Boylston*, 19 Pick. 361.

In *Fisher v. Glover*, 4 N. H. 180, the court held that a town had the right to remove, pursuant to a town vote, its meeting house from one location to another in order to accommodate the town to the best advantage, without being liable for disturbing the pew holder in his use of the same.

So where from overruling considerations it is expedient that a sale should take place, the interests of the pew owners are destroyed. *Wheaton v. Gates*, 18 N. Y. 305.

And the order of a county court for the sale of the building is valid and puts an end to the pew owner's rights. *Ibid*.

Where the building was sold by the corporation under the order of the court, and a new edifice built upon a new site, the court held that the pew owner was entitled to a pew in the new edifice corresponding in location to the one he occupied in the old church, upon payment of such sum as in equity he ought to pay if the new building cost more than the proceeds of the sale of the old one, or to compensation in damages in case of refusal. *Mayor v. The Temple Beth El*, 52 N. Y. S. R. 636.

In *Van Houten v. McKelway*, 17 N. J. Eq. 126, where it was sought to restrain the defendants from selling, the court held that the trustees or owners of a church have the right to take down, rebuild, or remove the edifice for the purpose of more convenient worship without making compensation to the pew holders for the temporary interruption.

But where the pew is destroyed for convenience or from expediency, and not from necessity, the owner has a right to compensation and indemnity. *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 108.

To the same effect, *Re Brick Presby. Church*, 8 Edw. Ch. 155, 6 L. ed. 607; *Kellogg v. Dickinson*, 18 Vt. 266; *Mayer v. The Temple Beth El*, *supra*.

Where the parish takes down a meeting house which is in good order, for the purpose of rebuilding one in better taste or of larger dimensions, compensation must be paid. *Howard v. First Parish in North Bridgewater*, 7 Pick. 138.

Neither the corporation, nor a majority of the congregation, can, for mere purposes of improvement or embellishment, deprive the pew owner of his property without compensation. *Voorhees v. Presbyterian Church of Amsterdam*, *supra*.

The corporation, however, has a right to change or take down pews according to propriety, upon giving compensation. *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222.

If reconstruction is unnecessary, a mere matter of taste and fancy, and the pew owner is dissatisfied with the change, he may refuse to accept the new pew and ask for the price of the old pew or damages suffered by the unnecessary destruction of his pew. *Curry v. Trustees of First Presby. Cong. of Erie*, 2 Pittsb. 40.

If the owner accepts a new pew in place of the old one or in lieu of damages for its removal, he becomes the purchaser of a new and different pew. *Ibid*.

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The parish has the right to remove or change the form of the pews for the purpose of repair and rendering the interior more convenient, or to destroy them altogether for the purpose of erecting or substituting a more commodious or elegant edifice without compensation in cases of necessity (*Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347; *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159; *Daniel v. Wood*, 1 Pick. 102, 11 Am. Dec. 151), as the good of the society may require.

A temporary unfitness may be caused by accident, or by partial decay, or by the making of necessary alterations and repairs, and will not bar the pew owner's right. *Gorton v. Hadsell*, 9 Cush. 508.

The mere fact that the house is unfit for worship upon a particular day is not sufficient to warrant the grant of compensation. *Ibid*.

Where the repairs and alterations did not interfere with the plaintiff's right to occupy his pew, but consisted in the placing and construction of other pews in front of his, the court refused him relief. *Bronson v. St. Peter's Church*, 7 N. Y. Legal Obs. 361.

The trustees of such a corporation have power to direct the alteration; the pew holders being left to claim reasonable compensation for the deprivation of their rights. *Cooper v. Trustees of First Presby. Church of Sandy Hill*, 32 Barb. 222.

Under General Statutes, chap. 80, §§ 35, 36, the rights of pew holders to compensation is secured. *Schler v. Trinity Church*, 100 Mass. 1.

By Stat. 1817, chap. 189, § 5, the proprietors have the right to take down any pews for the purposes of repairing, enlarging, or rebuilding, the pews being first appraised, the new pews to be sold, and the money arising from such sale to be applied in payment of the pews removed.

If the parish act in a legal manner in removing or destroying a pew they may lawfully tender the owner thereof the appraised value thereof, and thus bar any action for damages. *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347, decided under the Act of 1817, chap. 189.

If they take from the owner the use of the pew, they must substitute its equivalent in money. *Kimball v. Second Cong. Parish in Rowley*, *supra*, in which case they were looked upon as purchasers, under Stat. 1817, chap. 189, at a fair compensation.

In *Kimball v. Second Cong. Parish in Rowley*, *supra*, the court applied the provisions of Stat. 1817, chap. 189, respecting the appraisal of pews upon removal to territorial parishes, holding that they might proceed according to that act.

b. Action for disturbance.

The pew owner cannot be divested of his rights except by consent. *Religious Cong. Soc. in Bakersfield v. Baker*, 15 Vt. 119, 40 Am. Dec. 668.

The right is absolute against every other person, and may be enforced in trespass, ejectment, or action upon the case according to the circumstances. *Wentworth v. First Parish in Canton*, 8 Pick. 344.

For the disturbance of the pew owner's rights the action is by way of trespass on the case. *Perrin v. Granger*, 33 Vt. 101, where the action was for disturbing the plaintiff, an administrator, in the use and occupation of the pew.

Re New South Meeting-House in Boston, 18 Allen, 497, 507.

Nevertheless, the right of the pew holder is held to be of such a nature that he is entitled to an indemnity if the parish or the proprietors exercise their right to take down the church when it is in such a condition that its demolition is not actually necessary. If it has become necessary to take down a

meeting house,—that is to say, if a meeting house has become so old and ruinous that its further use is not practicable,—the parish or proprietors need not make payment to a pew holder for the removal of his pew. But if a meeting house is taken down, or the pews are removed, merely as a matter of expediency, the pew holders are entitled to payment. This rule has been so often stated and

To the same effect, *Trustees of Third Presby. Church in Newark v. Andrus*, 21 N. J. L. 325; *Howe v. Stevens*, 47 Vt. 262; *Kellogg v. Dickinson*, 18 Vt. 286; *Shaw v. Beveridge*, 8 Hill, 26, 38 Am. Dec. 616; *Woodworth v. Payne*, 74 N. Y. 740, 30 Am. Rep. 298.

The pew owner has an action in trespass or by way of writ of entry, against any one disturbing him in his seat. *Gay v. Baker*, 17 Mass. 435, 9 Am. Dec. 159.

An action *quare clausum fregit* will lie for breaking and entering the plaintiff's pew so long as pews are considered as real estate. *Jackson v. Rounseville*, 5 Met. 127.

For the violation of his right to possession he may maintain an action of trespass *quare clausum fregit*. *O'Hear v. De Goesbriand*, 38 Vt. 593, 30 Am. Dec. 638.

The party aggrieved has his action upon the case for damages, or he may hold a property in the new pews equal to the old one. *Daniel v. Wood*, 18 Mass. 102, 11 Am. Dec. 151.

So trespass lies by one tenant or pew owner against another owner as it lies against a stranger. *O'Hear v. De Goesbriand*, *supra*.

The owner has the right to remove any person wrongfully in the occupation of the pew, upon refusal to vacate using no more force than absolutely necessary. *Jones v. Towne*, 58 N. H. 455, 42 Am. Rep. 602.

Even against the owner of the legal estate in whom the land is vested. *O'Hear v. De Goesbriand*, *supra*.

Even though possession equal to an ouster of the society may have taken place, yet a pew holder has his action for the interference with his rights individually. *Howe v. Stevens*, 47 Vt. 262.

The members of a religious society who are the owners of pews in a meeting house cannot maintain a bill in equity against the members of the society owning the house, under Gen. Laws, chap. 154, § 17, for a sale of the house and a division of its proceeds. *Trinitarian Cong. Soc. in Frankestown v. Union Cong. Soc. in Frankestown*, 61 N. H. 884.

But the owner of a loose bench or seat in a church, occupied by the owner by the mere will and license of the trustees, cannot maintain trespass against them for the removal thereof, as it is not attached to the freehold. *Niebuhr v. Piersdoff*, 24 Wis. 316.

No action lies at the suit of a pew holder for a mere breaking and entry of the church building. *Howe v. Stevens*, *supra*.

In *Solomon v. Congregation B'nai Jeshurun*, 49 How. Pr. 264, the court refused an injunction restraining the society from removing and changing the pews of the synagogue in violation of the plaintiff's rights as a pew holder, and as contrary to the Jewish customs, usages, and doctrine, the meeting of the society being regular and ratified by the trustees: the equities being denied and the statute giving the trustees full power to regulate the renting of pews.

IV. Free church.

In the absence of any proof that, by usage or otherwise, rights were acquired to special seats, the trustees of a free church have a right to control 22 L. R. A.

places where persons shall sit. *Sheldon v. Vall*, 33 Hun, 854.

Where, by force of an act incorporating religious societies and its supplements, the church trustees are its wardens and vestrymen, who along with the rector control the temporal affairs of the church together with the discretionary authority in the disposition of the seats and pews of the church, the vestry by-laws govern the church in respect thereto. *State v. Trinity Church in Trenton*, 45 N. J. L. 230.

Therefore where the original holder joined in the adoption of the free church plan and occupied the pews till his death, when one was given up, the court held that the deceased had no alienable or transmissible interest in the pew, the right being one in land within the statute of frauds and subject to the rule that an interest in land must be created by deed under seal, and further that at most his interest was merely leasehold for the term for which pews were usually rented at the annual letting. *State v. Trinity Church in Trenton*, *supra*.

Where the church was free, without the renting of seats, and no proof was given of any conditions upon which parties were allowed to occupy any particular seat, or any seats at all, the court held that the plaintiff might be lawfully ejected from a pew although he was in the habit of using a particular pew, a request to vacate having been made. *Sheldon v. Vall*, *supra*.

V. Attachment.

A pew may be attached upon mesne process without the officer entering the building. *Perrin v. Leverett*, 13 Mass. 123.

In Massachusetts, whenever a pew is attached or taken in execution, notice thereof shall be given in writing, by the attaching officer to the clerk of the parish or religious society holding the church wherein the pew is situated, or left at his dwelling house or usual place of abode. Stat. 1822, chap. 93, § 7.

Where the only notice of attachment was an attested copy of the writ, without copy of the officer's return, and no notice of the pew attached, the party owning more than one, the court held there was not sufficient notice under the statute. *Sargent v. Pelce*, 2 Met. 80.

Where the execution is never recorded it is a fatal defect in the tenant's title, as everything requisite to a statutory title must appear of record. *Ibid*.

The levy of an execution gives a legal title over a party holding a mere assignment of the certificate of the right to the pew, which is a mere equitable interest. *Barnard v. Whipple*, 29 Vt. 401, 70 Am. Dec. 422.

The debt or expense incurred in rebuilding a church is not such an incumbrance upon the property as will render the covenantor or grantor liable to damages for a broken contract under his covenant against incumbrances. *Spring v. Tongue*, 9 Mass. 23, 6 Am. Dec. 21.

VI. Assessment and taxation.

A pew right by itself is not the subject of taxation. *Church v. Wells*, 24 Pa. 249

maintained that it must be taken to be the settled law of this commonwealth, however the law may be elsewhere. *Howard v. First Parish in North Bridgewater*, 7 Pick. 188; *Kimball v. Second Cong. Parish in Rowley*, 24 Pick. 347, 349; *Gorton v. Hadsell*, 9 Cush. 508; *Wentworth v. First Parish in Canton*, 8 Pick. 844. It is obvious that if, for any reason, the place of public worship has been

changed so that religious services are no longer held in the church which was formerly used for that purpose, the value of a pew is much diminished; but, when such change has been made merely from reasons of expediency, the parish or proprietors cannot go on and demolish the pew without making compensation to the owner of it. He still has an existing right, which may not be very

The meeting called for the purpose of assessment for repairs must be one of the corporation duly called for that purpose. *Mayberry v. Mead*, 80 Me. 27.

The trustees and congregation can adopt a by-law or resolution to equalize the amount necessary for its support, and assess the proportionable amount upon each pew holder, even in the absence of an express provision in the constitution or articles of association authorizing them to do so. *Curry v. Trustees of First Presby. Cong. of Erie*, 2 Pittsb. 40.

The right to assess a tax upon the owner of a pew, used and occupied by him, and to charge him personally therewith, if it exists at all, is only by reason of the conditions and provisions of the deed under which the pews is held. *First M. E. Soc. v. Brayton*, 9 Allen, 248.

In *Mussey v. Bulfinch Street Soc.*, 1 Cush. 148, where the society was duly incorporated, the court held it had a right to sell its pews, adopting a method of taxation with the consent of all the proprietors, as means of payment under its powers to purchase and sell or dispose of its property.

The taxation of a pew by a corporation may be assented to by the pew owner by receiving the deeds authorizing the levy and assessment of such pews. *Ibid.*

The unaccepted offer made by a pew holder to the corporation under Gen. Stat., chap. 30, § 41, to sell his pew, will not prevent the society's selling the same for taxes, especially where he has occupied the same continuously thereafter for a number of years the society exercising no act of ownership thereover or interfering with the possession. *Curtis v. First Cong. Soc. in Quincy*, 108 Mass. 147.

Where the sale was objected to upon the ground that the consent of all the pew owners was not obtained to the assessment under the Act of 1852, chap. 319, the parish whose house was erected prior to the Act of 1845, never having voted to avail themselves of the Act at a regular parish meeting called for that purpose as required by the Act of 1854, chap. 268, the proceedings being by a direct vote for that purpose, the court thought the parish had not placed themselves in a position to pass a vote to assess taxes on pews. *First Parish in West Newbury v. Dow*, 8 Allen, 369.

The original owner of a pew who bids for the same at an auction sale made by the treasurer for nonpayment of taxes, is not estopped from objecting to the sale as illegal though he continue in possession upon being sued for the price. *Ibid.*

In *Mayberry v. Mead*, 80 Me. 27, it was held that the assessors had no authority to add to the sum raised an outlay at their pleasure, and assess it on the pews in the absence of statutory authority, as their acts were in excess of their powers and therefore void.

The court will not restrain the sale of the pew by the trustees for nonpayment of assessments, upon the ground that the plaintiff was deprived of his share of the proceeds of the sale at the end or termination of the lease of the property. *Abernethy v. Society of the Church of Puritans*, 3 Daly, 1.

Where the terms of plaintiff's deed showed that the grantee should pay an annual sum equal to ten per cent of the original appraised value of the pew,

and whatever further assessment should be made thereon, or forfeit the pew in case of default, the court refused to restrain a forfeiture and sale of the pew. *Ibid.*

Where a *pro rata* assessment upon the value of the pews was made by the trustees in order to defray the proper and necessary expenses, the pew owners will be liable therefor even though higher than the rate of assessment mentioned in the deeds. *Curry v. Trustees of First Presby. Cong. of Erie*, 2 Pittsb. 40.

Where the plaintiff, whose pew was owned by him before the incorporation of the church and subject to all rates and taxes imposed thereon for expenses, etc., sought to restrain the defendant from selling pews for nonpayment of taxes assessed thereon, the court held that it was no objection to such assessment that a clause in the subsequent charter requiring the majority's assent to taxation had been repealed even without notice to him. *Bailey v. Trustees of Power Street M. E. Church*, 6 R. I. 491.

Where an act of incorporation provided that the tax assessment upon pew holders should not exceed a certain amount for repairs, the support of the pastor and congregation, and payment of incidental expenses, and gave leave for any pew holder to surrender his pew upon giving written notice as required thereby, from which time assessments ceased as to him so far as supporting was concerned, with the right reserved for such owner to reoccupy and hold under the same terms upon giving the requisite notice, the court held that such surrendered pews could only be taxed to the yearly amount specified, and that the pastor's support could not be included. *Second Universalist Soc. v. Cooke*, 7 R. I. 69.

Pew owners are not liable *in personam*, for assessments, unless there is some special ground from which a contract to pay may be implied. *St. Paul's Church in Syracuse v. Ford*, 34 Barb. 14.

The trustees of a church have no power to make and levy personal assessments upon the pew owners to defray the salary of the minister as such owners are not liable *in personam* in the absence of special grounds raising an implied contract to pay. *Trustees of First Presby. Cong. in Hebron v. Quackenbush*, 10 Johns. 217.

Where the statute merely provided that the proprietors might at a duly authorized meeting *tax themselves* to raise money to repair when necessary, the court held that it only contemplated a tax personally upon the pew holders, and not the pews, no provision for forfeiture or sale for nonpayment being provided. *Perrin v. Granter*, 80 Vt. 593.

A joint liability cannot exist or result from the ownership of a pew in common, any more than a joint liability of all the pew owners results from a quasi tenancy in common of the whole church. *St. Paul's Church in Syracuse v. Ford*, *supra*, where defendants were sought to be charged as pew rent on an assessment.

A parish is not the proper party to institute an action to recover the amount due for a bid at an auction sale of a pew by its treasurer, for nonpayment of taxes assessed thereon for the support of public worship. *First Parish in West Newbury v. Dow*, 8 Allen, 369.

valuable, but which, nevertheless, is entitled to recognition under the laws. Religious services may be re-established there, or other uses of this pew may be open to the pew holder. The archbishop had no greater rights in respect to the demolition of the plaintiff's pews than an organized religious corporation of any other denomination would have had by reason of its ownership of the

church. The right of the pew owner is not subject to the absolute power of such a corporation to destroy the pew; and it could not properly be ruled, as matter of law, that the plaintiff's rights were wholly gone. Under the terms of the report in the opinion of a majority of the court, the verdict must be set aside, and the case stand for trial.
Case to stand for trial.

In order to render a title under a tax sale deed secure, it must be shown by the record that a majority of the members of the corporation were present or voted to repair, raise the money or assess it on the pews. *Mayberry v. Mead*, 80 Me. 27.

The assessors of a tax upon pews for the repair of the church have no power to add to the sum assessed an overlay at their pleasure, and assess it on the pews in the absence of statutory authority. *Ibid.*

Relief under English law.

In order to entitle a party to a right of action for disturbance in the use of his pew, it must be annexed to a house or messuage in the parish. *Mainwaring v. Giles*, 5 Barn. & Ald. 354, and see cases *supra*, head, "English doctrine."

Sixty years' possession without proof of either a prescriptive right or a faculty is not sufficient to ground an action for disturbance. *Stocks v. Booth*, 1 T. R. 423.

The grant of a part of the chancel by a lay proprietor is not sufficient in law to enable the grantee to maintain an action for pulling down the pews therein. *Clifford v. Wicks*, 1 Barn. & Ald. 498.

In order to prove a title by prescription in a pew it must be shown that the plaintiff has repaired it from time to time. *Woollocombe v. Ouldridge*, 8 Add. Ecol. Rep. 1.

Case is the proper remedy in case of a disturbance of the right of the owner. *Bryan v. Whistler*, 8 Barn. & C. 294.

Yet the action on the case did not lie if the pew was not annexed to a house, the disturbance being one of ecclesiastical cognizance only. *Mainwaring v. Giles*, 5 Barn. & Ald. 354.

But trespass will not lie, as the holder has not the exclusive possession. *Stocks v. Booth*, 1 T. R. 423.

Chancery has power in vacation to issue an *ex parte* prohibition restraining a spiritual court from trying a claim by prescription to pews in parish churches. *Re Bateman*, L. R. 9 Eq. 660.

A spiritual court will be restrained by prohibition from proceeding in a suit by a nonresident or extra parochial person for a pew in the body of the

parish church. *Byerley v. Windus*, 7 Dowl. & R. 564, 5 Barn. & C. 1.

So such a court will be restrained by prohibition, from proceeding, where the pew is claimed otherwise than by prescription. *Ibid.*

Even when so claimed, if the defendant deny such prescription. *Ibid.*

Where the temporal right was in question, the court granted a prohibition against the disturbance of a seat in a church. *Witcher v. Cheslam*, 1 Wils. 17.

Where the consistory court adjudged the right to the pew to be in the plaintiff and admonished the defendant not to sit in it, and the court of arches reversed the sentence, but still admonished the defendant not to use it again, the court held these sentences not conclusive evidence of the plaintiff's right in an action between the same parties. *Cross v. Salter*, 3 T. R. 639.

The ecclesiastical court has jurisdiction over the grant of a faculty to appropriate certain parts of a parish church, which the queen's bench will not presume to have been improperly exercised nor restrain its judgment thereon even though the faculty may be larger than the court had power to grant. *Hallack v. Cambridge University*, 1 Gale & D. 100, 1 Q. B. 593.

In *St. Mary Magdalen Bermondsey Church* in Southwark, 2 Mod. 222, the court held that a vestry on notice given for the purpose by the churchwardens to the parish might, in case the church were ruinous and unrepairable, make a rate for pulling it down and rebuilding it upon its old foundation.

Such rate would be good though it include both the nave and chancel. *Ibid.*

And was enforceable by the spiritual court. *Ibid.* And prohibition will not be against a suit to recover it. *Ibid.*

Yet such a rate cannot be set by a spiritual court. *Ibid.*

It would seem that section 2 of the English Prescription Act, 2 & 3 Wm. IV., chap. 41, does not apply to the case of a pew in the nave of a parish church. *Crisp v. Martin*, L. R. 2 Prob. Div. 15.

R. W.

WASHINGTON SUPREME COURT.

SEATTLE & MONTANA R. CO., *Resp't.*,

v.

STATE of Washington *et al.*, *Appts.*

(.....Wash.....)

1. The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is either express or clearly implied authority to extend them to public property.

2. Tide lands cannot be condemned for railroad uses, by reason of a statutory provision as to the appropriation of "state, school, or county land," under the Washington constitution and statutes, in the nomenclature of which "state" lands did not include tide lands.

3. The fact that a territorial legislature had no power over tide lands does not change the effect of a territorial statute as to railroads along "any river, stream of water, watercourse, etc.," after the admission of the territory as a state.

NOTE.—A peculiar case in respect to the right of one railroad company to overlay the tracks of another company in a narrow place for the purpose of crossing is presented above with an elaborate discussion of the general rights of railroads as to crossing each other.

4. **The state, as owner of the fee of tide lands** over which a street runs and of lands abutting on both sides of the street, is entitled to damages for the occupation of the street for ordinary railroad purposes.
5. **The laying out of a street over tide lands** is authorized only for the extension of existing streets, under Act March 24, 1880, giving a city the right "to project or extend" streets over such lands.
6. **The length of a railroad, or the amount of its business,** does not affect its right to retain its right of way as against a railroad which subsequently desires to appropriate a portion of it, although the amount of damages may be thereby affected.
7. **Railroad tracks constructed lengthwise of a public street** cannot be made to constitute a part of the company's yard so as to come within the provisions of a statute forbidding the crossing of a yard by the tracks of other companies.
8. **The statutory right of one railroad to cross another does not apply** to a commingling of tracks for 400 feet or more along a 30-foot right of way making it impracticable to operate either track, or set of tracks, when any one of the other tracks is in actual use.
9. **The convenience of the railroad to be crossed** and the probability of some other means of accomplishing the same purpose may be considered in determining the necessity of appropriating any part of the right of way by another company, where the statute requires the judge to be satisfied by competent proof of such necessity.
10. **The points and manner of crossing,** the place where, and whether under, over, or at grade are to be decided by the court, on an application by one railroad for the right to cross another, under Gen. Stat., § 1571.
11. **A claim of the right to lay four tracks on another railroad's right of way** may be denied by the court, where the place is practically a street and the whole room applicable to railroad purposes is extremely limited, and allowing two tracks will give better facilities than the other road enjoys.
12. **An attempt to agree as to the points and manner of crossing** must be made by a railroad which desires to cross another before it can seek the aid of the court, under Gen. Stat., § 1571.
13. **It is not error for a judge who heard a case** on the question of the necessity of the condemnation of land, under Code Prac., § 651, to send the jury trial to another judge.
14. **It is proper for a railroad desiring to cross another to pay the expense of necessary frogs and crossing apparatus.**

(August 9, 1893.)

A PPEAL by defendants from a decree of the Superior Court for King County in favor of petitioner in a proceeding instituted to condemn a right of way for railroad purposes. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Ashton & Chapman and Andrew F. Burleigh*, for appellants, the railroad companies:

The petition shows upon its face that it is beyond the power of the superior court, or a judge thereof, to order the appropriation of the 22 L. R. A.

property of the appellants to the use of the petitioner it being already devoted to a public use of as high and of a similar nature to that to which the petitioner seeks to appropriate it, to wit, railroad purposes.

The petition shows upon its face that the appropriation sought to be made is of the tracks and railroad yards and property of the appellants longitudinally for the purpose of enabling the petitioner to lay its tracks and yards along, over, and upon the same space, to be used for the same purposes, and none other, to which the appellants are devoting the property.

Neither the petition nor the proof shows a necessity for the taking as proposed.

Under the general authority to locate and construct a railroad from one point to another the company so authorized is not empowered to take the property of other railroads in use for railroad purposes.

Lewis, Em. Dom. §§ 267, 276; Houseatonic R. Co. v. Lee & H. R. Co. 118 Mass. 391; Worcester & N. R. Co. v. Railroad Comrs. 118 Mass. 561; Boston & M. R. v. Lovell & L. R. Co. 124 Mass. 368; Alexandria & F. R. Co. v. Alexandria & W. R. Co. 75 Va. 780, 40 Am. Rep. 748; Oregon Cascade R. Co. v. Bailly, 8 Or. 164; Contra Costa Coal Mines R. Co. v. Moss, 28 Cal. 323; California Pac. R. Co. v. Central Pac. R. Co. 47 Cal. 549; Chicago & N. W. R. Co. v. Chicago & E. R. Co. 113 Ill. 589; Re Boston & A. R. Co's Petition, 53 N. Y. 574; Baltimore & O. & C. R. Co. v. North, 108 Ind. 486; State v. Drummond, 46 N. J. L. 644; Milwaukee & St. P. R. Co. v. Faribault, 23 Minn. 167; Prospect Park & O. I. R. Co. v. Williamson, 91 N. Y. 552; Re New York Cent. & H. R. R. Co's Petition v. Metropolitan Gas Light Co. 63 N. Y. 326; Re Buffalo, 68 N. Y. 167; Re Providence & W. R. Co's Petition, 17 R. I. 324.

Under a general authority a part of the right of way of a railroad cannot be taken longitudinally for the purposes of a highway, nor can the way be laid through depot grounds, shops, and the like which are devoted to special uses in connection with the road and necessary to its operation and in constant use in connection therewith.

New Jersey S. R. Co. v. Long Branch Comrs. 39 N. J. L. 28; Bridgeport v. New York & N. H. R. Co. 86 Conn. 255, 4 Am. Rep. 63; St. Paul Union Depot Co. v. St. Paul, 30 Minn. 359; Milwaukee & St. P. R. Co. v. Faribault, and Prospect Park & O. I. R. Co. v. Williamson, supra; Atlanta v. Central R. & Bkg. Co. 53 Ga. 120; Lewis, Em. Dom. § 266.

The right, however, of one railroad company to cross the tracks of another where such crossing is necessary is undoubted.

6 Am. & Eng. Encyclop. Law, 537 C; *North-ern Pac. R. Co. v. St. Paul, M. & M. R. Co. 1 McCrary, 302, 8 Fed. Rep. 702; Lewis, Em. Dom. 268; Re Boston, H. T. & W. R. Co. 79 N. Y. 64; National Docks & N. J. C. R. Co. v. State, 58 N. J. L. 217; Pittsburgh Junction R. Co's App. 122 Pa. 511; Barre R. Co. v. Montpelier & W. R. R. Co. 4 L. R. A. 785, 61 Vt. 1; United N. J. R. & Cana. Co. v. National Docks & N. J. C. E. Co. 52 N. J. L. 90; Sharon R. Co's App. 122 Pa. 533.*

The power which the petitioner seeks to exercise is in derogation of private rights.

Therefore constitutional provisions or stat-

utes authorizing its exercise must be strictly construed.

1 Rorer, Railroads, p. 298.

The constitutional provision making the question of public use a judicial question can in no manner change or modify this principle.

Lewis, Em. Dom. § 814; *Norris v. Hill*, 1 Mich. 202; *Clark v. Teller*, 50 Mich. 618; *McCormick v. West Chicago Park Comrs.* 118 Ill. 655.

The words "intersect" and "cross," in section 18, article 12, and the same words in section 1571 of the Statutes, have a well-defined legal meaning, which does not permit one railroad, in crossing or intersecting another, to include in the space occupied by such "crossing" an area fully occupied by the tracks of the railroads being crossed, and which in effect entirely destroys the yard of one of such railroads and renders the operation of the main lines and additional tracks of each impracticable, thereby destroying the greatest public benefit which is the very object of the legislative power.

Rorer, Railroads, p. 86.

The words "intersect" and "cross" are synonymous.

State v. New Haven & N. R. Co. 45 Conn. 344; *Springfield Road*, 78 Pa. 127; *Pittsburg v. Chuley*, 74 Pa. 259; *United N. J. R. & Canal Co. v. National Docks & N. J. J. C. R. Co. supra*; *Flint & P. M. R. Co. v. Detroit & B. O. R. Co.* 64 Mich. 350; *Prospect Park & O. I. R. Co. v. Williamson, supra*.

There must be a very clear expression of the legislative intent to authorize the taking, by the power of eminent domain, of property which has already been devoted to the public use by an earlier exercise of the same power. If both uses cannot stand together with some tolerable interference which may be compensated by damages, or if the latter use, when exercised, must supersede the former, it is not to be implied that the legislature meant to subject property devoted to a public use, to such burdens.

Sutherland, Stat. Constr. §§ 888, 889.

The necessity for such taking must be so absolute that without such appropriation the grant to the latter company will be defeated.

Sharon R. Co's App. supra; *Eaergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 648; *Re St. Paul & N. P. R. Co.* 37 Minn. 164.

Assuming Railroad avenue to have been lawfully created, the petitioner by virtue of the ordinance permitting the laying of its tracks on said avenue, could acquire no rights over tracks of appellant.

Re New York, L. & W. R. Co's Petition, 99 N. Y. 12, 23 Am. & Eng. R. R. Cas. p. 43.

The right of way and tracks of a railroad company cannot be taken for the use of another, unless the public good and interest demand it.

Northern Railroad v. Concord & O. Railroad, 27 N. H. 183; *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.* 36 Conn. 196.

The only exceptions to the rule that one road cannot take longitudinally the property of another are when there is some physical necessity, created by natural obstructions, federal or state prohibitions; or when the expense

would be so enormous as to be inconsistent with the accomplishment of the undertaking, or so large as to make the future operations thereof unprofitable, any of which may create impossibilities or render the construction impracticable, as those terms are understood in this class of cases.

1 Rorer, Railroads, p. 284; *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, 39 Am. & Eng. R. R. Cas. 6; *Sharon R. Co's App. supra*.

The petition fails to state a case within either of the above exceptions.

Re New York Cent. R. Co. 66 N. Y. 407.

It is not shown either by the petition or proof that the petitioner and appellants cannot agree upon the points and manner of a crossing; simply that the appellants cannot agree to the peremptory demand of the petitioner for this particular taking of their property.

1 Hill's Code, § 1571.

This case presents an attempt upon the part of the petitioner to compel an agreement to its plan, but having no opportunity for voluntary action, or the exercise of discretion on the part of respondents. They must agree to this or nothing; accede to this demand or the court would decree it against their will.

Lewis, Em. Dom. §§ 801-804, 806, and authorities there cited; 1 Hill's Code, § 1571; *Re Marsh*, 71 N. Y. 315; *Reitenbaugh v. Chester Valley R. Co.* 21 Pa. 100; *Powers v. Hazleton & L. R. Co.* 33 Ohio St. 429; *Oregon R. & Nav. Co. v. Oregon Real Estate Co.* 10 Or. 444; *Whisler v. Lenawee County Drain Comr.* 40 Mich. 591; *Dickinson v. Van Wormer*, 39 Mich. 141; *Lincoln v. Colusa County*, 28 Cal. 662; *Williams v. Hartford & N. H. R. Co.* 18 Conn. 397; *Moses v. St. Louis Sectional Dock Co.* 84 Mo. 242.

In so far as the ordinance purporting to grant rights to the Seattle & Montana Railway Company conflicted with the rights previously granted to the appellants, it was inoperative and void and the petitioner acquired no rights thereby to enter into or take the whole or any portion of the property devoted by the appellants to their railroad purposes.

Valparaiso v. Chicago & G. T. R. Co. 123 Ind. 467; *Seymour v. Jeffersonville, M. & I. R. Co.* 126 Ind. 466.

There was no power of eminent domain vested in the city of Seattle.

Tacoma v. State, 4 Wash. 64.

As bearing more or less directly upon the questions involved in this case we cite the court to the following decisions:

St. Louis, J. & C. R. Co. v. Springfield & N. W. R. Co. 96 Ill. 274; *East St. Louis Connecting R. Co. v. East St. Louis Union R. Co.* 108 Ill. 265; *Newcastle & R. R. Co. v. Peru & I. R. Co.* 3 Ind. 464; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co.* 35 Mich. 265, 24 Am. Rep. 545; *Morris & E. R. Co. v. Central R. Co.* 81 N. J. L. 205; *South Carolina R. Co. v. Columbia & A. R. Co.* 13 Rich. Eq. 389; *Union Pac. R. Co. v. Burlington & M. R. R. Co.* 1 McCrary, 452; *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.* 29 Fed. Rep. 728; *Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co.* 33 Barb. 420; *Market Street R. Co. v. Central R. Co.* 51 Cal. 588; *Lynn & B. R. Co. v. Boston & L. R. Corp.* 114 Mass. 88; *Chicago,*

St. I. & P. R. Co. v. Cincinnati, W. & M. R. Co. 126 Ind. 518; *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501; *California Pac. R. Co. v. Central Pac. R. Co.* 47 Cal. 549; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174; *Sixth Ave. R. Co. v. Kerr*, 45 Barb. 188, 72 N. Y. 230; *Pennsylvania R. Co. v. Baltimore & O. R. Co.* 60 Md. 263; *Central City Horse R. Co. v. Fort Clark Horse R. Co.* 81 Ill. 523; *Eldridge v. Smith*, 84 Vt. 484; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137; *State v. Mansfield Comrs.* 23 N. J. L. 510; *Redf. Railways*, 249, § 641; 1 *Redfield*, Am. Railway Cas. 299; *Re New York, L. & W. R. Co's Petition*, 99 N. Y. 12; *Pennsylvania R. Co's App.* 93 Pa. 150; *Little Miami & C. and Xenia R. Cos. v. Dayton*, 23 Ohio St. 510; *Pittsburg & C. R. Co. v. Southwest Pa. R. Co.* 77 Pa. 173; *Cake v. Philadelphia & E. R. Co.* 87 Pa. 307; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Sharon R. Co's App.* 122 Pa. 583; *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.* 100 Ill. 21; 1 *Wood*, Railway Law, 669; *Lake Shore & M. S. R. Co. v. New York, C. & St. L. R. Co.* 8 Fed. Rep. 858; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812, 10 Am. & Eng. R. R. Cas. 444; *Alexandria & F. R. Co. v. Alexandria & W. R. Co.* 75 Va. 780, 40 Am. Rep. 743, 10 Am. & Eng. R. R. Cas. 28; *United States v. Chicago*, 48 U. S. 7 How. 195, 12 L. ed. 665; *Kaiser v. St. Paul, S. & T. F. R. Co.* 22 Minn. 149; *Baxter v. Spuyten Duyvil & P. M. R. Co.* 61 Barb. 423; *State v. Montclair R. Co.* 35 N. J. L. 823; *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273; *Union Depot Co. v. St. Louis*, 8 Mo. App. 412; *Re New York Cent. & H. R. R. Co.* 77 N. Y. 248; *Sheen v. Stothart*, 29 La. Ann. 630; *Long Branch Comrs. v. West End R. Co.* 29 N. J. Eq. 566; *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 648; *Re Rochester Water Comrs.* 66 N. Y. 413; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Hannibal v. Hannibal & St. J. R. Co.* 49 Mo. 480; *Iron R. Co. v. Ironton*, 19 Ohio St. 299; *Com. v. Old Colony & F. R. Co.* 14 Gray, 93; *Centralia & C. R. Co. v. Henry*, 81 Ill. App. 456.

Mr. James A. Haight, with **Mr. W. C. Jones**, *Atty-Gen.*, for appellant the State:

The general law in regard to the exercise of the right of eminent domain by railway companies does not expressly apply to the state, and cannot therefore be held to govern the state.

The state is not bound by an act of the legislature unless specially named therein.

This was true at common law of the sovereign.

Broom, Legal Maxims, 72; *Willion v. Berkeley*, Plowd. 289; *Magdalen College Case*, 11 Coke, 66; *Re v. Cook*, 3 T. R. 519; *Reg. v. McCann*, L. R. 3 Q. B. 141; *Dixon v. London Small Arms Co.* 1 App. Cas. 632; *Re v. Allen*, 15 East, 338.

It is true of the United States, whether the statute is an Act of Congress (*United States v. Greene*, 4 Mason, 427; *Dollar Sav. Bank v. United States*, 86 U. S. 19 Wall. 227, 239, 22 L. ed. 80, 82), or an act of a state legislature.

Swearingen v. United States, 11 Gill & J. 373.

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It is true of the state.

Com. v. Baldwin, 1 Watts, 54, 26 Am. Dec. 83; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379; *Sedgw. Stat. & Const. L.* 2d ed. 337; *State v. Kinne*, 41 N. H. 238; *Josselyn v. Stone*, 28 Miss. 753.

Statutes conferring right of eminent domain are strictly construed.

Sutherland, Stat. Constr. § 387; *Gray v. Liverpool & B. R. Co.* 9 Beav. 391; *Martin v. Rushion*, 42 Ala. 289; *Alabama G. & S. R. Co. v. Gilbert*, 71 Ga. 591; *Chicago & E. I. R. Co. v. Willes*, 116 Ill. 449; *Spofford v. Bucksport & B. R. Co.* 66 Me. 26; *Binney's Case*, 2 Bland, Ch. 99; *Cox v. Tipton*, 18 Mo. App. 450; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 121; *Watson v. Acquackanonck Water Co.* 86 N. J. L. 195; *Jersey City v. Central R. Co.* 40 N. J. Eq. 417; *State v. Hudson Terminal R. Co.* 46 N. J. L. 289; *Re Amsterdam Water Comrs.* 96 N. Y. 851; *Lea v. Johnston*, 81 N. C. 15; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560; *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23.

The statute conferring the right of eminent domain applies to lands, and not to waters.

The federal laws relating to the public lands and public domain do not apply to navigable waters.

Baer v. Moran Bros. Co. 2 Wash. 608.

This Act of February 1, 1888, was enacted by the territory of Washington, which at that time had no control over the tide waters of the state and whose assumed control, if embodied in any act of the legislature, must be deemed beyond its power and void, or the act itself must be deemed repealed by the constitution. *Eisenbach v. Hatfield*, 13 L. R. A. 632, 2 Wash. 236.

The tract proposed to be taken being navigable waters, is already devoted to the public use, and therefore cannot be appropriated to another public use, the statute not expressly authorizing such appropriation.

Lewis, Em. Dom. §§ 272, 276; *Wellington, Petitioner*, 16 Pick. 87, 26 Am. Dec. 631; *Re New York & B. B. R. Co.* 20 Hun, 201; *Re Boston & A. R. Co's Petition*, 53 N. Y. 574; *State v. Montclair R. Co.* 35 N. J. L. 823; *Hyde Park v. Oakwoods Cemetery Assn.* 119 Ill. 141; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486.

Waters where the tide ebbs and flows, and navigable streams, whether tidal or not, stand upon the same footing as public highways and other property devoted to public use. They cannot be interfered with under a mere general authority to take property for public use.

Lewis, Em. Dom. § 273; *State v. Anthoine*, 40 Me. 435; *Marblehead v. Essex County Comrs.* 5 Gray, 451; *Charlestown v. Middlesex County Comrs.* 3 Met. 202; *Stevens v. Erie R. Co.* 21 N. J. Eq. 259; *Com. v. Coombs*, 2 Mass. 459; *Atty-Gen. v. Stevens*, 1 N. J. Eq. 869, 22 Am. Dec. 526; *Tucker v. Burlington County Chosen Freeholders*, 1 N. J. Eq. 282; *Allen v. Monmouth County Chosen Freeholders*, 13 N. J. Eq. 68; *Simmons v. Mumford*, 2 R. I. 172; *United States v. New Bedford Bridge*, 1 Woodb. & M. 401.

Courts have not hesitated to recognize and enforce their duty to prevent the usurpation by the legislature of functions not pertaining to it.

Davies v. Saginaw County Suprs. 89 Mich. 295; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 29 L. ed. 477.

The dedication of the tract in question for street purposes, if there were a dedication, was not a dedication for railroad purposes. A railroad is foreign to the legitimate uses of a highway.

Lewis, Em. Dom. § 111.

Messrs. Burke, Shepard & Woods, for respondent:

Whatever rights the railroad respondents have in the premises, either by virtue of their right of way along a 80-foot strip granted by what is known as the "Ram's Horn Franchise," or by virtue of an alleged pre-emption right in the Columbia & Puget Sound Railroad Company, based on its ownership of abutting upland and of improvements on these premises in existence at the date of the Tide-land Act of 1890, these rights are certainly subordinate to the right which the city has exercised, in pursuance of the power of selection conferred upon cities by section 3 of article 15 of the State Constitution, to extend Washington, Main, and Jackson streets from the upland over these intervening tide lands to the harbor line; and railroad tracks can hardly be said to constitute a "yard" when their usefulness for yard purposes is cut short by their being traversed at intervals of 240 feet, by streets sixty-six feet wide, within the limits of which it is absolutely unlawful to switch cars or leave them standing.

Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co. 97 Ill. 506; *National Docks & N. J. J. C. R. Co. v. State*, 58 N. J. L. 217; *National Docks R. Co. v. Central R. Co.* 83 N. J. Eq. 755; *Mills, Em. Dom.* § 11; *Lewis, Em. Dom.* §§ 162, 288, 887, 898; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 609, 80 Am. Dec. 791; *Smith v. Chicago & W. I. R. Co.* 105 Ill. 511; *South Chicago R. Co. v. Dix*, 109 Ill. 287; *Re New York Cent. & H. R. R. Co.* 77 N. Y. 248; *Chicago, R. I. & P. R. Co. v. Lake*, 71 Ill. 838; *Re New York Cent. & H. R. R. Co's Petition v. Metropolitan Gas-Light Co.* 63 N. Y. 826; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 110; *Mississippi & R. R. Boom Co. v. Puttersen*, 98 U. S. 406, 25 L. ed. 207; *Colorado Eastern R. Co. v. Union Pac. R. Co.* 41 Fed. Rep. 293; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 888, 44 Am. Rep. 799; 1 Hill's Code, § 1571; 2 Hill's Code, § 10, p. 842, § 13, p. 883; *Endlich, Interpretation of Statutes*, § 368.

The appropriation decreed does not give the petitioner rights superior to those left to the respondents on the premises, but only such rights as are implied from every right to make a railway crossing, and these with the proper limitation in favor of the existing lines.

Chicago & A. R. Co. v. Joliet, L. & A. R. Co. supra.

The right which the petitioner claims to condemn as against the state rests on the following clause found in that section of the Acts of 1890, authorizing the appropriation of property by private corporations for corporate purposes.

In case the land, real estate, premises, or other property sought to be appropriated is state, school, or county land, the notice shall 23 L. R. A.

be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated.

Stat. 1890, § 2, p. 294.

The law can have no application whatever unless condemnation proceedings can be instituted against the state in respect to state land. The needs of the state, its topographical features, the absolute impracticability if not impossibility of building railway lines in many places without their traversing areas lying below the line of high tide, the duty resting upon the state to encourage, instead of resisting, enterprises that will develop its commerce and utilize its resources, all argue in favor of a construction of this act that will enable public carriers to acquire title as against the state, even to its submerged lands when necessary.

Lewis, Em. Dom. § 285; *Re New York Cent. & H. R. R. Co. supra*; *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280, 282, 30 L. ed. 398, 894; *Clark v. Barnard*, 108 U. S. 436, 445-447, 27 L. ed. 780, 784; *Kerr v. West Shore R. Co.* 127 N. Y. 269.

The contention that the construction of railroad tracks along "a street is foreign to its proper use as such has much authority opposed to it; and is especially untenable in this case, Railroad avenue having evidently been created for the express purpose of affording a pathway for steam transportation.

Mills, Em. Dom. §§ 200, 201; *Snyder v. Pennsylvania R. Co.* 55 Pa. 840; *Milburn v. Cedar Rapids*, 13 Iowa, 246; *Barney v. Keokuk*, 4 Dill. 598, 94 U. S. 824, 24 L. ed. 224.

The petitioner was rightly allowed to assume, by a stipulation tendered, the burden of construction and maintenance of the crossings.

Chicago & A. R. Co. v. Joliet, L. & A. R. Co. 105 Ill. 888, 44 Am. Rep. 799.

Stiles, J., delivered the opinion of the court:

This was a proceeding for the condemnation of a right of way for respondent's railroad, and involves three different appellants,—the state, the Columbia & Puget Sound Railroad Company, and the Northern Pacific Railroad Company. The right of way sought to be appropriated lies over land between the high and low water marks in Elliott bay, on the water front of the city of Seattle.

1. The state appeared by the attorney-general, and moved to dismiss the proceeding as against it, on the ground that the court had no jurisdiction to entertain it, which motion was denied. We think the court erred in its ruling on this point, for the following reasons: The state is the owner of this land, and there is no authority, either express or implied, in the statutes, for the taking of any part of it through exercise of the power of eminent domain. Our eminent domain act, as applied to railroads (Gen. Stat. §§ 1569, 1570; Code Proc. title 18, chap. 5), must be construed, as are all such acts, as having regard only to the taking of private property, unless there is either express or clearly implied authority to extend them further. *Lewis, Em. Dom.* § 273; *State v. Anthoine*, 40 Me. 435; *Marblehead v. Essex County Comrs.* 5 Gray, 451; *Charlestown v. Middlesex*

County Commrs. 8 Met. 202; Stevens v. Erie R. Co. 21 N. J. Eq. 259. The respondent, we believe, concedes thus much, but it claims to avoid the force of it by citing that portion of Code Proc., § 649, providing for service of notice in condemnation cases, which reads as follows: "In case the land, real estate, premises, or other property sought to be appropriated is state, school, or county land, the notice shall be served on the auditor of the county in which the land, etc., is situated." Tide lands are "state" lands in a certain sense; that is, they belong to the state; but in all the nomenclature of our constitution and statutes the latter term does not include the former. Articles 15 and 17 of the Constitution treat of tide lands, while article 16 is devoted to school and granted or state lands. Title 3, chap. 7, Gen. Stat., provided for a "state land commission," to whose supervision "all public lands now owned by or the title to which may hereafter vest in the state" was committed. But this sweeping term "public lands" did not include school lands, tide lands, the harbor areas, the capitol grounds, nor any of the lands upon which the public institutions of the state are located, all of which are committed to the supervision of other boards or officers. As well might it be contended that because a railroad is authorized to enter upon and condemn "any" land for its tracks, depots, shops, roundhouses, etc., it could, by serving a notice upon the auditor of Thurston county, take the entire ten acres upon which the state capitol stands for a depot and shops.

This much for construction of the term "state lands." But it would seem that the legislature, in expressly conferring upon railroad companies the right to construct their lines "across, along, or upon any river, stream of water, watercourse, etc., which the route of such railway shall intersect or touch" (Gen. Stat. § 1572), has gone as far as it intended in this direction. True, this law was passed in 1888, when the territorial legislature had not full, nor perhaps any, jurisdiction over such lands as that in question; but no change has been made in the law, and we can only interpret it as we find it. What it meant then it means now; the change in the conditions from territorial times to the present has not changed the meaning or intent of the statute. The argument from convenience is strongly urged upon us, and it is said that, unless tide lands are thus subject to condemnation, much embarrassment will ensue to the building of railroads, because the situation of the land in many places, and particularly at this place, is such that no land is available for tracks and railway terminal facilities except along the shores of tide waters and upon the tide flats. The state of Washington, by its constitution, has taken an advanced and decided position with regard to navigable waters and the lands beneath them; a position which is scarcely anywhere paralleled by the written law. It proposes to determine for itself what shall be the disposition of these lands, and how the facilities for transportation upon, to, and from its great natural water highways shall be managed and enjoyed.

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It will doubtless encourage and invite the building of railways, so as to take advantage of these lands and waters; but it proposes to say how that shall be done, and when and by whom. All railways built upon its tide lands, and all which may be built there until it shall have provided for them by law, will be there at sufferance, subject to be removed or rearranged, as the legislature subject to the constitution may ordain. It has harbor lines to lay in front of the city of Seattle which must be inviolate and the lands between which must be inalienable, except as the constitution permits; and it has its own policy as announced in legislation already enacted, concerning the disposal of the other tide lands.

2. The disposition of the case is, at this point, complicated with another matter, viz., the fact that the place over which this condemnation was sought was within what is known as "Railroad Avenue," a street laid out by the city council of Seattle in 1889, before the adoption of the constitution, and perpetuated in the freeholders' charter of 1890. The court below held that, inasmuch as this was a street authorized to be laid out by the constitution and the statutes of the state, the state, although a proper and necessary party to this proceeding, was not entitled to any consideration in the assessment of damages for the laying of the railroad along the street. We are unable to see why the state, as owner of the fee, and of lands abutting on both sides of the street, should not be entitled to damages for the occupation of the street for ordinary railroad purposes, even conceding this to be a lawful street, unless we were to adopt the theory that such occupation is not an additional burden for which the abutting owner may claim damages,—a theory which could hardly stand under our constitutional provisions against the taking or damaging of property without compensation, as the state would certainly be entitled to rank as a private owner in such a case. *Hatch v. Tacoma, O. & G. H. R. Co.* 6 Wash. 1. Neither the constitution nor the statute assumes to confer the fee of any tide lands for streets; an easement only is given.

The court's ruling last referred to, however, would not cut an important figure in this case, in view of a dismissal as to the state. But the main question is left,—whether Railroad avenue has any legal existence,—and this question vitally concerns the other parties to the proceeding. This street was declared to be a public street of the city immediately after the fire of 1889, when all of the ground covered by it was free from buildings or other structures, and it has been kept free ever since, although it occupies some of the space where such structures formerly stood. It begins at a point on the northeasterly shore of Elliott bay, and skirts the bay for several miles, much in the form of the letter U. It does not touch the upland at any point except where it begins, but keeps mostly within the low-tide line, until it passes south of King street, where the land recedes to the south and east, forming a large inner bay, which the street crosses. It is 120 feet wide, and is not the extension of any

city street. While it was laid out as and declared to be a public street, its real purpose was undoubtedly to afford an open space for the use of railroads, and its entire width, except space for sidewalks, has been covered by specific grants to railroad companies, of a certain number of feet each. When fully occupied, in accordance with the terms of these charters, the public will have no practical enjoyment of any part of it except at street crossings. Ordinarily, a city has no power to take land merely for the purpose of furnishing a railroad company with a right of way. Railroad companies are endowed with the same power of eminent domain which cities have, to enable them to take care of themselves. Neither corporation can make use of its power to condemn land for the use of the other. *Chicago & N. W. R. Co. v. Galt*, 133 Ill. 657, 672; *Jagare v. Chicago*, 139 Ill. 46. But the application of this rule to the present case may not be admitted, inasmuch as this street was not procured by condemnation.

Waiving the fact that the ordinance establishing Railroad avenue at the place in controversy was passed in July, 1889, when the city of Seattle had no jurisdiction to extend streets over tide lands, we shall treat the declarations of the charter of 1890 as in all respects a formally sufficient exercise of the authority conferred upon cities to extend streets over tide lands, even if the ordinance obtained no force at the adoption of the constitution. The article of the constitution on harbors and tide waters (15), after providing for the reservation of an outer harbor area not less than 15 nor more than 600 feet wide along the water front of all incorporated cities "for landings, wharves, streets, and other conveniences of navigation and commerce," and further providing for the leasing of rights to build structures in aid of commerce upon the harbor areas, contains this language: "Sec. 3. Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided." This provision is claimed to be self-executing, though it would seem that such a construction might be very embarrassing when the matter of the disposal of the inner tide lands comes up (that matter being committed entirely to the control of the legislature), since the state's officers can have no official knowledge of any city ordinance laying out streets unless provision is made for the authentication of such ordinances and their deposit among the records of the state. But, passing this point, the legislature, in the Act of March 24, 1890, providing for the government of cities of 20,000 inhabitants, confirmed the right granted in the constitution, in its enumeration of the powers of such cities, in these words: "Thirty-seventh. To project or extend its streets over and across any tide lands within its corporate limits, and along or across the harbor areas of such city, in such manner as will best promote the interests of commerce." In *Columbia & P. S. R. Co. v. Seattle*, 6 Wash. 382, we construed this statute as it reads, to enlarge the authority expressed in the constitution, so as to authorize

a city to extend its streets across any tide lands, although the streets extended might never touch the harbor area. But now the position is taken that this statute covers the laying out of a street, at the will of a city of the first class, in any direction, and to any extent, whether there was a street to begin with or not. If that is the construction, it must be found within the language of the statute, or by a plain implication therefrom. The constitutional provision will clearly not admit of any such construction, for the words there used clearly imply that the only purpose sought to be subverted was to enable the public to freely reach the harbor area, where, of necessity, commerce between the land and the water must meet. The statute broadens the right to extend streets, and will be enforced as enacted. But, in searching for the authority claimed by the respondent, we note: (1) That the power is to extend or project streets, and by those two words we understand the legislature to have meant the same thing. They are common words, and, when applied to an existing thing, like a street, they mean to construct it in the same direction and with the same width. (2) They are used with reference to existing things, since what a city may extend is its streets. (3) The power is exhausted with the extension of existing streets.

Counsel pleads for a common-sense construction of the statute, and suggests the absurdity of a case where the harbor area is a half mile or more from the shore, and only streets to it can be laid out because the city is so situated that there can be no streets to extend crosswise. We admit the absurdity that would occur if such a state of things were left to continue for any great length of time. But we submit that we have exhausted the sense of this statute, common and all, when we have read it according to its plain and unmistakable language; and we can only repeat what has been said before,—that this matter is all in the hands of the legislature, which will, no doubt, remedy any absurdities which may result from the administration of this law as it was enacted. We may, perhaps, be permitted to doubt, however, whether the legislature will ever, advisedly, authorize the opening of such a street as this one seems to be, in a portion of its length, and the surrender of it bodily to three or four railroad companies in specific grants, to the practical exclusion of all other possible railroads from the city, except as they may pay tribute to those already in possession. This street was laid out 120 feet wide, which is an unusual width, and perhaps a greater width than that of most of the city's streets; but if 120 feet, why not 200, or as great a width as the city may determine? And if any action of this kind which the city may take for the benefit of railroad companies is to be held binding upon the state, why not go further, and claim that, where the route of this street passes to the southward over tide flats a mile or more, it might be widened indefinitely, so that broad ground would be furnished for side tracks. It is said in this record that the respondent has acquired 140 acres of these tide flats for its terminal purposes by paying

for them, but the principle which it invokes as against the state would have applied almost as well had the city extended another street over that whole area, and then given it a franchise to lay tracks across it. It is not the business of municipal corporations either to build railroads or to specially facilitate railroad companies. They have the power to regulate them, and nothing more. Gen. Stat., § 520, subdiv. 9. Having disposed of the state's part of this case, we now turn to the other appellants.

3. The respondent is constructing a new railroad, which, together with other allied roads, will constitute the main line of the Great Northern Railway system, extending from St. Paul, Minn., and West Superior, Wis., to the city of Seattle. It will need, and has already arranged for, large terminal and repairing and building facilities at Seattle, a part of which are to the north of the city, and the remainder are to be at a distance of some five miles from the others, at the south. Ground for a passenger station has been obtained in the neighborhood of Jackson and Third streets, and the place intended for the freight yards is the 140 acres above spoken of. Its franchise over Railroad avenue consists of a permission to use 60 feet in width of that street throughout its length for one or more tracks. This width will accommodate four tracks, and it is prepared to place them all at once. But when it reaches a point opposite the principal business portion of the city it comes upon ground which has for many years been wharfed over by the appellants, and used by them for railroad purposes, partly under ordinances of the city, one of which was under discussion in this court recently in the case of *Columbia & P. S. R. Co. v. Seattle*, and partly without any public authority shown by the record. A little to the northward of Washington street the four tracks of the respondent, curving to the westward, meet two of the appellants' tracks, curving slightly to the east. But for the fact that Railroad avenue, in the middle of which the respondent's tracks are, curves to the west of this point, there might be no necessity for any crossing or interference of the two sets of tracks, for by running its line some 60 feet to the west over private property and street crossings, respondent could lay its tracks substantially parallel to the others. Proceeding further southward, the position of the appellants' two tracks is such, curving as they do from nearly the center of Railroad avenue at Washington street, to nearly the extreme west side of the avenue at Main street, one block further south, and back across the avenue to its extreme east side at Jackson street, still another block south, that within a distance of some 700 feet the respondent's two easterly tracks will cross the appellants' said two tracks twice, and its two westerly tracks, for about 500 feet, will be upon and among said two tracks in such a manner, owing to appellants' curves, that no part of either track can be operated while any portion of another is in use. Add to this that 60 feet south of Washington street the Columbia & Puget Sound company, which uses the easterly of appellants' said two tracks,

has a side track extending thence, parallel to its other track, to Jackson street and beyond; at Main street another side track commences within respondent's west track, and curves to the north and west to a wharf where the Columbia & Puget Sound Company has its passenger station; at Jackson street the Northern Pacific Company, beginning about the east line of Railroad avenue, runs out a spur, and crossing all of respondent's tracks going west to a wharf; and just north of Jackson street the Columbia & Puget Sound Company turns off two side tracks near the east side of Railroad avenue, which tracks run to Washington street. The four main tracks of respondent do not touch the last-mentioned side tracks, but at Main street it is proposed to run two tracks from its two easterly main tracks, by about an eight-degree curve, easterly across appellant Columbia & Puget Sound Company's two side tracks to its station grounds at Jackson and Third streets; and again at King Street, the Columbia & Puget Sound Company has two elevated coal bunkers for delivering coal to ships, with several tracks on each. One of these bunkers is high enough to permit of trains of cars passing under it, but the other is not, and, in order that room may be made, it is proposed to rearrange and rebuild this bunker. There is no practical possibility of respondent's passing these bunkers to the southward in any other way than that proposed, unless its entire road be carried to the east past its passenger station, and thence across appellants' tracks beyond where the bunker tracks commence. By keeping its tracks to the west, from Washington street south to about Jackson, respondent can avoid all of the complicated crossings, and by that method, if it pursues the plan of continuing its four tracks southward, they will cross only the spur of the Columbia & Puget Sound Company to its wharf, the spur of the Northern Pacific Company to its wharf, and the elevated tracks to the coal bunkers; all of which crossings will be nearly at right angles; and its passenger station tracks will need to cross but three of appellants' tracks once at Jackson street. The proof shows such an arrangement would be practically as easy a line for respondent to build and operate as the one proposed by it. It was the testimony of every witness upon the stand in the case that the plan proposed by respondent made a most undesirable series of crossings, which are to be avoided, from a railroad point of view, by all means, if reasonably possible; and from the standpoint of the public, which has occasion to use the cross streets constantly, and which will furnish the patronage of all these railroad companies, the desirability of some other scheme is equally as great, for the constant dangers arising from the operation of a railroad traffic amounting to from 200 to 400 train movements a day, according to the estimates of both parties, are too obvious for argument, occurring as they will in the heart of a busy city. As proposed, in the space of 700 feet there are 28 crossings at such a sharpness of angle that trains could not move upon some of the tracks which lie substantially parallel to each other without col-

tion; and such facilities as the Columbia & Puget Sound Company has for the transaction of its local business in the city, over the side tracks mentioned, to wagons, would be almost entirely destroyed. Time and effort were expended in showing that this arrangement of tracks could be operated by means of interlocking switches and watchmen. Of course, it could be done, and it does not take evidence to demonstrate it; but neither does it take evidence to show that it must be a most embarrassing situation to all the parties to the case, as well as to the public. Respondent suggested that, in so far as the appellants' principal tracks were concerned, they could save the most of these crossings by moving their tracks over to the east side of Railroad avenue, where the city has voted them 30 feet of the avenue for that purpose; but it is well understood that one railroad company is not thus required to turn out of its established way for another coming into the same neighborhood later. The last comer must accommodate itself to the first, unless another contention of respondent, to be noticed later, is sustained. Probably much, perhaps all, of this difficulty has arisen from the attempted establishment of Railroad avenue, and the assumption of the respondent that it could not travel outside of its limits. If so, an ordinance from the city is all that lies in the way of correcting the error.

Other matter in the case related to the comparative length of the respective railroads, and the traffic upon them past and prospective. Particular obloquy was sought to be cast upon the Columbia & Puget Sound road because it is but a short line, leading into some coal districts. But the statutes, and the administration of them by courts, do not make the right of eminent domain depend upon the length of a railroad or the amount of its business; and neither does the right of a railroad company to keep what it is in good faith employing in such business as it has depend upon the like considerations. Those matters relate entirely to the damages to be allowed when it is proposed to cross their rights of way and tracks,—a subject which this opinion will not discuss. The evidence clearly showed that neither of the appellants had such facilities in Seattle as they ought to have. These were somewhat awkwardly situated for the present and future operation of the roads, but they were put there when they had to serve a much smaller community, and the owners now have to operate them as best they may. All of this, however, does not detract from the right of these companies, as against the respondent, to have them remain as they are, undisturbed, except as its necessities, as an equal servant of the public, may require them to be trenched upon.

4. All this is certainly true, unless a point now to be noticed is sustained. Section 1571, Gen. Stat., reads as follows: "Every corporation formed under this chapter for the construction of a railroad shall have the power to cross, intersect, join and unite its railway with any other railway before constructed at any point in its route, and upon the grounds of such other railway company, with the necessary turnouts, sidings,

switches and other conveniences in furtherance of the object of its connections, and every corporation whose railway is, or shall be hereafter, intersected by any new railway, shall unite with the corporation owning such new railway in forming such intersections and connections, and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road." Without any direct provision on the subject, one railroad must have the right to cross another, since the authority to build railroads from one part of the country to another could not be exercised without it; and the foregoing section merely regulates the manner of acquiring that right, with some others. Appellants contend, however, that the plan proposed by respondent is not entitled to be treated as a crossing, but as a longitudinal taking of their property devoted to public uses, and therefore not authorized either by the statute or by decisions of courts. It is a general rule that property which is already devoted to one public use, such as streets, parks, burying grounds, state, county, and other public institutions, and railroad rights of way, station grounds, terminal grounds, yards, and the like, cannot be taken for another public use under the eminent domain laws, unless there is express or clearly implied statutory authority therefor. Gen. Stat., §§ 1574, 1575, provide for cases where public grounds under the jurisdiction of counties and cities are necessary for railroad purposes, but there is nothing further in our statutes on that subject except that Code Proc., § 658, makes provision for the cases where it is necessary for a railroad to go through a canyon, pass, or defile already occupied by an earlier road. The leading cases on this point are *Re Boston & A. R. Co.*, 53 N. Y. 575, concerning the taking of a public park, and *Re Buffalo*, 68 N. Y. 167, where lands used for railroad yards, tracks, and switches were sought to be taken for the building of a canal. Others are: *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486; *Providence & W. R. Co.'s Petition*, 17 R. I. 324; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Barre R. Co. v. Montpelier R. Co.* 61 Vt. 1, 4 L. R. A. 785; *Sharon R. Co.'s App.* 122 Pa. 533.

Appellants, as an inducement to the holding that the respondent's plan amounts to a longitudinal taking, ask a finding that the tracks to be crossed constitute a part of their yard, but we do not think they make out a case for the application of the rule as to yards. Certainly the Northern Pacific Company does not, for it has only one track and one switch leading to its wharf within the disputed ground; and as to both appellants, if the ordinance No. 262, sustained in *Columbia & P. S. R. Co. v. Seattle*, *supra*, is to have any force in limiting its authority to lay tracks along the water front, they exhausted their right to lay tracks when they

constructed a double track along the 80-foot right of way designated by the ordinance, for there was no mention of side-tracks in the ordinance except switches to wharves. As to the bunker tracks in King street, we think it safe to say that no railroad company should be permitted to claim that tracks, no matter how numerous, when constructed lengthwise upon a public street, constitute a part of its yard, so that they may not be crossed by a new railroad where there is a reasonable necessity therefor. In such case, all that the railroad has is a permanent license, not coupled with any interest in or ownership of the land, or any contingency through which it may acquire the land. But, notwithstanding we cannot find these to be yards of the appellants, it appears obvious from the maps on file in the case that as to the two westerly tracks of respondent there is much more than a crossing, or even a double crossing, for these two tracks lie lengthwise of the appellants' 80-foot right of way, or so nearly so that for a distance of more than 400 feet it will be impracticable to operate either track or set of tracks when any one of the other tracks is in actual use, for want of passing room. We do not think that the creation of such a situation is what the law means when it gives one railroad the right to cross another, nor did any of the witnesses, some of whom were persons of large experience as engineers and practical railroad operators, speak of any such case existing. One instance of a double crossing caused by the straight track of one road intersecting the curved track of another at Dayton, O., was shown to have existed for some years, ending fifteen years ago; but whether that case was brought about by condemnation proceedings or not did not appear. It was testified that there were some worse crossings than this proposed, all things considered; and the respondent, as an example, put in evidence a number of the Chicago Engineering News, containing a cut of a certain set of crossings in that city at Stewart avenue and Twenty-First street. The crossings illustrated look complicated enough certainly, but, although five different railroads cross each other's tracks at that point, none of them having less than two, and one of them having four tracks, there is not one double crossing, and there is no instance of a track or set of tracks overlapping and running parallel to and upon the tracks of another road. Moreover, the article to which the illustration belongs is devoted to a lamentation over the state of things in Chicago growing out of the numerous and complicated grade crossings of railroads, of which the Stewart avenue crossing is presented as a fair sample, and to a consideration of the best method of doing away with what has become such a nuisance that the city of Chicago, as the article shows, has ordered the elevation of all such tracks, at immense cost, or their removal from an area half a mile wide by two or three miles long. The argument to be drawn from this example is not favorable to this proposition, considered as a crossing. Concerning a proposed crossing very much less complicated than this, it was said in *Missouri, K. & T. R. Co. v. Texas & 22 L. R. A.*

St. L. R. Co., 10 Fed. Rep. 497: "The most common experience has little need of the testimony of experts to aid it in reaching the conclusion that such crossings as this application seeks to have restrained would be such a source of danger of collision in the transit of trains as could not be adequately compensated by any moneyed consideration, and such as should not be permitted except under the pressure of some paramount necessity for the service of the public convenience or of the state."

5. But passing this matter, the final position of the respondent is that, no matter what may be the character of the crossing, or how destructive of the property of the existing road, "it is for the corporation building the new line to select its route, as all the considerations bearing upon that selection dictate to it; and that, if such route requires a crossing and recrossing of an existing line, the new corporation has as much right, under the statute, to make such crossing and recrossing, as it would have to make a single crossing, though it admits that an attempted crossing in bad faith, merely for the purpose of vexing the senior road, should not be permitted. This is to say that, so long as the junior road is not convicted of bad faith in its proposition, the courts have no right to inquire into the necessity of the place and manner of crossing, but must simply proceed with an assessment of damages; and this requires a study of our statutes on the subject. Certainly all of the provisions of Gen. Stat., chap. 5, title 18, conferring these powers on railroad corporations, are to be exercised in the manner provided for in Code Proc., chap. 6, title 9, known as the "Eminent Domain Act." Section 1571 of the former volume, concerning crossings, expressly makes the latter law applicable where the companies cannot agree. Now, it is a provision of Code Proc. § 651, that if at the time and place appointed for the hearing of the petition the court or judge shall be satisfied by competent proof "that the land, real estate, premises, or other property so sought to be appropriated, are required and necessary for the purposes of such enterprise," he shall make an order for a jury. The mere statement of the petitioner is not, under this law, to be taken as final, but the court must be satisfied by "competent proof," and upon that, and that alone, he is authorized to act further. Nothing is said about cases where there may be a failure of such proof, but the plain implication follows that if the proof is not made the proceeding must fail; and this proof must satisfy the court that the condemnation as proposed is "required and necessary," a mere showing of convenience or lessening of expense not being sufficient. *Lewis, Em. Dom. § 303; Re New York Cent. R. Co. 68 N. Y. 407; Sharon R. Co's App. 123 Pa. 533; Re St. Paul & N. P. R. Co. 37 Minn. 164.* The same rule applies to a crossing, and according to the record the respondent must have been proceeding in the court below in exact accordance with it, for it voluntarily begun the case by offering proof to sustain the claim that the crossing proposed was necessary, and some hundreds of pages of testimony are devoted to nothing

else. But respondent's claim goes further, and asserts that if there exists a necessity for it to proceed in the way it has laid out, the court is not to consider the convenience of the railroad to be crossed, or the practicability of some other means of accomplishing the same purpose. Plainly, however, if the junior road proposes to cross at a place or in a manner which will be disproportionately injurious to the senior road, and there be, near by, some other place where the junior road can pass and go on its way without any crossing at all, it must follow that there is no necessity for the crossing; or, if there be some other point or means of crossing imposing less cost and difficulty of operation to the senior road, and merely additional expense to the junior, the like want of necessity is evident. Respondent does not suggest what disposition is to be made of that portion of Gen. Stat., § 1571, which provides that, "if two corporations cannot agree upon . . . the points and manner of such crossings . . . the same shall be ascertained and determined in the manner provided by law for the taking of lands." But it is very important, and, it seems to us, is decisive of this whole matter; and it is especially pertinent here, because there must be some crossing of appellants' tracks to enable respondent to prosecute its enterprise. The matter of the points and manner of crossing—the place where, and whether under, over, or at grade—is to be decided upon the application to the court, and by the court, since it is an exercise of its equitable powers. *Chicago & N. W. R. Co. v. Chicago & P. R. Co.* 6 Biss. 219; *Humeston & S. R. Co. v. Chicago, St. P. & K. C. R. Co.* 74 Iowa, 554.

■ *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, is cited in support of the contrary view, to the effect that the junior road can determine the point of crossing for itself, so long as it is willing to pay for the damage it does, which was assessed in *Lake Shore & M. S. R. Co. v. Chicago, St. P. & K. C. R. Co.* 100 Ill. 21. In the former case the court was construing a statute in the exact words of our General Statute, § 1571, with this important difference: that whereas our statute provides that where there is no agreement between two corporations as to the points and manner of crossing, "the same shall be ascertained and determined in the manner provided by law for the taking of lands," etc., the Illinois statute merely provided that "the same shall be ascertained and determined in manner prescribed by law." Ill. Stat. 1885, p. 1914. Moreover, the eminent domain act there under discussion did not contain any provision requiring the court to be satisfied of the necessity of the proposed taking. Id. p. 1041 *et seq.* Counsel in the case were contending that, although the authority to cross was expressly conferred by the statute, it was inoperative, because it was a taking of property which could not be taken without compensation, and no law had been enacted for the ascertainment of such compensation, or the determination of the points and manner of crossing. This necessitated the court to say that, if the contention set up were sustained, it must result that in

Illinois no railroad could cross another at any point, and it held that the eminent domain act was adapted and intended to ascertain damages for railroad crossings as well as other condemnations of land; but it confessed that the law had not provided the method of ascertaining the points and manner of crossing, and therefore fell back upon the language of the act, which gave to every railroad company the right to cross any other railroad "at any point on its route," and interpreted it to mean that the petitioner could fix its own point of crossing, referring at the same time to a former law which authorized commissioners to fix points and manner of crossing. The difference between the two statutes is so obvious that comment is unnecessary. *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.*, 116 Ind. 578, was a discussion of a statute exactly like our General Statute, § 1571, except that in case of disagreement the points and manner of crossing were to be fixed in the first place by commissioners, as was the amount of compensation. On a question as to the sufficiency of allegations showing an inability to agree, one side arguing that the necessity for showing disagreement only went to compensation, the court said: "We cannot see how it is possible, looking solely to the words of the statute, to hold that all that it refers to is the matter of compensation, since to reach such a conclusion many strong and clear words must be rejected. The language is plain, but, plain as it is we think it is not more plain than the object the legislature intended to accomplish. It is very evident that the legislature did not mean to invest the younger company with power to cross at any point and in any mode it might elect, but that, on the contrary, it meant to prevent the arbitrary exercise of the right to cross the older line. . . . Our conclusion is that, the negotiations which the statute requires the two corporations to conduct, are negotiations concerning the three things we have enumerated [compensation and points and manner of crossing]; and that if these three things cannot be settled by negotiation they must be brought before the appropriate tribunal for adjudication."

Cases upon statutes similar to ours and that of Indiana are found in *St. Louis Transfer R. Co. v. St. Louis, I. M. & S. R. Co.* 100 Mo. 419; *Montana Cent. R. Co. v. Helena & R. M. R. Co.* 6 Mont. 416; *Toledo, S. & M. R. Co. v. East Saginaw & St. C. R. Co.* 72 Mich. 206; *Union Pac. R. Co. v. Leavenworth, N. & S. R. Co.* 29 Fed. Rep. 728; *Re Lockport & B. R. Co.* 77 N. Y. 557; *Re Minneapolis & St. L. R. Co.* 86 Minn. 481, and *Re St. Paul & N. P. R. Co.* 87 Minn. 164,—in all of which the matter of the points and manner of crossing are treated as, or held to be, matters of judicial determination, and not of arbitrary exercise by the petitioning corporation. In the case cited above from 6 Biss., the United States circuit court of the northern district of Illinois held that although the general policy of the legislation of that state was to allow a new railroad to cross an existing road at grade, equity would interfere to compel it to cross overhead, at a different

place, although at some cost, where the crossing proposed would materially interfere with the business of the senior road. Judging this case by our own statute, and by these authorities, we do not think the respondent made out a case of necessity that it should cross appellants' tracks at the point and in the manner proposed, except as to the crossing beneath the coal bunkers of the Columbia & Puget Sound Company. One of the items in which it failed has not yet been mentioned, viz. its proposed crossing with four tracks. It showed no definite intentions as to the use of so many tracks, but suggested that it would probably use the easterly two tracks for the passage of its freight and passenger trains, the third track for the passing and repassing of locomotives, and the fourth track for connections with wharf spurs. All of these tracks it calls "main tracks," but they are obviously so in name only. The main line consists of but a single track, and the three additional tracks are for mere connections between the shops and the freight yard. Conceding, however, that a necessity was shown for two tracks for the purposes of such connection through the city, it was not suggested why these two tracks could not perform the entire service required or likely to be required. Ordinarily, under the statute, a railroad company is permitted to condemn land to a certain width, and may maintain thereon as many tracks as it sees fit, but in such a case as this, which the principal of respondent's witnesses likens to the case of a canyon or defile, the right of way allowed to be taken should be limited to what is necessary, and no more. With two tracks—an inward and an outward—it would have facilities far better than those of either of the appellants, and equal to those of nine railroads in ten in the country. Being located practically upon the streets of a city, where the whole room applicable to railroad purposes is shown to be extremely limited, it should not expect more, and certainly the public interest would not be subserved by conceding more for the purposes set forth.

6. Appellants claim that there was no attempt on the part of respondent to agree with them as to the points and manner of crossing, and the record sustains them. In cases of crossings like this one courts will not be technical in requiring an effort to agree, but the theory adopted by respondent, and its letter to the appellants, shows that it purposely limited its proposition to one of compensation for the specific crossing described, and none other. The importance of showing an attempt to agree upon the three cardinal points appears from the cases we have cited elsewhere.

7. We do not think there was error on the part of the judge who heard the case on the question of necessity in sending the jury trial to another judge, for the case consisted of two distinct branches. If a judge should die, or retire from the bench after ordering a jury, there could certainly be no necessity for going over the preliminary part of the case again; but on a motion for a new trial before the second judge we think the whole case would be open for re-examination, and the better practice would be for the same judge to hear the entire matter.

8. The proposition of the respondent to stipulate that it would put in and maintain at its own expense all necessary frogs and crossing apparatus was proper, and is sustained by authority. *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799. So, also, we think, would be the proposition to construct and maintain the overhead arrangement for the crossing under the bunkers, the manner of construction being left to the court in case the parties could not agree.

Other questions in the case appealed have either been covered or are immaterial to a decision.

The decree of appropriation will be reversed, and the petition dismissed.

Dunbar, Ch. J., and Anders and Scott, JJ., concur.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania
v.
POTTSVILLE IRON & STEEL CO., *Appt.*

(157 Pa. 500.)

The immunity from taxation of the capital stock of a corporation "exclusively engaged in manufacturing," under the Act of 1889, is not lost by its possession of the ancillary power of mining to supply its own raw material, especially where it has never used, or sought to use, this power.

(October 2, 1892.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Dauphin County, settling the account of the auditor general and state treasurer of a tax on the capital stock of the defendant corporation for the years 1890 and 1891. *Reversed.*

The material portion of the opinion of the court below was as follows:

"(1) The Pottsville Iron & Steel Company, defendant, has a capital stock of \$450,000. It paid no dividends during the tax years 1890 and 1891, and its proper officers made and returned to the auditor general for

NOTE.—See, on the question of the exemption of manufacturing corporations, the case next following, *Com. v. Juniata Coke Co. (Pa.) post*, 232, also the earlier cases of *Com. v. Northern Electric L. & 22 L. R. A.*

P. Co. (Pa.) 14 L. R. A. 107, with note on the question, What constitutes manufacture?—and *People v. Wemple (N. Y.)* 14 L. R. A. 70

each of said years a valuation of the capital stock at par or \$450,000. The auditor general thereupon settled and entered, and the state treasurer approved, an account for tax for said years, charging tax at three mills upon the appraised value of the stock for each of said years, the tax amounting to \$1,350 for each year, or \$2,700 for the two years. From the account so settled, entered and approved, the company duly appealed to this court.

"(2) Defendant was chartered under clause 17 of section 2 of the General Corporation Act of 1874, which provides for the incorporation of companies for 'the manufacture of iron or steel, or both, or of any other metal, or of any article of commerce from metal or wood, or both.' Section 88 of said Act provides that—'companies incorporated under the provisions of this Act for the manufacture of iron or steel, or both, or of any other metal, or of any article of commerce from wood or metal, or both, unless otherwise provided by this Act, shall, from the date of the letters-patent creating the same, have the powers and be governed, managed, and controlled as follows:

" 'Clause 1. Every such corporation may, in the manner prescribed in this Act, increase its capital stock to an amount not exceeding five million dollars, and shall have the right to purchase, lease, hold, mortgage, and sell real estate and mineral rights, to prove and open mines, to mine and prepare for market, or for their own use and consumption, coal, iron ore, and other minerals, and to erect and construct furnaces, forges, mills, foundries, manufactories and such other improvements and erections as they may deem necessary, and to manufacture iron and steel, or any other metal, or either thereof, in all shapes and forms, and either of these metals, exclusively or in combination with other metals or wood, and to transport all of said articles or any of them to market, and to dispose of the same, and to do all such other acts and things as a successful and convenient prosecution of said business may require; *Provided*, They shall not at any one time have more than ten thousand acres of land within this commonwealth, including leased lands.'

"(3) In its application to the governor for charter the company set forth that its object in seeking incorporation was for the purpose of 'having the right to dig iron ore, build and operate furnaces, forges, manufactories, rolling mills, and to manufacture machinery and other manufactures of iron and steel, and to have and exercise all of the rights and privileges conferred by the Act of April 29, 1874.'

"The company has no powers, privileges, or franchises except such as are conferred by the General Corporation Act of 1874 upon all corporations chartered since the date of its passage for the manufacture of iron or steel.

"(4) The capital stock of the defendant company is now, and was in 1890 and 1891, invested exclusively in blast furnaces, rolling and steel mills fully equipped, and in sundry building, appertaining thereto, in which said blast furnaces, rolling and steel mills it was and is engaged in the manufact-

ure of pig iron, railroad iron, steel beams, channels, bars, plates, etc., for structural purposes in the county of Schuylkill, employing constantly from 800 to 1,200 men in said manufacturing business.

"(5) The defendant has never at any time exercised the right of eminent domain, nor engaged in the business of brewing or distilling spirits or malt liquors.

"(6) The defendant company is not and never has been engaged in any business other than that of manufacturing, as aforesaid. No part of its capital is invested in iron or coal land, it does not dig or mine iron ore or coal either to sell to others or for use in its own furnaces, but all of its capital is invested in its strictly manufacturing plant, property and business, and its corporate energies are confined exclusively to such manufacturing business.

"Upon the above facts defendant claims to be within the proviso to section 21 of the Revenue Act of 1889, which relieves from taxation upon their capital stock corporations 'organized exclusively for manufacturing purposes and actually carrying on manufacturing within the state' and we should so hold were it not for the decision of the supreme court in *Com. v. Westinghouse Electric & Mfg. Co.*, 151 Pa. 265, which, as we understand it, requires us to deny any exemption whatever to any corporation in whose charter we find a power, used or unused, to engage in any business other than manufacturing. In *Com. v. Lackawanna Iron & Coal Co.*, 129 Pa. 346, it was held that the ownership of iron ore and coal properties and the mining of iron ore and coal for the supply of raw materials, while frequently convenient and desirable, were nevertheless, not essential or legally incident to the business of manufacturing, and, as we find that the law under which defendant is incorporated and which constitutes its charter confers upon it authority to own coal and ore lands and mine coal and iron ore, we must hold that it is authorized to make investments and do things not absolutely essential to a manufacturing business, and that, therefore, within the ruling in the *Westinghouse Case*, it is not entitled to exemption, but is taxable upon its entire capital stock, although, as matter of fact, it is not engaged in any other business, and its whole capital is invested in manufacturing. But in so ruling we reiterate what was said by McPherson, J., in *Com. v. National Oil Co., Limited*, 157 Pa. 516, viz.:

" 'While, however, in this case and in others, we have cheerfully obeyed the decisions made last year (reported in 150 and 151 Pa.), and do not question in the least the soundness of the abstract reasoning upon which they rest, we have met with so many practical difficulties in the effort to follow them that we respectfully request the supreme court to reconsider those decisions, and in the light of these unforeseen obstacles to reverse the judgment we are about to enter and declare taxable only upon so much of the defendant's capital as is not invested in its manufacturing operations.

" 'The phrase used by the Act of 1889—"exclusively organized"—is confessedly ambig-

uous. Its meaning in the statute may differ from its meaning in the dictionaries, and evidently depends upon the point of time which is relied upon as fixing the character of the corporation for the purpose of this particular tax. If the time of granting the charter is taken, no other conclusion can rationally be reached than that which has been announced in the cases referred to; but if the time of imposing the tax is taken, then the actual business of the corporation is the natural test. This, we respectfully submit, may fairly be concluded to have been the legislative intention, because (the language being doubtful) this construction allows apportionment wherever justice and equity demand it, and thus avoids the inequality of burden which otherwise must result; while the construction now adopted forbids apportionment altogether in a large number of cases the inevitable result being much friction and unintended injustice.

"We may be permitted to give a few examples of inequality. Here are two iron manufacturing companies, alike in all respects except that the charter of one contains a power to mine ore or coal. This power is not used and never has been used; nevertheless, although their business is precisely similar, one is exempt and the other is taxed. Again, the General Corporation Act of 1874, under which the majority of charters now exist, gives mining powers in section 88 to certain manufacturing companies. What is to be done with this class of cases? Are these mining powers to be considered as written in the charters, although they are not formally expressed? If so—and section 25 of the Act of 1874 declares that "the franchises granted shall be construed according to the same rules of law and equity as if (the corporation) had been created by special charter"—there is not an iron manufacturing company in the state, incorporated under the Act of 1874, which is entitled to exemption. On the contrary, all are already liable for considerable arrears. But, if these powers are not to be considered as written in the charters, with what justice is the tax imposed on a corporation chartered by a special act, merely because the right to mine is specially given? The right exists as really in the one case as in the other, and ought to affect both corporations alike.

"Take also the case of two corporations doing a similar manufacturing business, both of which are usurping a power not given by their charters, but only one of which possesses an unused franchise which is not manufacturing. Surely, both ought to be treated alike; and yet, one is taxed only upon the capital invested in the unauthorized business, and the other is taxed upon its whole capital stock, although the operations of the two companies are identical. And this inequality becomes more conspicuous, if the case is slightly varied and two corporations are considered, one of which has an exclusively manufacturing charter, but is usurping another franchise, while the other has a similar manufacturing power and in addition possesses the franchise to do lawfully what the other is doing unlawfully. If any dis-

crimination is to be made, it would seem that the violator of law should bear the heavier burden. But the fact is otherwise; the usurper pays tax only upon the capital unlawfully invested, while the other is taxable upon its whole capital stock.

"Additional examples might be given, but these may suffice, for a moment's thought will bring to mind the slate companies, the coke companies, the fire brick companies and others of that class, to say nothing of many others that possess special charters containing particular privileges. We will only add, that the examples we have given are neither fanciful nor imaginary, and that we would not have made this unusual application if we were not abundantly convinced by our experience (which necessarily embraces a large number of cases that are not brought to the attention of the supreme court) that it is hardly possible to apply the present rule without severe and extensive hardship. Unquestionably serious practical difficulties exist and very considerable numbers of corporate taxpayers are either injured or threatened, because of the rule we are now bound to apply. We venture to express the hope, that a reconsideration of the subject will find no serious obstacle to adopting the alternative construction of a doubtful phrase, and may thus permit us to return to the hitherto well-established and equitable rule of taking the actual business as the test of corporate character. This inevitably leads to apportionment in all proper cases, and, with restored freedom of apportionment, these difficulties will disappear. So diverse and multiform are the charters and the powers and the actual business of manufacturing corporations that, without a full power to apportion, they can neither be fairly exempted nor fairly taxed."

"In this case there would, indeed, be no need of apportionment, because there is no investment of capital outside of the purely manufacturing business of the company. We can hardly conceive that it was not in the minds of the legislators to exempt such a corporation as this. If it is to be taxed there is neither equity nor justice in exempting any other manufacturing corporation, and yet, for the reasons stated, and in obedience to the ruling in the *Westinghouse Case*, we must hold, as a conclusion of law, that defendant is not organized exclusively for manufacturing purposes, and, therefore, not entitled to any exemption whatever."

Messrs. M. E. Olmstead and D. C. Henning for appellant.

Messrs. W. U. Hensel, Atty.-Gen., and James A. Stranahan, Deputy Atty.-Gen., for the Commonwealth:

The powers conferred by its charter conclusively show that appellant is not "organized exclusively for manufacturing business."

The powers contained in the charter of the defendant company, brings it within the ruling of *Com. v. Westinghouse Electric & Mfg. Co.* 151 Pa. 265.

See also *Com. v. Lackawanna Iron & Coal Co.* 129 Pa. 846.

It cannot be contended in a case like the

present that the taxation of its capital stock would be, upon the part of the commonwealth, any embarrassment to the employment of capital in the class of manufacturing business that this company might be engaged in this state digging ore. It could not drive the employment of labor outside of the state, because the employment of labor in that part of the business authorized by the charters of this company that is not strictly manufacturing purposes could not be driven into another state, because the ore production is not there. This, therefore, would come within the ruling in *Com. v. Northern Electric L. & P. Co.* 14 L. R. A. 107, 145 Pa. 105.

Williams, J., delivered the opinion of the court:

The defendant company was incorporated under the provisions of the General Law of 1874 (Pub. Laws, 73). One section of that act gives to companies incorporated under it for the manufacture of iron and steel the right to hold mineral land and mine coal, iron, and other minerals for their own use and for sale in market. In the application to the governor for letters-patent this company stated its objects to be to secure the right to "dig iron ore, build and operate furnaces, forges, manufactories, rolling mills, and manufacture machinery and other manufactures of iron and steel and to have and exercise all the rights and privileges conferred by the Act of April 29, 1874." The right to mine was conferred by the Act of 1874, and was applied for by the defendant as ancillary to the business of manufacturing, and not as an additional or alternate line of business to be pursued by the company at its own election. The findings of the learned judge of the court below show that the ancillary power thus provided by general law and by the articles of incorporation has never been used. It was conferred by the legal organization, but when the breath of life had been breathed into the new company its first work was to settle the character of its business organization, and arrange its plant accordingly. In doing this it seems to have determined that its entire capital should be invested in and devoted to the business of manufacturing. It bought no mineral lands, and has at no time owned, leased, or operated any mine. Upon these facts the question raised is whether this company is entitled to the exemption of its capital stock from taxation as a manufacturing company. The court below, with un concealed reluctance, held that it was not, and placed its judgment on the recent case of *Com. v. Westinghouse Electric & Mfg. Co.*, 151 Pa. 265. An examination of that case convinces us that it does not rule this. Incorporation had been effected in that case, not under the general law providing for the incorporation of manufacturing companies, but under one of those odious special charters, so frequently described as "omnibus charters." It was organized under the Act of April 9, 1872, entitled "An Act to Incorporate the Charters Improvement Company, and to Define the Powers thereof." These powers were defined by a reference to the Act of May 12, 1871, entitled "An Act to Incorporate the Improvement and Co-operative Company," etc. There is no hint of manufacturing in the title of either of these acts or in the body of them. In the language of our Brother Heydrick, the grant of powers in these acts was "so vaguely defined that it would be unsafe to say what was not authorized, if anything could be authorized by such generalities, except the issue of its own obligations as currency, which was expressly excluded, and manufacturing, which the most liberal construction of the Act of 1871 would not comprehend." The Westinghouse Company did not show, therefore, that it was ever organized as a manufacturing company by the law creating it, or that it had by any distinct corporate act limited and defined the objects and purposes of its business organization. In this case the defendant company was organized under the law providing for the incorporation of manufacturing companies. The purpose of its creation was to engage in manufacturing. Its investments have been made and its business arranged and conducted for this single purpose from first to last. It is in name, in the nature of its corporate powers and characteristics, and in its actual business operations, a manufacturing company, and nothing else. The mere possession of an ancillary power which it has never used or sought to use, which it had express legislative permission to hold, and which was evidently intended for use only in aid of its manufacturing enterprises, does not change the character of the corporation, or deprive it of its privileges and immunities as a manufacturing corporation.

It is urged that the word "exclusively," which is found in the Act of 1889, but was not found in that of 1885, requires us to draw a sharper line of demarkation between companies whose capital stock is exempt from taxation and those whose stock is subject to it than has been heretofore drawn, and subjects the entire capital of all manufacturing companies to taxation, if, under a mistake about their rights, they have secured the grant of any ancillary privilege not absolutely indispensable to manufacturing. We are not prepared to assent to this proposition. It would seem that in the use of this word the legislature had the old system of omnibus legislation in mind, and intended to discriminate against that class of corporations organized under special charters granted before the present constitution was adopted. Charters were then granted, and some of them are still in existence, conferring upon a single company the powers of a mining, a manufacturing, and a transportation company. Such a charter was actually before the court in *Com. v. Westinghouse Electric Mfg. Co.*, *supra*. The manufacturing which is done by such a company may be in aid of its mining or its transportation business. Such a company is not organized, either as to its corporate powers or its actual business, exclusively as a manufacturing company, and is entitled to no exemption upon its capital stock. Many railroad companies make engines and cars for their own use, but they do not become manufacturing companies there-

by, or entitled to the exemption extended to such companies. A manufacturing company, on the other hand, does not cease to be such because it seeks to supply its raw material by production instead of purchase. It may subject so much of its capital as is so employed to taxation, but it does not lose its own identity. The question whether a given company is incorporated as a manufacturing company, and is actually engaged in the business of manufacturing, is to be decided upon the proofs. The court will look at its title, its articles of association or charter, and the provisions of the statute under which the incorporation has been effected. If these do not effectually settle the character of the company, recourse must then be had to the business organization, the character of the plant, and the actual business entered upon. Applying these tests to this case, we could not hold that the company was organized for mining, or for any purpose other than that of manufacturing. It has shown by its name, its legal organization, the statute under the provisions of which it was incorporated, and by its whole course of corporate conduct, that it was organized for manufacturing iron and steel, and for no other purpose. It is therefore, within the words and the spirit of the Act of 1889, a manufacturing company, and as such entitled to exemption from taxation on its capital stock. Having reached this conclusion, we congratulate ourselves upon being able to do in this case that which it is rarely in our power to do, reverse a judgment of the court below with the cordial approval of the court by which the judgment was rendered.

The judgment is reversed, and judgment is entered in favor of the defendant below, on the findings of the learned trial judge and the evidence.

McCullum, J., not present.

COMMONWEALTH of Pennsylvania

JUNIATA COKE CO., *Appt.*

(187 Pa. 507.)

The exercise of the power to mine its own coal by a manufacturing corporation to supply itself in part with the raw material used by it does not defeat the exemption of the capital stock of the manufacturing company from taxation, under the Act of 1889, but requires such exemption to be limited to that part of the capital which is used exclusively in manufacturing.

(October 2, 1893.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Dauphin County which confirmed a tax account against defendant's capital stock, which had been set-

tled by the auditor-general and state treasurer. *Reversed.*

Defendant claimed to be exempt from taxation under the provisions of the Act of June 1, 1889, which provides: "The provisions of this section shall not apply to the taxation of the capital stock of corporations, limited partnerships, and joint-stock associations organized exclusively for manufacturing purposes and actually carrying on manufacturing within the state, except companies engaged in the brewing or distilling of spirituous or malt liquors, and such as enjoy and exercise the right of eminent domain."

The court below refused to recognize the exemption and entered judgment against defendant for the full amount of the tax.

Further facts appear in the opinion.

Messrs. Lyman D. Gilbert, John H. Weiss and M. M. Cochran, for appellant:

When the legislature in the twenty-first section of the Revenue Act of 1889 exempted from taxation the capital stock of corporations, it had in view companies having a franchise for mining coal and included them within the tax exemption.

Com. v. Northern Electric L. & P. Co. 14 L. R. A. 107, 145 Pa. 105.

The court did not exempt that portion of the capital stock of the appellant which was employed in strictly manufacturing operations. To this partial measure of right the appellant is undoubtedly entitled.

Com. v. Lackawanna Iron & Coal Co. 129 Pa. 846.

Messrs. W. U. Hensel, Atty-Gen., and James A. Stranahan, Deputy Atty-Gen., for the Commonwealth.

Williams, J., delivered the opinion of the court:

This case involves a question not settled by *Com. v. Pottsville Iron & Steel Co.*, ante, 228, which has just been decided. In that case a power had been conferred upon a manufacturing company to mine its raw materials, but when the company came to make its investments and organize its business it discarded this power, and arranged to supply itself with its materials and fuel by purchase. We held in that case that the mere possession of a power ancillary to its manufacturing business, which had never been used, and the use of which had been effectually declined by the character of its business organization, did not deprive a manufacturing company of the exemption of its capital stock from taxation under the proviso in the Act of 1889. In this case we have the power to mine coal for the manufacture of coke, and we have the continued use of this power as a means of providing itself with the coal from which the coke is made. The production of coke from coal is a process of manufacture. The production of coal by removing it from its bed and bringing it to the surface is a process of mining. They have no necessary connection. The legislature has seen fit to separate and

NOTE.—On the question of the exemption of manufacturing corporations from taxation which has become in recent years a question of much importance in several states, see the case proceeding, 22 L. R. A.

also earlier cases in this series: *Com. v. Northern Electric L. & P. Co.* (Pa.) 14 L. R. A. 107, with note on the question, What constitutes manufacture? and *People v. Wemple* (N. Y.) 14 L. R. A. 708.

classify corporate powers, and to confer upon one class of corporations an exemption from taxes which other classes are required to pay. Manufacturing companies must purchase their supplies in the market. It may be convenient for them to produce their raw material, as in the case of the appellant, and the denial of the power to do so may work some inconvenience, and increase the cost of the manufactured article; but the exemption is conferred upon the manufacturer, as distinguished from the mining, the transportation, the storage, or other business agency employed in handling the raw material—the fuel—and other supplies required by the manufacturer. It ought not to be extended so as to cover operations outside the legitimate processes of manufacturing. We are in this case to determine, therefore—First, whether the appellant is a manufacturing company; next, whether, if a manufacturing company, it is using any part of its capital in such a manner as to infringe upon the field occupied by corporations that are required to pay taxes on their capital stock. We understand from the findings of the court below and from the evidence that this company was organized as a manufacturing company, and has been steadily engaged in the manufacture of coke. We understand that it has the power to mine its own coal, and has in fact done so from the first, and that it has in this way supplied itself in part with the raw material it has used. This, as we have held in *Com. v. Pottsville Iron & Steel Co.*, *supra*, does not strip it of its character as a manufacturing company, or of the protection which the law has extended to manufacturers. But, on the other hand, the fact that its business is manufacturing will not enable it to bring under the protection of its privilege any ancillary line of business in which it may find it economical or convenient to engage or cover the employment of its capital for any other than strictly manufacturing purposes. What, then, is the situation of the appellant? It is in name, in business purposes, and in product prepared for the market, a manufacturing company. In the conduct of its manufacturing business it seeks to cheapen its raw material, and thereby the

cost of its product, by mining the coal it consumes. This is not necessary to the process of manufacture, though it may be both economical and convenient for the manufacturer. It is therefore the employment of part of its capital for a purpose not within the letter or the spirit of the exemption. As to so much of its capital it is subject to taxation, precisely as though no exemption existed. The use of the word "exclusively" in the proviso in the Act of 1889, given the office we have assigned to it in the *Pottsville Iron & Steel Co. Case*, does not stand in the way of our conclusion in this case. It was intended, as we there held, to discriminate between companies organized for the conduct of two or more lines of business simultaneously and such as were organized for the purpose of manufacturing. A company incorporated for the latter purpose will not lose its character or its privileges because of an effort to supply itself with what it needs for its manufacturing business in some cheaper way than by purchase. Such effort, and the reservation of the power to make it, are in aid of the purposes of the company as a manufacturer. Neither as to the public nor the commonwealth is it a change of organization or of business. Whether the appellant mines its coal or buys it makes no difference with its product, except as to its cost. In either case it makes and it sells coke, and nothing else. It is not a mining company. It neither sells coal nor offers it for sale. It simply seeks to provide itself by mining, instead of purchase, with the coal needed for its ovens. This, as we have seen, is such a use of a part of its capital as takes the sum so used out from under the exemption provided by the Act of 1889, and subjects it to taxation in the same manner and at the same rates that other capital so employed is subject to. This is a proper case for apportionment. The appellant is entitled to exemption as a manufacturing company. Upon so much of its capital as is employed in the effort to supply itself with coal it must pay taxes.

The judgment is reversed, and record remitted, that the apportionment may be made.

McCollum, J., not present.

FLORIDA SUPREME COURT.

William M. CARNEY *et al.*, Appts.,

v.

Jesse HADLEY *et al.*

(32 Fla. 344.)

*1. As a general rule two conditions must concur to give a court of equity

*Headnotes by MARRY, J.

jurisdiction to enjoin a mere trespass on property: First, the complainant's title must be admitted, or legally established; and, second, the trespass must be of such a nature as to cause irreparable damage, not susceptible of complete pecuniary compensation. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such cases, for the reason that a legal remedy has been devised to redress such wrongs,

NOTE.—Injunction against trespass to cut timber.

Injunctive relief seems to have been granted quite early in cases of waste, but the courts declined for a long time to extend the relief to cases in which there was no privity between the parties and which were therefore cases of trespass simply.

In *Mogg v. Mogg*, 2 Dick. 670, in which the de-

fendant, with absolutely no right, persuaded tenants to cut down timber, the chancellor refused an injunction on the ground that defendant was a trespasser, and as such liable to an action at law.

In *Smith v. Collyer*, 8 Ves. Jr. 80, where plaintiffs were in receipt of the rents, claiming as devisees, and the defendants were cutting timber, claiming

and so long as this remedy is adequate, equity has no right to interfere.

2. **The practice of granting injunctions in cases of trespass**, it seems, is more liberal now than it was formerly, but a clear case of the inadequacy of the legal remedy must still be shown in order to justify the interference of the court of chancery.
3. **While insolvency alone of the defendant may not be sufficient to authorize an injunction**, yet it is an important element in many cases in determining whether or not a court of chancery should act in granting injunctions.
4. **In cases of repeated trespasses where it becomes necessary to quiet a rightful, admitted, or established possession**, chancery has often interposed to prevent a multiplicity of suits, although there may be a remedy at law. This court will not, however, grant an injunction against one person merely because he is guilty of repeated trespasses, where the legal remedy affords an adequate and complete redress in damages. The rule seemingly well sustained by authority is that before a court of chancery will interfere to prevent a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own pretension of right.

as heirs-at-law, the court said that the title of plaintiffs being denied, the case was trespass and not waste upon the showing of the parties, and the right being disputed, no order was issued in the case.

In *Courthorpe v. Mappleaden*, 10 Ves. Jr. 290, in which the person cutting the timber was acting in collusion with the tenant and the suit was by the landlord, the court said that the trespass partakes of the nature of waste and that therefore the injunction could be granted. In that case the somewhat similar case of *Hamilton v. Worsefold*, in which an injunction was granted by *Lord Thurlow*, is cited.

But in *Crookford v. Alexander*, 15 Ves. Jr. 188, the defendant had obtained possession under a contract to purchase and the court was inclined to treat the case as one of trespass, and granted the injunction although from the facts of the case it seems that it might have been treated as a case of waste.

And in *Lowndes v. Bettie*, 33 L. J. Ch. 451, it is said that the tendency of the decisions is to break down the distinction between trespass and waste.

The injunction was issued in *Kelly v. Robb*, 58 Tex. 377.

Courts conservative in extending relief.

The principles upon which the courts will act in granting an injunction to prevent cutting trees are not yet settled. Some courts have granted the relief in cases where other courts have said it was not appropriate, but the general tendency is to be conservative in extending the use of the writ.

If the cutting of timber is a simple act of trespass for which there may be adequate remedy at law, injunction will not lie. *Wilson v. Hughell*, *Morris (Iowa)* 451; *Cowles v. Shaw*, 2 Iowa, 496.

The injunction will not be granted to restrain a mere trespass, if it is not shown that the wrong is not abundantly capable of compensation in damages by ordinary suit at law. *Hatcher v. Hampton*, 7 Ga. 49.

Injunction will not lie in case of an ordinary trespass upon land and cutting down timber, where the plaintiff is in possession and has an adequate and complete remedy at law,—at least where there

5. **Whenever the complainant's title is disputed** in cases of trespass, a court of equity will not interfere by injunction on the ground of a multiplicity of suits until he has successfully established his title by trial at law.

6. **Where the alleged trespass or threatened injury is to trees standing on land**, in order to justify the granting of an injunction by a court of equity, it must appear that the trees are of such peculiar value and importance to the estate as that the alleged injury to them will so affect the uses and purposes for which the estate was designed as to make the injury to them an irreparable loss to the owner. An allegation that the trees are valueless except for turpentine and timber, and without them in a condition to produce turpentine and timber, the land would be of little value, and that the acts of defendants in extracting turpentine from the trees greatly lessens their value as timber producing trees, does not show that the injury complained of amounts to a destruction of the estate, or that the injury done could not be adequately compensated in damages. This was the rule prior to the enactment of section 1460, Revised Statutes.

(October 2, 1893.)

A PPEAL by defendants from a decree of the Circuit Court for Escambia County

is nothing so special and peculiar as to call for such relief. *Stevens v. Beekman*, 1 Johns. Ch. 318, 1 L. ed. 155.

The injunction will not issue if it appears that the trees have no peculiar value and that adequate compensation for their destruction may be obtained at law. *Powell v. Rawlings*, 38 Md. 230.

Where plaintiff is in possession and the person cutting the timber is an utter stranger, not claiming under color of right, the tendency is not to grant an injunction, unless there be special circumstances, but to leave the plaintiff to his remedy at law; but if the acts tend to a destruction of the estate, an injunction may be granted. *Lowndes v. Bettie*, 33 L. J. Ch. 451.

An injunction will not lie to prevent the commission or repetition of a trespass in entering and cutting down timber on land of which the plaintiff is in possession as owner and has adequate remedy at law for the trespass, there appearing nothing in the case so especial or peculiar as to call for that particular relief. *Thomas v. James*, 32 Ala. 723.

In *Hanson v. Gardiner*, 7 Ves. Jr. 305, an injunction to prevent the cutting of timber by defendants, who claimed some rights to common of estovers, was dissolved, where it appeared that the plaintiff had brought an action to prevent the alleged unlawful acts and had permitted himself to be nonsuited and had subsequently recognised the claimed rights on the part of the defendants in a negotiation with defendants to compensate them for shutting them out.

A bill to enjoin a trespass is fatally defective if it does not aver a good title in the plaintiff, contains no charge of insolvency against defendants, and does not show that irreparable damage would result if the injunction is denied. *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250.

An allegation in the complaint that at a certain time the defendants commenced cutting wood and that they "threaten and intend, as the complainants believe, to cut down and take away very large quantities of wood and timber," is not sufficient to cause an interference by injunction. *Cornelius v. Post*, 9 N. J. Eq. 196.

The injunction will not be granted where there has been nothing excepting threats on the part of

in favor of complainants in a suit brought to enjoin defendants from committing certain alleged trespasses on complainants' land. *Reversed.*

Statement by **Mabry, J.:**

This is a bill for an injunction filed by appellees against appellants. The bill alleged that complainants were the owners in fee of a certain tract of land situated in Escambia county, Florida, consisting of six hundred and forty acres, described by metes and bounds, and known as the Benjamin Hadley, or Richland Pond, tract, and that they and Benjamin Hadley, under whom they claim title as heirs, had been in possession of this land with interruptions for more than sixty years, and were then in possession; that said land was very thickly studded with pitch pine trees of large size and of great value, and that defendant Carney and his foreman Gilchrist and Carmichael have from time to time, during two years prior to filing the bill, trespassed upon the said land for the purpose of boxing the trees, and thereby producing turpentine which they have removed from said trees and from said land; that not only does the removal of the turpen-

tine from said trees and land deprive complainants of the said turpentine and the value thereof, but its extraction from said trees greatly lessens the value of the same as timber producing trees, and except for the purpose of the production of turpentine and timber said trees are valueless; that said trees constitute in large part the value of said land, and without them in a condition to be made valuable for turpentine and timber the said land is of little value; that the trespasses of respondents are continuous and frequent, and they threaten not only to trespass in the future upon said land for the purpose of removing turpentine already collected in boxes on the trees, but from time to time to trespass for the purpose of boxing and re-scraping said trees; and that said respondents reside in the state of Alabama and are possessed of no property of any kind in the state of Florida, and unless they are restrained from their said repeated and innumerable trespasses, complainants are remediless, save by repeated, vexatious, and multiplied suits against respondents, which would be fruitless in the state of Florida because of their alleged want of property in this state. The bill prays among other things for an order restraining

the defendant. *Griffin v. Winne*, 10 Hun, 571; *Woods v. Kirkland*, 3 La. Ann. 397.

The injunction may be awarded if there is no adequate remedy at law.

Subject to some disagreement as shown below as to how far the title must be first settled, the general rule is that equity will aid by injunction if there is no adequate remedy at law. There is, however, some further disagreement as to when there is and when there is not such remedy.

In *Kerlin v. West*, 4 N. J. Eq. 452, it is said that in applying the principle of injunctive protection to woodland it is not always easy to discriminate between the mere trespass and the irreparable mischief which may destroy the inheritance or jeopard its value; that being done the case is clear.

To justify the interposition of an injunction the threatened injury must be irreparable. *Leininger's App.* 106 Pa. 398.

The injunction will not issue if it is not shown that the trespass is destructive of the estate. *McMillan v. Ferrell*, 7 W. Va. 223.

An injunction will lie to prevent the cutting down of trees on the boundary line of two adjoining owners, if such conduct would cause irreparable injury to the complaining party. *Musch v. Burkhart*, 13 L. R. A. 484, 88 Iowa, 301.

In *West Point Iron Co. v. Beymert*, 45 N. Y. 708, timber is placed in a class of subjects which the court said are protected by injunction, upon the ground that injuries to and depredations upon them are or may cause irreparable damage, and also with a view to prevent a multiplicity of actions for damages that might accrue from a continuous violation of the rights of the owners.

The fact that the damage is charged to be almost instead of absolutely irreparable will not defeat the injunction. *Davis v. Reed*, 14 Md. 152.

When remedy at law is inadequate.

If complainant has bought land in proximity to his mill for the timber trees it contains and an action at law cannot be tried before defendant has stripped the land of the trees, injunction may be granted, because the loss of the use of the mill and the profits cannot be recovered at law. *Wadsworth v. Goree* (Ala.) April 12, 1893.

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If plaintiff is a married woman and seeks to restrain defendant from cutting timber on lands belonging to her separate estate under a license from her husband as trustee, there is not an adequate remedy at law and an injunction will be issued. *Thomas v. James*, 32 Ala. 723.

If a farm contain a small tract of woodland, the preservation of which is necessary for the proper use of the farm, as well as a building site for the owner's residence, many of the trees being large and of ancient growth, the destruction of them by a naked trespasser, without title or claim of right leaving the owner without wood, shade, or proper building site, is ground for an injunction. *Powell v. Cheshire*, 70 Ga. 357.

Destroying the fruit and ornamental trees and shrubbery around a dwelling house in a city is irreparable damage. *Wilson v. Mineral Point*, 39 Wis. 160.

Injunction will lie to restrain a trespasser from cutting the trees growing on the only wood-lot owned by the plaintiff, when it works a permanent injury to the land,—especially when there is no denial of the allegation of irreparable injury. *Smith v. Rook*, 59 Vt. 232.

Acts which will result in the destruction of all the timber on a man's home plantation, where wood and timber are necessary to the enjoyment of the property in that character will justify an injunction. *Davis v. Reed*, 14 Md. 152.

Where the land belongs to complainant and is occupied by him as a dwelling plantation containing timber particularly valuable to the estate, defendants will be enjoined from clearing up the timber land and converting it into waste and pasture land. *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371.

To warrant the injunction, it must appear that the trees have a peculiar value, or are of great importance to the estate,—as that they are fruit or ornamental trees, or, if timber and wood, that the enjoyment of the estate will be so affected by their destruction as to make the damage irreparable. *Green v. Keen*, 4 Md. 93.

Cutting maple timber which is the chief value of the estate, is irreparable injury within the power of equity to prevent. *Butman v. James*, 34 Minn. 547.

appellants from trespassing upon the said land for the purpose of boxing or scraping or otherwise injuring the trees upon said land, and from removing the turpentine already in the boxes on the same.

The injunction as prayed for was granted, and respondents answered the bill. The answer denies the allegation that complainants were the owners of the said tract of land, or any part of it, or that they or any of them were then in possession of the same, or have at any time been in possession except for a few days during the month of March, 1888, when they or their agents went upon a portion of said land, but were notified that they were trespassers by Carney, one of the respondents, or his agent, and they shortly thereafter left said premises and have not since made any effort to take possession of same; that said land was deeded December 18, 1820, by Benjamin Hadley, the ancestor through whom complainants claim title, for valuable consideration to one William Denman, and the same has never been reconveyed to said Hadley or his heirs; that said land belongs to and is the property of William M. Carney, one of the respondents, and that he is in possession of same as owner and ad-

versely to all others, and has been so in possession since the 31st day of August, 1882, when the same was deeded to him by John D. Reilly for valuable consideration, and said deed was duly recorded on the 16th day of February, 1883. Further, that when said Reilly executed said deed he was in actual possession of said land as owner thereof under a deed conveying same to him by James J. Milstead, bearing date March 27, 1852, and that he (Reilly) had been in possession of the said land since the date of said deed; that said Milstead at the time of making said deed to Reilly was in possession of said land under chain of title from said William Denman, to whom Benjamin Hadley had conveyed.

The allegation that respondents were without property in the state of Florida is denied, and it is averred that Carney, one of them, owns about six thousand acres of land in Escambia county, Florida, and further, that a suit for damages alleged to have been sustained by complainants by reason of the alleged trespasses on the part of respondents was then pending between said parties in Escambia county, Alabama. It is also alleged that the matters contained in complainants' bill are determinable at law, and do

The destruction of forest and other trees is an irreparable injury from which parties may be restrained by injunction. *De la Croix v. Villere*, 11 La. Ann. 39.

Cutting timber on land is an irreparable injury, where it constitutes the chief value of the property. *Shreve v. Black*, 4 N. J. Eq. 177.

But it has been held that cutting off the timber from a tract of pine land, valuable only or chiefly for the wood on it, is not such a case of irreparable mischief as will warrant the granting of an injunction. *West v. Walker*, 3 N. J. Eq. 279.

A plaintiff in possession who has reserved for preservation some young growing walnut trees may maintain a suit for injunction against a mere trespasser who is attempting to cut them down. *Thatcher v. Humble*, 37 Ind. 44.

But in *Dunkart v. Rinehart*, 37 N. C. 224, it was held that the cutting and carrying away of walnut trees does not of itself show irreparable injury.

In some of the cases the insolvency of defendant in addition to the acts which he is committing may render the remedy at law inadequate when the acts themselves would not do so.

Thus an allegation that a trespasser is about to commit irreparable injury by boxing and working turpentine trees and by cutting timber and making staves, leaving the land fit only to be cultivated for its products, without an averment of the defendant's insolvency, is insufficient. *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728.

So it is said that to warrant the injunction the defendant must be insolvent or the injury irreparable, so that adequate compensation cannot be obtained at law. *Hillman v. Hurley*, 33 Ky. 628.

Cutting timber on the land of another without color of title may be enjoined as a destructive trespass, if the defendant is insolvent and the injunction is necessary to prevent a multiplicity of suits. *Echert v. Ferst*, 10 Phila. 514.

The mere fact that the timber on the land is needed for developing the minerals lying under it, and that there is no other timber in the neighborhood and no means of easily obtaining any, is not sufficient to warrant an injunction, if it is not shown that defendant is not peculiarly responsible for the damage done. *Heaney v. Butte & M. C. Co.* 10 Mont. 590.

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Multiplicity of suits.

The circumstances may be such as to justify the injunction to prevent a multiplicity of suits.

The injunction may be allowed for the purpose of preventing a multiplicity of suits, where one action at law has been decided in favor of the complainant and another action is pending in which the same question is raised. *Livingston v. Livingston*, 6 Johns. Ch. 500, 2 L. ed. 198.

But it has been held that the fact that the trespasser is guilty of continued and repeated trespasses will not authorize an injunction to prevent a multiplicity of suits. *Hatcher v. Hampton*, 7 Ga. 49.

Where plaintiff, the owner of agricultural land containing an orchard of fruit trees and also ornamental trees and shrubbery, had recovered two verdicts against a mining company for entering upon the land and destroying the trees in their mining operations, the court granted an injunction against further trespasses on the ground that the plaintiff was not obliged to take the money for the property destroyed. *Daubenspeck v. Gear*, 18 Cal. 444.

The question of possession or title.

The influence of the conservative tendency of the courts has created some confusion as to what must be the state of the title or possession in order to warrant the relief. On the one side it is held that the action will not lie, unless it is shown that plaintiff is not only entitled to the possession, but that he is in actual possession. *Hillman v. Hurley*, 33 Ky. 628.

Also the injunction cannot be sustained if the complainant fails to show title in himself. *Tate v. Vance*, 27 Gratt. 571.

Also if plaintiff fails to show that he has the title to the land or the possession of it, the injunction will not issue. *Wearin v. Munson*, 62 Iowa, 466.

But on the other side in *Hicks v. Michael*, 15 Cal. 116, the court seems to regard it as settled that a plaintiff out of possession may have an injunction to prevent waste of the estate, even before he brings his action at law; but it is stated that ordinarily the injunction will not be granted before a hearing on the merits, except in cases of urgent necessity or when the subject-matter of the com-

not constitute any ground for relief in a court of equity, and pray the same advantage by their answer as if they had demurred to said bill.

Respondents moved to dissolve the injunction because the material allegations of the bill had been denied, and at a subsequent date moved to dissolve the injunction and dismiss the bill for want of jurisdiction in the court appearing upon the face of the record. The motions to dissolve were refused and the case proceeded regularly to final hearing, when upon the pleadings and proofs a final decree was rendered adjudging complainants to be the owners of the land in question, and that the respondents and their agents and attorneys be perpetually enjoined from going upon said land to box or scrape the pine trees thereon or to remove any turpentine therefrom, and from committing any acts of trespass on the land. Respondents appealed.

Messrs. Mallory & Maxwell for appellants.

No appearance for appellees.

Mabry, J., delivered the opinion of the court:

According to the allegations of the bill before us, the acts, against the doing of which an injunction was sought and obtained, amounted to a trespass upon real estate. This trespass, according to the bill, consisted in entering upon land of complainants, boxing the pine trees standing thereon for the production of turpentine and the removal of the turpentine from the trees and the land. The case arose and was determined in the circuit court before the enactment of chapter 3884, Laws of 1890, and must be disposed of independently of the provisions of that Act.

Courts of equity do not ordinarily extend the harsh remedy of injunction to cases of trespass, but leave the redress of such grievances to the courts of law where originally jurisdiction in such matters was lodged. It is said that originally courts of equity did not grant injunctions to restrain trespasses in any case, but whether in analogy to the remedy to prevent waste, or to prevent injuries supposed not to be adequately recompensed by damages in the legal forum, it is now

plaint is free from controversy, or irreparable injury will be produced by its continuance.

So if an heir is in possession disputing the validity of the will, he may be restrained, pending proceedings to determine the validity of the will, from cutting timber, which amounts to spoliation. *Fingal v. Blake*, 2 Molloy, 50.

But if the defendant is in possession and building in the ordinary course of agriculture, the injunction will not issue merely on the ground that he is insolvent. *Thompson v. Williams*, 54 N. C. 173.

So where a defendant is in possession, and a plaintiff claiming possession seeks to restrain him from cutting timber, the court will not interfere, unless the acts amount to such flagrant instances of spoliation as to justify the court in departing from the general rule. *Lowndes v. Bettle*, 33 L. J. Ch. 451.

And if a person claiming ownership seeks to recover land from one in possession, before he can enjoin the cutting and boxing of turpentine trees by the latter, he must show that defendant is unable to respond in damages. *McCormick v. Nixon*, 33 N. C. 113.

So it has been held that a denial of the plaintiff's title defeats the suit.

The allegation of an adverse claim by defendant to the land presents an obstacle to injunctive relief; especially when no suit at law is pending or offered to be brought to establish the plaintiff's right. *West v. Walker*, 3 N. J. Eq. 273.

Where there is a contest between the parties for the possession of the land, each claiming the legal title, and the answer fairly meets every material allegation of the complaint and denies insolvency, the injunction will not be granted to restrain the working of turpentine trees. *Bell v. Chadwick*, 71 N. C. 323.

Although it has been held that in a suit for injunction to prevent the cutting down of trees, the bill may be read as an affidavit to contradict the answer. *Lloyd v. Heath*, 45 N. C. 41.

The injunction will not be granted if it appears from the pleadings that the title to the premises is disputed, and the facts do not show that the damage would be irreparable. *Schoonover v. Bright*, 24 W. Va. 406.

An injunction will not be issued, in a suit by the United States to annul a railroad land grant, to prevent the cutting of timber on the land in dis-

pute prior to a judgment of forfeiture, if the pleadings in the case set out facts which, if proved, will sustain the title in the railroad company. *United States v. Southern Pac. R. Co.* 55 Fed. Rep. 569.

But it has been said that where a person in possession seeks to restrain one who claims by an adverse title, the tendency is to grant an injunction, at least if the acts done either constitute or tend to constitute a destruction of the estate. *Lowndes v. Bettle*, 33 L. J. Ch. 451.

It has been held that a defendant in possession under color of title will not be disturbed.

A defendant having color of title to the property and being in possession will not be enjoined from cutting timber therefrom pending an action to try the title. *Shreve v. Black*, 4 N. J. Eq. 177.

Defendants will not be restrained from cutting timber pending a suit to try the title, if their answer shows that the title has been in litigation for many years, and that they have maintained their right to the property during all that time. *Cornelius v. Post*, 9 N. J. Eq. 196.

The injunction will not be granted if the defendant is in possession claiming exclusive title and was in the actual possession at the time that plaintiff acquired his right. *Powers v. Heery*, R. M. Charl. (Ga.) 523.

Preventing waste pending litigation.

Some of the cases have, however, manifested a tendency to impound the subject-matter of a litigation and preserve it *in statu quo* whenever such relief has been asked.

If the title is in dispute equity may, in its discretion, enjoin the cutting of timber upon the premises until the question of title has been settled. *Griffith v. Hilliard*, 64 Vt. 643.

It is not necessary that the legal title should be established before the aid of equity is sought, but if the bill sets out that an action has been, or is about to be, instituted for the purpose of establishing the title, an injunction may be issued to preserve the subject-matter of the action. *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 723.

The injunction will be granted to preserve the estate pending a suit to try the title. *Shubriok v. Guerard*, 2 Decauss. Eq. 616.

Where there is a controversy pending in equity involving the title to land, an injunction may be granted to restrain the commission of waste pend-

firmly settled that injunctions will be granted to restrain trespasses under certain conditions. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such matters for the obvious reason that a legal remedy has been devised to redress such wrongs, and so long as the law provides an adequate remedy, equity has no right to interfere. The general rule, as has often been stated, is that in order to give the court of equity jurisdiction to enjoin torts to property, two conditions must concur: First, the complainant's title must be admitted, or be established by a legal adjudication; and, second, the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation. The courts have generally accepted the statement of the rule here given as correct, although they have encountered considerable difficulty in its application to the facts of the various cases that have arisen out of the complication of human transactions. *Jerome v. Ross*, 7 Johns. Ch. 315, 2 L. ed. 305, 11 Am. Dec. 484; *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *McMillan v. Ferrell*, 7 W. Va. 223; *Citizens Coach Co. v. Camden Horse R. Co.* 29 N. J. Eq. 209; *Echelkamp v. Schrader*, 45 Mo. 505; *Hamilton v. Ely*, 4 Gill, 84; *Catching v. Terrell*, 10 Ga. 578; *Frederick v. Groshon*, 80 Md. 436; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387. To authorize the issuance of the writ of injunction by a court of chancery the injury threatened must be of such a peculiar nature that compensation in money cannot atone for it. The view ex-

pressed by *Chancellor Kent* is, that "it must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of this court by injunction." *Jerome v. Ross*, *supra*. In one case of cutting timber where the petition alleged that the defendants were continuing the trespass with a view to carrying away the timber, and that they intended, if not restrained, to take and carry away the timber (converted into cord wood) from the premises, and so dispose of it as to put it beyond the reach of petitioners, the court in holding this not to be sufficient, said: "We do not say that there may not be cases where the legal remedy would be incomplete, and in which an injunction might properly issue. For instance, as above suggested, the defendants might be entirely insolvent; the trespass might grow into a nuisance or waste; numberless suits might have to be brought, in order to make the remedy complete; the trespass might be by a party occupying a fiduciary relation; or the injury of such a character that the loss would be irreparable, and not be compensated in dollars and cents; and in any such, or similar cases, an injunction might be proper." *Cowles v. Shaw*, 2 Iowa, 496. It is apparent that quite a field for the exercise of chancery powers is here opened up, and many cases show that this court has extended its jurisdiction in the directions indicated. It is said that a more liberal practice prevails now in granting injunctions than obtained formerly. But the rule seems to have been adhered to, however, in the cases, that a clear case of the inadequacy of

ing the suit for the preservation of the estate. *Green v. Keen*, 4 Md. 98.

An injunction is proper to preserve the estate for the benefit of those ultimately entitled to it. *Fulton v. Harman*, 44 Md. 251.

Complainants in possession may, pending proceedings to determine the validity of an alleged title claimed by defendants, who are unable to respond in damages for the trespasses committed, restrain the stripping of the land of its timber which constitutes its chief value. *Sullivan v. Rabb*, 86 Ala. 423.

Where trees standing in a lane were alleged by plaintiff to belong to his estate and to be extremely ornamental to the mansion house and park, and defendant claimed that the trees were standing on a part of the waste of a manor of which he was the lord, the injunction was granted to preserve the property until the title could be determined at law. *Kinder v. Jones*, 17 Ves. Jr. 109.

Where complainants and those under whom they claim had been in possession for many years defendants, who were peculiarly irresponsible, were enjoined from selling off from the premises wood and timber which constituted their chief value, although defendant had brought an action of ejectment to try the title to the property. *Piper v. Piper*, 38 N. J. Eq. 81.

In *Duval v. Waters*, 1 Bland, Ch. 569, 18 Am. Dec. 850, the chancellor says that it is general practice in Maryland to restrain a defendant in possession from committing waste by cutting timber pending an action at law to establish the title.

But in *Hamilton v. Ely*, 4 Gill, 84, it is said that it is not the established chancery doctrine to restrain the repetition of a mere trespass pending an action to try title.

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And in another Maryland case in which the question was not as to the cutting of timber, it was decided that an injunction will not lie to restrain the commission of a mere trespass pending proceedings at law to try the right, except in cases of irreparable mischief, or to prevent a multiplicity of suits, or where peculiar circumstances imperatively demand such a conservative remedy. *Amelung v. Seekamp*, 9 Gill & J. 468.

If both parties claim title, both may be restrained from interfering with the land pending the settlement of the adverse claim. *Johnson v. Hall*, 33 Ga. 281.

In case of an application for an injunction against interference with the property on a mining claim, in which the issuance of the injunction was resisted on the ground that the title was in dispute, the Supreme Court of the United States said: "It is now common practice, in cases where irreparable injury is being done or threatened, going to the destruction of the substance of the estate, such as the cutting down of timber, to exercise the authority of the court to preserve the property from destruction, although the title is in litigation." *Erhardt v. Boaro*, 113 U. S. 537, 23 L. ed. 1116.

And the same doctrine is announced in a case where the alleged trespass was the placing of buildings on the property, the court declaring that in cases where the title is in dispute, a stronger and clearer case of irreparable mischief must be presented than where the title is undisputed. *LeRoy v. Wright*, 4 Savy. 530.

In *Wood v. Braxton*, 54 Fed. Rep. 1005, it is said that the jurisdiction of equity by way of injunction to prevent the cutting of timber is of comparatively recent origin, but that it is now fully recognized and well established, and that if the nature

the legal remedy must be shown in order to justify the interposition of the court of chancery by the harsh remedy of injunction.

The trespasses alleged in the bill under consideration consist in entering the land of complainants and boxing trees for the production of turpentine. These trespasses are alleged to be continuous and frequent, and that the defendants reside in the state of Alabama and have no property in this state; also, unless the said defendants be restrained from their repeated and innumerable trespasses, complainants were remediless save by repeated, vexatious, and multiplied suits which would be fruitless in this state because of the alleged want of property in this jurisdiction by the respondents. The answer positively denies the allegation in the bill that respondents were not possessed of any property in this state, and it is alleged that Carney, who is the only person asserting any claim to the land, owns at least six thousand acres in Escambia county, Florida. It seems that a suit for damages in reference to the subject-matter of this proceeding and between the same parties, is pending in Escambia county, Alabama. No effort was made on the part of appellees to establish the allegation that appellants were not possessed of any property in Florida, but the showing made by the latter is clear that Carney at the time of filing the bill was possessed of considerable real property situated in Escambia county, Florida, amounting to at least six thousand acres. Insolvency is an element in determining whether or not the court should act in granting an injunction in a case. In *Gause v. Perkins*, *supra*, it is said that the "injury must be of a peculiar nature, so that compensation in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be con-

sidered irreparable." And in many of the cases where injunctions have been granted to restrain trespasses the insolvency of the trespasser has been an important element. Our court has said that insolvency alone of the defendant will not be sufficient to authorize an injunction. *Pensacola & G. R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747. Under the proof in the record before us insolvency cannot be claimed in support of the decree. The showing is that one of the respondents, and who is the real party in interest in the subject-matter of this suit, owns considerable property within the jurisdiction of the court, and liable to any judgment for damages that may be recovered against him.

In cases of repeated trespasses where it is necessary to quiet a rightful admitted or established possession, chancery has often interposed to prevent a multiplicity of suits, although there may be a remedy at law, and this is a well-recognized head of chancery jurisdiction when a proper case is presented. The court will not, however, grant an injunction against one person merely because he is guilty of repeated trespasses where the legal remedy affords an adequate and complete redress in damages. The rule, as stated by many decisions, is, that to justify the interference of a court of equity in cases of trespass in order to avoid a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own claim or pretension. *Jerome v. Ross*, *supra*; *Hatcher v. Hampton*, 7 Ga. 49; *Nicodemus v. Nicodemus*, 41 Md. 529; *Thorn v. Sweeney*, 12 Nev. 251; *John A. Roebbing Sons' Co. v. First Nat. Bank of Richmond*, 80 Fed. Rep. 744; High, Inf. § 700.

The bill is filed against Carney and two others alleged to be his foremen. Carney is the only person who is making any claim to the land as against appellees, and is the

of the injury goes to the substance of the estate, equity will interfere without regard to the question of the insolvency of the defendant, and that this interference may take place to preserve the estate intact pending an appeal to a higher court from a judgment settling the title in one of the adverse parties.

But other courts have held that—

The mere fact that an ejectment suit is pending for possession of the land is not sufficient to warrant the court in enjoining defendant from cutting the timber and removing it from the land pending such suit. *Cox v. Douglass*, 20 W. Va. 175.

So the cutting of the timber will not be restrained pending a suit to establish the title, if the cutting is an ordinary use of the property and there is nothing to show that a money consideration will not give an adequate compensation for all the damage suffered by the prevailing party. *John L. Roper Lumber Co. v. Wallace*, 93 N. C. 22; *Lewis v. John L. Roper Lumber Co.* 98 N. C. 11.

Proceedings in equity cannot be maintained for the purpose of settling the question of the title to the land. *Watson v. Ferrell*, 34 W. Va. 406.

Statutory provisions.

Jurisdiction over trespass is given in certain cases by the Georgia Code. *Powell v. Cheshire*, 70 Ga. 267.

Under the North Carolina Act of 1885, chap. 401, it is not necessary to allege insolvency in case of

the cutting or destruction of timber trees. *John L. Roper Lumber Co. v. Wallace*, *supra*.

Cutting timber on public land is waste, within the Washington Code, § 663, which provides that where there are opposing claimants to public land, and one is threatening to commit on such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, he may be enjoined therefrom. *Arment v. Hensel*, 5 Wash. 152.

Allegation of irreparable injury not sufficient.

Some of the courts have held that it is not sufficient for the bill to simply allege that the injury would be irreparable, but facts must be stated which will show that such will be the case. *Thompson v. Williams*, 54 N. C. 176; *Bogey v. Shute*, 54 N. C. 180.

The facts constituting the irreparable injury must be set out. *Schoonover v. Bright*, 24 W. Va. 698; *Watson v. Ferrell*, 34 W. Va. 406.

Interference with contract rights.

The vendors who have sold property may be enjoined from stripping the timber therefrom at the suit of the vendee. *Smith's App.* 69 Pa. 479.

One who has purchased the timber on a tract of land may enjoin a subsequent purchaser of the land with notice of his rights from cutting and removing the timber. *Gress Lumber Co. v. Leitner* (Ga.) July 24, 1893.

H. P. F.

sole moving agency in the alleged invasion of their rights. The other persons named are simply agents and servants, and they do not assert any claim to the land. What they do is for Carney and in his name, and the controversy in reference to the land is solely between appellees and appellant Carney. According to the rule just stated, there would be no occasion for the interference of chancery on account of the multiplicity of suits between the parties. But in addition to the rule mentioned, it seems to be clearly settled that whenever the complainant's title is disputed a court of equity will not interfere by injunction, or make perpetual an injunction already granted, on the ground of a multiplicity of suits, until he has procured his title to be established by a successful trial at law. The ground upon which this action is based is because as a general thing courts of equity do not try disputed legal titles to land. 1 Pom. Eq. Jur. § 252; *Poyer v. Des Plaines*, 123 Ill. 111; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Irwin v. Davidson*, 38 N. C. 311; *Caro v. Pensacola City Co.* 19 Fla. 766. The answer shows that the title of appellees was disputed, and an examination of the testimony in the record does not dispel the presence of a serious issue between the parties as to the legal title to the land in question. In any view we take of the case there is nothing to help the final decree in favor of appellees on the ground of the right of the court to interfere on account of a multiplicity of suits.

But can the decree in favor of appellees making the injunction perpetual be supported on the ground that appellants were committing an irreparable injury within the meaning of the rule already stated? It is safe to say that even in cases of the destruction of timber by cutting and removing it from the land, it is not sufficient in order to obtain an injunction to simply allege that such cutting and removal amount to irreparable injury to the land, and a great damage and loss to the owner. In addition, it must appear that the trees are of such peculiar value and importance to the estate as that their destruction or injury will so affect the uses and purposes for which it is designed as to make their loss an irreparable injury to the owner. If adequate compensation can be made in money, the remedy is at law. In *Green v. Keen*, 4 Md. 98, the allegation as to the trespass was, in substance, that the defendant had entered upon the premises mentioned and had felled timber trees and other trees standing upon the land, and committed other and further waste thereon by driving wagons and other vehicles over the same, and had threatened to fell other timber trees on the land to its irreparable injury and to the great damage and loss of complainant. This was held not sufficient to authorize an injunction.

It was alleged in *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371, that complainant's home, consisting of two hundred and forty acres, had on a part of it timber consisting of oak, chestnut, hickory, and other growth common to the country, and that it was "particularly valuable and desirable to com-

plainant as timber land, so much so that it would be and is attended with irreparable injury for the same to be cut down and destroyed, or converted into pasture or waste land; that a portion of said timber land, and the portion which is in part the subject of the waste and destruction hereinafter complained of, is so situated in reference to complainant's house and outbuildings that it affords them protection and shelter from the severity of the seasons of summer and winter, besides being ornamental, and that on these accounts also the waste and destruction hereinafter set forth and complained of is attended with and is an irreparable injury to complainant." The trespass of entering upon and destroying the timber by defendants was also alleged. The same court held this bill to be sufficient for an injunction. The principle applied here is this—the trespass complained of went to the destruction of that which was essential to the value of the estate, and to the destruction of the estate itself, in the character in which it had been enjoyed. When such an injury is inflicted it is irreparable, in the meaning of the rule, and cannot be compensated by the legal remedy, and hence a court of chancery, ever ready to prevent an injustice, steps forward with its restraining power to prevent the threatened injury. The character of the injury as being capable of compensation, or such as is irreparable in its nature, is the distinguishing feature in determining the jurisdiction of chancery in such cases. *West v. Walker*, 8 N. J. Eq. 279; *Thompson v. Williams*, 54 N. C. 176; *Powell v. Rawlings*, 38 Md. 239; *Thatcher v. Humble*, 67 Ind. 444; *Hatcher v. Hampton*, *supra*; *Thomas v. James*, 32 Ala. 728; *Hillman v. Hurley*, 82 Ky. 626.

The averments of the bill in *Gause v. Perkins*, to which reference has already been made, were that most of the land was fit for little else than the production of turpentine, staves, and timber, and that defendant had entered upon the land by his agents and servants and boxed some 25,000 trees for producing turpentine, and had carried on the business of making turpentine on this land and carrying it off and selling the same in large quantities. Further, that he was overworking the trees, and in a few years they would be worn out, useless, and unfit for making turpentine, and defendant was at the time of filing the bill engaged in committing other wastes, spoil, and destruction upon the land, and was thus doing an irreparable injury to the land and would render the same utterly useless and valueless unless he was restrained by injunction. The court decided in this case that the boxing of pine trees for turpentine, and working them for such purpose, was not destruction, and that the court could not see that the injury would be irreparable unless it was shown that the defendant was insolvent, and, on that account, unable to atone for any injury that he might do the complainant. In another case, *Beil v. Chadwick*, 71 N. C. 329, where an injunction against working pine trees for turpentine was sought, the court said: "It should be a very clear case of trespass, and irreparable mischief, to justify a court in crippling the

industry of the country and preventing the full development of our resources." As was said in a still later case, *McCormick v. Nixon*, 83 N. C. 113, the decisions in that state were placed upon the ground of justice to the party sought to be enjoined, and in obedience to public policy, which favors the use to which lands are adapted as means of developing the resources of the country. We have been unable to find any case holding that the simple working of pine trees for turpentine in the customary manner was irreparable injury, to prevent which a court of equity would grant an injunction. In *Stevens v. Beekman*, 1 Joins. Ch. 318, 1 L. ed. 155, the allegation, in effect, was that defendant had entered the premises, cut down and taken away timber, and that the part of the land on which such waste was committed, was principally, if not exclusively, valuable on account of the timber. This was held insufficient to sustain the injunction. So far as the loss of the turpentine is concerned, or damage to the trees in the production of turpentine, the bill entirely fails to exhibit a case of irreparable injury. It is made to appear that the trees are valueless except for turpentine and timber, and without them in a condition to produce turpentine and timber the land would be of little value; also that appellees were being deprived of the turpentine by reason of the acts of appellants. It does not ap-

pear from this that the working of the trees for turpentine will be a destruction of them, nor does it appear that the alleged injury is of such a nature as that it cannot be fully compensated in damages. There is an allegation in connection with the above, that the extraction of the turpentine from the trees greatly lessens their value as timber producing trees, but here again there is an absence of any clear showing that the injury resulting from the source amounts to a destruction of the estate, or is such as cannot be fully atoned for in money, and that a recovery for the damage done to the trees as timber in working them for turpentine would not be full and adequate for all the injury sustained. There is no special allegation of damage showing that pecuniary compensation will not compensate for all the loss.

The court we think was in error in not dissolving the injunction on final hearing, without reference to the question of appellees' title. The answer denied the title and possession of appellees, and on the proof it is contended by appellants that the court should have refused relief on the ground of want of title in appellees. What we have said disposes of the case, and we need not discuss the question of title.

The decree of the court should be reversed and it is so ordered.

NEW YORK COURT OF APPEALS.

Levi P. MORTON, *Respt.*,
v.
Mayor, etc., of NEW YORK, *Appts.*

(140 N. Y. 207.)

1. The legislative authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question.
2. The right of a city to build a pumping station for waterworks on its own land so near the premises of a private owner that buildings subsequently erected by him will be made untenable by the noise and vibration of the pumping machinery, is not conferred, even if the legislature has power to confer it without compensation to him, by a general authority to locate necessary structures and machinery for the waterworks.

(November 28, 1893.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court,

First Department, reversing a judgment of the New York Circuit in their favor in an action brought to recover damages for the alleged depreciation of the value of plaintiff's property by reason of the operation of a pumping station by defendants on adjoining land. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Charles Blandy*, with *Mr. William H. Clark*, for appellants:

The pumping station in question was erected and maintained under the direct authority and sanction of the legislature.

Laws 1878, chap. 386.

The plaintiff was bound to submit graciously to his inconvenience and damage, because the pumping station was a lawful structure engaged in doing work of a public character and for the public good. Damages from lawful acts cannot usually be made the basis of an action.

Weeks, Damnum Absque Injuria, § 8; *Beltinger v. New York Cent. R. Co.* 23 N. Y. 42; *Radoliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Graves v. Otis*, 2 Hill, 466; *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719; *Mills v. Brooklyn*, 82 N. Y. 489; *Henry v.*

NOTE.—It is clear that courts in modern cases tend more and more to the protection of the rights of individuals as against the public, evidently mindful of the fact that the public, rather than a single individual, ought to bear the expense or loss by acts done for the benefit of the public. While the above case does not decide that the legislature could not authorize a nuisance to private property

in the interest of the public without compensation to the owner of such property, it applies a strict rule of construction to the claim of such legislative authority. For brief reference to illustrations of the tendency above referred to, see *notes* to *Forster v. Scott* (N. Y.; 15 L. R. A. 543, and *Memphis & C. R. Co. v. Birmingham, S. & T. R. R. Co.* (Ala.) 15 L. R. A. 16a.

Pittsburgh & A. Bridge Co. 8 Watts & S. 85; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Re Philadelphia & T. R. Co.* 6 Whart. 43, 36 Am. Dec. 202.

A municipal corporation, acting under the authority of its charter or of the general statute, cannot be subjected to a liability for damages arising from the exercise by it of the authority conferred, so long as the authority is properly exercised, and not exceeded, unless a statute or the fundamental law expressly gives a right to such damages.

15 Am. & Eng. Encyclop. Law, p. 1153; *Radcliff v. Brooklyn*, *supra*; *Re Furman Street*, 17 Wend. 667; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Kavanagh v. Brooklyn*, 38 Barb. 232; *Waddell v. New York*, 8 Barb. 95; *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Cohen v. New York*, 4 L. R. A. 406, 118 N. Y. 536; *Fobes v. Rome*, W. & O. R. Co. 8 L. R. A. 453, 121 N. Y. 505; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 122 N. Y. 18; *Uline v. New York Cent. & H. R. R. Co.* 101 N. Y. 98, 53 Am. Rep. 123, *note*, 54 Am. Rep. 621; *Conklin v. New York*, O. & W. R. Co. 102 N. Y. 107; *Cooley*, Const. Lim. 5th ed. 671.

In *Atwater v. Canandaigua Trustees*, 124 N. Y. 602, the court decided: "No liability rests upon the village, which in the exercise of its powers conferred by statute (Laws 154, chap. 852, § 1), constructed a coffer-dam in the channel of the outlet of a lake for the purpose of enabling them to build a bridge in the highway across the outlet, and thereby caused the overflow of pasture land bordering the lake and a mile distant from the dam."

Radcliff v. Brooklyn, 4 N. Y. 195, 53 Am. Dec. 357; *Bellinger v. New York Cent. R. Co.* 28 N. Y. 42; *Moyer v. New York Cent. & H. R. R. Co.* 38 N. Y. 851; *Uline v. New York Cent. & H. R. R. Co. supra*; *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 24 L. ed. 336; *Pumpelly v. Green Bay & M. Canal Co.* 90 U. S. 13, 18 Wall. 166, 20 L. ed. 557; *Paine v. Delhi*, 5 L. R. A. 797, 116 N. Y. 224; *Kane v. New York Elec. R. Co.* 11 L. R. A. 640, 125 N. Y. 166; *Waterloo Woolen Mfg. Co. v. Shanahan*, 14 L. R. A. 481, 128 N. Y. 845; *Silasy Mfg. Co. v. State*, 104 N. Y. 562; *Roxford v. Knight*, 11 N. Y. 813; *American Bank Note Co. v. New York Elev. R. Co.* 129 N. Y. 252; *Benner v. Atlantic Dredging Co.* 17 L. R. A. 220, 184 N. Y. 156; *Hudson River Teleph. Co. v. Waterliet Turnp. & R. Co.* 17 L. R. A. 674, 185 N. Y. 398.

Cooley on Constitutional Limitations, on page 673, says: "So, if in consequence of the construction of a public work an injury occurs, but the work was constructed upon proper plan and without negligence, and the injury is caused by accidental circumstances, the injured party cannot demand compensation."

Sprague v. Worcester, 13 Gray, 193; *Brown v. Cayuga & S. R. Co.* 12 N. Y. 486; *Pumpelly v. Green Bay & M. Canal Co. supra*; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

In *Rutz v. St. Louis*, 7 Fed. Rep. 438, circuit court of Missouri, 1881, where a state authorized a structure protruding into a navigable river which caused plaintiff's land to be washed away, it was held, while such would be considered a private nuisance if done by a
23 L. R. A.

private citizen, yet where such a structure is authorized by the state, its own citizens must accept the legal consequences.

Northern Transp. Co. of Ohio v. Chicago, 99 U. S. 635, 24 L. ed. 336; *Weeks*, *Dammum Absque Injuria*, § 8; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357; *Imler v. Springfield*, 55 Mo. 125, 17 Am. Rep. 645; and various other cases; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Fort Worth v. Crawford*, 64 Tex. 202, 53 Am. Rep. 753; *Daniels v. Keokuk Water Works*, 61 Iowa, 549; *Chicago v. Taylor*, 125 U. S. 164, 31 L. ed. 640.

A municipal corporation is not impliedly liable to an action for damages either for the nonexercise of or for the manner in which in good faith it exercises discretionary powers of a public or legislative character.

Dill. Mun. Corp. § 949; *Urguhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655; *Mills v. Brooklyn*, 32 N. Y. 489; *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664.

Mr. B. F. Tracy, for respondent:

The pumping station, erected and maintained by the defendant upon its own land, was a nuisance, specially injurious to the houses and lots of the plaintiff adjoining and in its immediate vicinity.

Had the acts complained of been committed by a private person, his liability to the plaintiff for the injury sustained would not be doubted.

McKeon v. See, 51 N. Y. 300, 10 Am. Rep. 659; *Fish v. Dodge*, 4 Denio, 811, 47 Am. Dec. 254; *Tipping v. St. Helen's Smelt. Co.* 4 Best & S. 608; *Bohan v. Port Jervis Gas Light Co.* 9 L. R. A. 711, 122 N. Y. 23.

In such cases it is not necessary to allege and prove negligence.

Cogswell v. New York, N. H. & H. R. R. Co. 103 N. Y. 10, 57 Am. Rep. 701; *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 829, 27 L. ed. 744; *Bohan v. Port Jervis Gas Light Co. supra*.

The fact that the defendant is a municipal corporation does not relieve it from liability.

Noonan v. Albany, 79 N. Y. 476, 35 Am. Rep. 540; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Griffin v. New York*, 9 N. Y. 456, 61 Am. Dec. 700.

One who pleads legislative authority for particular acts, which would otherwise be a nuisance must show that the legislature authorized, in express terms, or by clear and unquestionable implication, the doing of the very acts complained of; or that the statute was imperative and could not be executed without causing a nuisance.

United States v. Fisher, 6 U. S. 2 Cranch, 390, 2 L. ed. 814; *Cogswell v. New York, N. H. & H. R. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701; *Hill v. Metropolitan Asylum Dist. Managers*, L. R. 4 Q. B. Div. 433, S. C. on appeal, 6 App. Cas. 193; *Truman v. London, B. & S. C. R. Co.* L. R. 25 Ch. Div. 423; *Reg. v. Bradford Nav. Co.* 6 Best & S. 631; *Atty. Gen. v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. 147; *Hooker v. New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477, 15 Conn. 312.

The fact that the plaintiff's dwelling houses

were erected after the pumping station was in operation is immaterial.

Wood, Nuisance, 2d ed. § 520; *Com. v. Upton*, 6 Gray, 473; *Campbell v. Seaman*, 63 N. Y. 584, 20 Am. Rep. 567; *Taylor v. People*, 6 Park. Crim. Rep. 352; *Wier's App.* 74 Pa. 230; *Brady v. Weeks*, 8 Barb. 157; *Barwell v. Brooks*, 1 L. T. 454.

O'Brien, J., delivered the opinion of the court:

The municipal authorities of the city of New York were empowered by chapter 886 of the Laws of 1878 to extend and enlarge the distribution of Croton water throughout the city, and for that purpose to raise and expend a sum of money not to exceed \$1,500,000. The authority thus conferred is to be found in the second section of the Act, which reads as follows: "The commissioner of public works of the city of New York, when thereunto authorized by three-fourths vote of all the members elected to the common council of said city, to be approved by the mayor of said city, is hereby authorized to expend for materials and labor and other services in such manner as the said commissioner shall deem for the best interest of said city, in laying pipes to extend and enlarge the distribution of Croton water throughout the city of New York, including the two new wards, and to furnish a sufficient supply thereof to the institutions in charge of the department of public charities and correction, located on Blackwell's island, Ward's island and Randall's island, and in laying mains and erecting or constructing such structures and fixtures as the said commissioner of public works may deem necessary to deliver said water at higher levels and in greater quantities, an additional sum not exceeding \$1,500,000." The common council and the commissioner of public works proceeded to execute the power conferred by this act, and erected upon certain lots owned by the city a building, in which were placed pumping engines, tank, and other fixtures, and laid the necessary mains and pipes to connect the points to be served with the source of supply. The object of the improvement was to supply water at higher elevations to the portions of the city built on high ground. The pumping station was constructed some time after the passage of the act, and in the year 1888 had been in operation some years. About this time there was erected a row of brick dwelling houses extending from the west wall of the pumping station westerly, twelve in number, which, on the 18th of July, 1888, were all conveyed to the plaintiff. The three houses nearest to the station are known as Nos. 116, 118, and 120; the first having been built close to the west line of the lot upon which the structures of the city had been placed. The injury for which the plaintiff complained was that, by reason of the operation of the pumps and machinery in the station, the noise and vibration therefrom greatly damaged the three houses next adjoining, rendering them untenable, or at least greatly diminishing the rental value. The vibration and noise affected the three houses in proportion to their proximity to the sta-

tion. It is conceded by the learned counsel for the defendant that the plaintiff at the trial proved that the three houses were seriously affected by the action of the machinery in use in the pumping station, and that the vibrations and noise therefrom produced actual pecuniary loss to the plaintiff. There is no complaint of negligent management on the part of the municipal authorities, but the plaintiff's contention is that he was entitled to the use and enjoyment of the property which he owned free from such annoyance or loss. On the other hand, the defendant insists that it is not liable for the results of the injury, for the reason that it acted in the exercise of powers for public purposes conferred by express legislative authority. These positions assumed by the respective parties sufficiently disclose the nature of the legal question involved. The defendant's position was sustained by the trial court, and the complaint dismissed, but the general term has reversed the judgment.

The defendant, by the exercise of the power of eminent domain, could have taken such portion of the adjoining property as would enable it to conduct its operations without damage to what remained, and the owner would then be entitled to compensation. It may be a question worthy of consideration whether, upon the facts disclosed, the defendant's acts do not virtually amount to a taking without any compensation, to the extent of the damage caused; but a consideration of this feature of the case is rendered unnecessary by recent decisions of this court, which, when applied to the facts disclosed by the records, fully sustain the view taken by the learned general term. These cases have grafted upon the principle contended for in behalf of the defendant—that legal liability in damages cannot result from acts done by a corporation in the performance of a public duty by express legislative authority, resulting in consequential injury to others, and which as between individuals, would be regarded as a nuisance—an important limitation. It is that the authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question. *Hill v. New York*, 139 N. Y. 495; *Bohan v. Port Jervis Gas Light Co.* 122 N. Y. 18, 9 L. R. A. 711; *Cogswell v. New York, N. H. & H. R. R. Co.* 103 N. Y. 10, 57 Am. Rep. 701.

The authorities cited show that this qualification of the general doctrine is founded in reason and justice, and that it is not by any means a new principle. It only remains to point out its application to this case. The legislature undoubtedly authorized the defendant to construct a building, and to place in it the necessary machinery to accomplish the purpose in view. But that is not the act complained of, or which produced the injury to the plaintiff's property. The wrong consisted in placing the building and machinery so near to the adjoining property as to injuriously affect it by the noise and vibration.

The city has a right to build upon its own land, but there was nothing in the statute that required it to place the structure where it did. It could perform every duty imposed by the statute by building the pumping station at such distance from the adjoining houses as to avoid the results of which the plaintiff justly complains. If it was not possible or practicable to do that upon the land that the defendant owned, then more could have been acquired for the purpose. The legislature did not select the place for the station, but the defendant did. A general authority to raise and expend money for the purpose of extending and enlarging the supply of water, and erecting the necessary structures and machinery for that purpose, is neither an express nor implied authority to construct a pumping station which adjoins the walls of another house, or block of houses, in such manner as to render them untenable by the noise and vibration. It was entirely possible to execute the statute without invading the property rights of others. General powers for the accomplishment of a general purpose were conferred upon the defendant, but no express or implied power or authority was conferred to do the very act complained of, nor can it be said that the legislature contemplated it. It is quite likely

that all the power intended to be conferred by the statute was to enable the city to raise and expend the money for the purpose indicated. Aside from this power the city probably could, if it had the means, build the station under existing law, and without any additional legislation. But, however that may be, it cannot be said that the legislature contemplated the selection of such a place for the station that the operation of the pumps and machinery would inevitably expose private property to destruction or injury. The language of *Chief Justice Marshall* in *United States v. Fisher*, 6 U. S. 2 Cranch, 390, 2 L. ed. 314, is applicable: "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." It is plain, we think, that the specific act of the defendant which resulted in the injury is not within the express words of the statute, or any necessary implication.

The order appealed from should therefore be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All concur.

INDIANA SUPREME COURT.

Caroline DAVENPORT, *Appt.*,

v.

George GWILLIAMS.

(133 Ind. 142.)

The general language of a deed with covenants sufficient to pass the estate of the grantor is not limited by a clause which recites that it is intended to convey absolutely all the interest of his wife who is named therein as one of the grantors but who has only an inchoate dower interest therein.

(September 14, 1892.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Benton County in favor of defendant in an action brought to recover possession of certain real estate formerly owned by plaintiff's deceased husband, who had joined with his former wife in a deed which was alleged to have conveyed only her interest in the property. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Edwin P. Hammond, Matthew H. Walker, George H. Gray and William B. Austin, for appellant:

The deed to Whaples, as shown by the instrument itself and the circumstances surrounding its execution, was plainly intended

to convey only the interest of the wife, Sarah, and, as she had only an inchoate interest as the wife of Joseph, the deed was a nullity and passed no title whatever.

Attempted conveyances convey nothing.

Sharp v. Bailey, 14 Iowa, 387, 81 Am. Dec. 489; *Martin v. Dively*, 6 Wend. 9, 21 Am. Dec. 245; *Vertner v. Humphreys*, 14 Smedes & M. 130; *Board of Trustees v. Davison*, 65 Ill. 124; *Heaton v. Fryberger*, 34 Iowa, 185; *Smith v. Elliott*, 39 Tex. 201; *Leftwich v. Neal*, 7 W. Va. 569; *Little v. Dodge*, 32 Ark. 453.

This is not an action to reform a deed. Appellee claims title under the deed as it is.

Hummelman v. Mounts, 87 Ind. 178.

The rule of construction, as between apparently repugnant clauses in a deed, is, that the meaning of general words are restrained by more specific and particular words. Under this rule the general words of conveyance in the granting part of the deed in controversy, which, standing alone, would be sufficient to convey the title of both Joseph and his wife, are qualified by the particular and specific words of the grant whereby it was declared to be the intent of the parties to convey the interest of Sarah.

Green Bay & M. Canal Co. v. Hewett, 55 Wis. 96, 42 Am. Rep. 701; *Bates v. Foster*, 59 Me. 157, 8 Am. Rep. 406.

NOTE.—On the construction of deeds several important recent cases have been reported in this series. As to condition for specified charitable public or quasi-public purpose, see *Greene v. O'Connor* (R. I.) 19 L. R. A. 262, and note.

For other valuable cases on the construction of 22 L. R. A.

deeds, see *McLeod v. Tarrant* (S. C.) 20 L. R. A. 846; *Flaten v. Moorhead* (Minn.) 19 L. R. A. 195; *Mansfield v. Place* (Mich.) 18 L. R. A. 39; *Rupert v. Penner* (Neb.) 17 L. R. A. 324; *Hubbard v. Greeley* (Me.) 17 L. R. A. 511.

The cardinal and fundamental rule of all construction is to ascertain the intention of the parties, and this intention is to be arrived at by taking the instrument as a whole and giving appropriate meaning to every clause and every word.

Bishop, Cont. § 384; *Bassett v. Budlong*, 77 Mich. 388; *Ingalls v. Newhall*, 139 Mass. 268.

If the full and entire intention of the parties does not appear from the words of the contract, and if it can be interpreted from any custom or usage of the place where it is made, that course is to be adopted.

Story, Conf. L. § 270; *Jackson v. Myers*, 8 Johns. 388, 8 Am. Dec. 504.

Nothing being disclosed in the record to the contrary, this court will presume that the common law prevailed in Connecticut when the Davenport deed was made.

1 Jones, Mortg. § 22; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390.

By this law, the mortgagee held the legal title, was entitled to possession, and could maintain ejectment against the mortgagor. After condition broken, the mortgagor's estate was forfeited at law and his only remedy was, after tender of payment or demand for accounting, to apply to a court of equity to redeem.

With this law, believed by the parties to be applicable to the mortgage in question, it requires no fanciful imagination to grasp the situation of the parties as it appeared to them. The legal title, as it seemed to them, was in Whaples, Hunn's executor, who held the mortgage. The mortgage debt being past due, Joseph Davenport's title was forfeited. His only remedy was to go into a court of equity to redeem, which to him was no remedy at all, involving as an indispensable condition the payment of the mortgage debt. He had nothing to pay with. He was wholly without means. Then, as it appeared to Davenport and Whaples, the title of the former was to all intents and purposes gone, and was vested absolutely in the latter, subject to the inchoate dower of the wife who had not joined in the mortgage. All, as the parties thought, that was essential to make Whaples' title perfect was a deed conveying to him this inchoate interest. And this was plainly and manifestly the only object of the deed in controversy.

Had the law in Indiana been as the parties supposed, we are not prepared to say that the deed would have been ineffectual for the purpose intended, namely, to convey the interest of the wife alone, that of the husband having, as the parties believed, previously passed by the mortgage.

McCormick v. Hunter, 50 Ind. 186; *Dunn v. Tousey*, 80 Ind. 288.

The mistaken view of the parties respecting the law of Indiana by which the validity of the Davenport deed is to be tested, cannot change the legal effect of that instrument.

In executing the deed in controversy the parties used a printed blank, and all that portion of the deed, containing in general words the grant whereby it is claimed that the title of the husband was conveyed, is in print, while that portion in which specific and particular words are used, limiting the conveyance to the interest of the wife, is in writing. In such

case, the written are given pre-eminence over the printed words in arriving at the intention of the parties.

Bates v. Foster, 59 Me. 157, 8 Am. Dec. 406; *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 383; *Bassett v. Budlong*, 77 Mich. 388.

Messrs. Coffroth & Stuart and Jay H. Adams for appellee.

McBride, Ch. J., delivered the opinion of the court:

While several errors are assigned in this case, they all hinge upon the construction of the following deed: "To all people to whom these presents shall come, greeting: .

"Know ye, that we, Joseph Davenport and Sarah Davenport, his wife, of the town of West Hartford county of Hartford, and State of Connecticut, for the consideration of one dollar received to our full satisfaction of Shubael H. Whaples, of the town of Newington, in said county, executor of the will of Albert S. Hunn, deceased.

"Do give, grant, bargain, sell and confirm unto the said Shubael H. Whaples, executor as aforesaid, a certain piece of land situated in the county of Benton, State of Indiana, being the northwest $\frac{1}{4}$ section seventeen, and the east half of section eighteen, in the township number twenty-five, range seven west containing four hundred and eighty acres of land. Said premises were mortgaged by deed recorded in mortgage records book No. 9 at pages 131 and 132, by Joseph Davenport to said Albert S. Hunn, intending thereby to convey absolutely to said grantee as executor as aforesaid, all the interest of Sarah Davenport in said premises.

"To have and to hold the above granted and bargained premises with the appurtenances thereof unto the said grantee, his heirs and assigns forever to his and their own proper use and behoof. And also I the said grantors do for ourselves, our heirs, executors and administrators, covenant with the said grantee his heirs and assigns that at and until the unsealing of these presents we are well seised of the premises as a good, indefeasible estate in fee simple, and have right to bargain and sell the same in manner and form as is above written, and that the same is free from all incumbrances whatsoever.

"And furthermore we, the said grantors, do by these presents bind ourselves and our heirs forever to warrant and defend the above granted and bargained premises to him and the said grantee, his heirs and assigns against all claims and demands whatsoever, with the exception of such taxes as may have been assessed or become due since March 30, 1878.

"In witness whereof, we have hereunto set our hands and seals this fourteenth day of April, in the year of our Lord, One Thousand Eight Hundred and Seventy-nine.

"Joseph Davenport, (L. S.)

"Sarah Davenport. (L. S.)

"Signed, sealed and delivered in the presence of Henry Talcott, Sarah J. Bywater."

When the deed was executed Joseph Davenport was owner in fee of the land in controversy, subject to the mortgage referred to in the deed. Sarah Davenport owned no inter-

est whatever therein, except her inchoate interest as his wife. We quote from the brief of counsel for the appellant their statement of the contention:

"The contention between the parties arises upon the construction of the Davenport deed to Whaples. Appellee claims that it was effective to convey Joseph Davenport's title. Appellant insists that its manifest purpose was to convey only the inchoate interest of Davenport's first wife, and that as her death occurred before that of her husband the deed was inoperative and void."

This argument rests upon the use by the parties of the words, "intending hereby to convey absolutely to said grantee as executor aforesaid all the interest of Sarah Davenport in said premises," which they insist are words of limitation, serving to limit the estate conveyed to the inchoate interest of the wife therein referred to. The construction contended for by the appellant would violate many well-settled rules for the construction of deeds. The purpose of all such rules is to ascertain the intention of the parties. Washb. Real Prop. *622-631.

A deed should if possible be so construed that some effect will be given it. It will be assumed that the parties did not intend that it should be a nullity, and did intend that it should be operative. It will be upheld, rather than defeated. 2 Parsons, Cont. 505; *Irwin v. Kilburn*, 104 Ind. 118; *Gano v. Aldridge*, 27 Ind. 294.

When it becomes necessary to resort to rules of construction to determine the meaning and purport of a deed because of any ambiguity in the terms used, that construction will be adopted which is most favorable to the grantee. *Hunt v. Francis*, 5 Ind. 802; *Hackleman v. Henry County Comrs.* 78 Ind. 162; 2 Parsons, Cont. *supra*.

It is also a cardinal rule in the construction of deeds that it be made on the entire deed, and not merely upon a particular part of it, and therefore every part of a deed ought, if possible, to take effect and every word to operate. Hilliard, Real Prop. 401; *Williams v. Owen*, 116 Ind. 70; *Allen v. Holton*, 20 Pick. 458.

If the words in controversy had been omitted from the deed there would have been no room for doubt as to its meaning. It is clear that the deed without them would have conveyed the entire interests of both grantors. Giving to that clause, however, the effect contended for by the appellant renders it inoperative and defeats it as a conveyance. The inchoate right of the wife in the lands of her husband is not a present estate. So long as the title of the husband remains vested in him such inchoate right alone cannot be conveyed. A deed which attempts to convey such inchoate right and no more, leaving the husband's title in him, is void. *McCormick v. Hunter*, 50 Ind. 186; *Paulus v. Latta*, 93 Ind. 34; *Snoddy v. Leavitt*, 105 Ind. 357; *Hudson v. Eeans*, 81 Ind. 596; *Rupe v. Hazley*, 118 Ind. 416.

Such construction is not that most favorable to the grantee, but is destructive of his interests. It assumes that the parties, with all the formalities attending the execution of a valid conveyance of land, executed a paper which conveys nothing and is a nullity. These words relate solely to the wife's interest in the land and declare the purpose of the parties to convey such interest to the grantee. The language previously used is ample to convey that interest. The words in question, while surplusage, are not contradictory of, nor are they inconsistent with any other portion of the deed. Treating them as surplusage, while it convicts the parties of using unnecessary and redundant language, acquits them of the charge of inconsistency and of making a void instrument. It upholds, instead of striking down the deed. The latter construction harmonizes all of the provisions of the deed, and is, in our opinion, the correct one.

The conclusion we have reached is in accordance with the judgment of the Circuit Court, and its judgment is therefore affirmed, with costs.

Petition for rehearing denied December 22, 1892.

SOUTH CAROLINA SUPREME COURT.

Elizabeth H. EDWARDS *et al.*, *Appts.*,
v.
CHARLOTTE, COLUMBIA & AUGUSTA
R. CO., *Repts.*

(.....S. C.)

The common-law rule, regarding surface water as a common enemy which a landowner may, when necessary for the protection of his property, throw back on neighboring land to the damage of the owner thereof,

exists in South Carolina, under Gen. Stat., § 2734, adopting the common law of England.

(September 22, 1893.)

APPEAL by plaintiffs from a judgment of the Common Pleas Circuit Court for Aiken County in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by defendant's unlawful interference with the flow of surface water. *Affirmed.*

NOTE.—The law of surface waters as affecting the right to obstruct the flow and throw back the water although in much conflict is fully shown in the ex-
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haustive note covering the whole subject of surface waters which is published with the case of *Gray v. McWilliams* (Cal.) 21 L. R. A. 598.

The facts sufficiently appear in the opinion. **Messrs. Henderson Bros. and John R. Clay**, for appellants:

The proper rule on the subject is the civil-law rule.

Wallace v. Columbia & G. R. Co. 34 S. C. 66, 37 S. C. 335; *Philadelphia, W. & B. R. Co. v. Davis*, 68 Md. 280, 34 Am. & Eng. R. R. Cas. 143; *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480; *Bryant v. Bigelow Carpet Co.* 131 Mass. 491; *Louisville & N. R. Co. v. Hays*, 11 Lea, 382, 47 Am. Rep. 291; *Staton v. Norfolk & C. R. Co.* 17 L. R. A. 338, 111 N. C. 278.

The cases which sustain defendant's proposition are not in accord with the more recent and better authorities, and they are rapidly being submerged by the steady and increasing current of judicial decision.

Lewis, Em. Dom. § 566.

Messrs. Croft & Chafee, for respondent:

As regards the hindrance to the flow of surface water from its natural course no cause of action lies if what the railroad has done was proper and necessary for the safety of its road-bed.

Kansas City & E. R. Co. v. Riley, 38 Kan. 374, 20 Am. & Eng. R. R. Cas. 117; *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *Dill. Mun. Corp.* § 798, and notes; *Angell, Watercourses*, § 108; 1 Addison, Torts, 105; *Cooley, Torts*, 574; *Hilliard, Torts*, 584; *Taylor v. Fickas*, 64 Ind. 187, 31 Am. Rep. 114; *Schlichter v. Phillips*, 87 Ind. 201; *Gannon v. Hargadon*, 10 Allen, 106, 87 Am. Dec. 625; *O'Connor v. Fond du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 754; *Pettigrew v. Neanville*, 25 Wis. 223, 3 Am. Rep. 50; *Fryer v. Warne*, 29 Wis. 511; *Abbott v. Kansas City, St. J. & C. B. R. Co.* 83 Mo. 271, 53 Am. Rep. 581, 20 Am. & Eng. R. R. Cas. 103.

Section 2738 of the General Statutes reads: "Every part of the common law of England not altered by this act, nor inconsistent with the constitution of this state and the customs and laws thereof, is hereby continued in full force within this state in the same manner as before the passage of this act."

Messrs. Cothreau & Abney also for respondent.

McIver, Ch. J., delivered the opinion of the court:

The plaintiff, who is a married woman, joining her husband with her as a coplaintiff, brings this action against the Charlotte, Columbia & Augusta Railroad Company to recover damages alleged to have been done to her property, as well as to her health, by reason of the obstruction, by the defendant company, of the natural flow of surface water over and across the right of way and railroad track of defendant. The allegations in the complaint, substantially, are that some time in the year 1867 the defendant company constructed its railway through the town of Graniteville, over and along Canal street of said town, running north and south, parallel with Horse creek, a natural watercourse, on the west of the railway; that plaintiff is the lessee of certain premises situate at the northeast corner of Canal street and Cottage, the latter being a street running perpendicular
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to the former; that on the eastern side of the town of Graniteville the land is hilly, and gradually slopes towards Horse creek; and that the surface water which would accumulate on the eastern side was accustomed to flow, in part, down and along Cottage street, across Canal street, to said Horse creek, previous to the construction of defendant's road, and for some time afterwards, without injury to plaintiff's premises, but that some time in the year 1878 "the defendant negligently, unlawfully, and unnecessarily" erected a large sand bank, at the intersection of Canal and Cottage streets, whereby the surface water was forced back on plaintiff's premises, and has continued to maintain and increase said sand bank. The defendant claims that the sand bank complained of (which was constructed on defendant's right of way) was necessary to protect its roadbed and right of way from being undermined and washed away by the flow of the surface water, and therefore its construction was no invasion of the legal rights of the plaintiff, and the defendant is not liable for any damages which plaintiff may have sustained by reason of such obstruction of the flow of the surface water. The circuit judge, in effect, charged the jury that the first question for them to determine was whether the construction of the sand bank was necessary for the protection of defendant's roadbed and right of way, and, if so, then the defendant was not liable. The jury, under this instruction, found a verdict in favor of the defendant, and, judgment being entered thereon, the plaintiff appeals upon the several grounds set out in the record. Under the view which we take we do not deem it necessary to repeat these grounds, for the whole case, in our judgment, turns upon the inquiry whether there was any error in the instruction thus given to the jury.

It is not, and cannot be, denied that the rule in regard to interference with the flow of surface water is wholly different from that which prevails in regard to the waters of a natural watercourse. We shall therefore confine our attention entirely to the rule as to surface water. What that rule is has been the subject of debate in numerous cases in the other states, many of which we have examined in preparing this opinion. Some of the states have adopted what is known as the "civil-law rule," while others seem to have adopted what is designated as the "intermediate rule," while others, again (a majority of the states, as is said in a note to *Goddard v. Harpswell*, 30 Am. St. Rep. 891), adhere to the rule of the common law. In this state, so far as we are informed, there is no adjudication upon the subject, for what was said upon the subject by the late *Chief Justice Simpson* was "not intended as a final adjudication, and conclusive of said question in the future," as he himself expressly said in that opinion, but simply his own opinion as to the comparative merits of the several rules. But in view of the express declaration of the lawmaking power, as embodied in section 2734 of the General Statutes, we feel bound to declare, in the absence of any constitutional provision, statute, or even authorita-

tive decision to the contrary, that the common-law rule must still be recognized as controlling here, for that section expressly declares that "every part of the common-law of England, not altered by this act nor inconsistent with the constitution of this state, and the customs and laws thereof, is hereby continued in full force and virtue within this state in the same manner as before the passage of this act." Under the common-law rule, surface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if, in doing so, he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of *damnum absque injuria*, and affording no cause of action. This rule was applied in a case very much like the present,—*Rove v. St. Paul, M. & M. R. Co.* 41 Minn. 384. Also in *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *O'Connor v. Fond du Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. Rep. 754; *Johnson v. Chicago, St. P. M. & O. R. Co.* 80 Wis. 641, 14 L. R. A. 495. See also *Chadeayne v. Robinson*, 55 Conn. 345, and *Abbott v. Kansas City, St. J. & C. B. R. Co.* 88 Mo. 271, 53 Am. Rep. 581; in which the case of *Shane v. Kansas City, St. J. & C. B. R. Co.* 71 Mo. 237, 36 Am. Rep. 480, relied upon by appellant, as well as the case of *McCormick v. Kansas City, St. J. & C. B. R. Co.* 70 Mo. 359, 35 Am. Rep. 431, are commented on and practically overruled, so far as the question now under consideration is concerned. These cases, as well as many others which might be referred to, together with those cited by respondent's counsel in his argument, abundantly show that there was no error on the part of the circuit judge in giving the instruction complained of to the jury. The case of *Staton v. Norfolk & O. R. Co.*, recently decided by the supreme court of North Carolina, 111 N. C. 278, 17 L. R. A. 838, seems to be much relied on by the

counsel for appellant. But we do not think it in point. The question there was different from that presented here, and the discussion was principally devoted to an inquiry into the rights acquired by a railroad company from the exercise of its right to condemn lands under the power of eminent domain, with which we are not concerned here. Here we freely and fully concede the doctrine laid down in that case, that a railroad company has no higher rights in reference to the treatment of surface water than an individual land proprietor; and that is as far as that case is applicable to the present. Besides, as we understand, North Carolina is one of the states which recognizes the civil-law rule in reference to surface water, and hence the decisions in that state would afford no assistance where the common-law rule prevails. So, too, the cases of *Mills v. Greenville & O. R. Co.* 13 S. C. 97, and *Wallace v. Columbia & G. R. Co.* 34 S. C. 66, and again reported in 37 S. C. 335, being cases in reference to natural watercourses, and not cases of surface water, have no application to the present case. Nor are we able to discover anything in the case of *Gregory v. Layton*, 36 S. C. 93, which throws any light upon our present inquiry. Under the view which we have taken, the other grounds of appeal become immaterial; for, even if the alleged errors there complained of were well founded, the result reached would not have been affected. Assuming, as we must do, that the jury found as matter of fact that the sand bank complained of was necessary for the protection of defendant's right of way and roadbed, we are unable to see how the instructions complained of could possibly have affected the result. We may add, however, that we see no error in any of the instructions complained of.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

McGowan and Pope, JJ., concur.

GEORGIA SUPREME COURT.

Joseph SIMPSON, *Plff. in Err.*,
v.

STATE of Georgia.

(.....Ga.....)

*1. A person in a boat on the Savannah river, within thirty yards of the Georgia side, at a point where the river is at least 175 yards wide, is prima facie in the state of Georgia.

2. The offense of shooting at another is committed in this state when one in the state of South Carolina, without malice aforethought, but not in his own defense, or under other circumstances of justification, aims and fires a pistol at another who at the time is in this state, although the ball misses him, and strikes the water in this state, near the boat which he occupies.

*Headnotes by LUMPKIN, J.

NOTE.—For rivers and lakes as state boundaries, see note to *Buck v. Ellenboit* (Iowa) 15 L. R. A. 187. 22 L. R. A.

3. The evidence warranted the verdict and there was no error in denying a new trial.

(May 20, 1868.)

ERROR to the Superior Court of Hart County to review a judgment convicting defendant of the statutory offense of shooting at another. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. A. G. McCurry*, for plaintiff in error:

The defendant is indictable where the criminal act is committed.

A common-law court has jurisdiction only over transactions within its own county.

1 Bishop. New Crim. L. § 111; 1 Bishop, Crim. Proc. §§ 47, 49.

Subject to exceptions to be stated, no man is to suffer criminally for what he does out of the territorial limits of the county.

1 Bishop, New Crim. L. § 110, and authorities there cited.

The exception referred to is this: If one personally out of the county puts in motion a force which takes effect in it he is answerable where the evil is done though his presence is elsewhere, as where a man standing beyond the outer line of our territory by discharging a ball over the line kills another within it.

1 Bishop, New Crim. L. § 110. See the doctrine also in 1 Whart. Crim. L. § 279.

Where any felony or misdemeanor shall be begun in one county and completed in another, it may be dealt with, etc., in either county as if it were wholly committed therein.

1 Archbold, Crim. Pr. & Pl. 217.

Venue is a fact to be proven by the state and unless proven a conviction will not stand.

Davis v. State, 82 Ga. 205.

It must be proved as laid.

State v. Hartnett, 75 Mo. 251, 4 Am. Crim. Rep. 572.

In all the cases cited in the books something was done in the territory where the prosecution was had.

In the case of shooting at another the offense is complete by aiming and firing the gun or pistol irrespective of the execution that may be done and irrespective of the range and distance of the bullet. If the balls from Mr. Simpson's pistols did not take effect within Georgia's jurisdiction—if he aimed and fired in the state of South Carolina—and if the crime of shooting at another is completed by aiming and firing, then there was no criminal act and no part of the crime committed in Georgia so as to bring the case within any of the exceptions to the general rule.

Mr. William M. Howard, Sol. Gen., for the State.

Lumpkin, J., delivered the opinion of the court:

1. According to the convention of Beaufort between the states of Georgia and South Carolina, agreed on by the commissioners of both states on the 28th of April, 1787, the current or main thread of the channel of the Savannah river is the boundary between the two states. Code, § 16; Hotchkiss' Stat. 918-917. This being so, at a point where the river is not less than 175 yards wide, a person in a boat not more than thirty yards from the Georgia side is *prima facie* in this state. In the present case it was practically conceded that the testimony showed the person assaulted was on the Georgia side of the main current of the river.

2. Under the evidence introduced in behalf of the state, and which the jury evidently believed to be true, the accused shot twice at the prosecutor, intending the balls from the pistol used to take effect upon him. At the time of the firing the prosecutor was in a boat upon the Savannah river, and within the state of Georgia, and the accused was standing upon the bank of the river in the state of South Carolina. It was conceded that if either or both of the balls had struck the prosecutor an offense of some kind would have been committed in Georgia, upon the idea that the act of the accused took effect in this state; but it was contended that, inasmuch as the prosecutor

was not struck, no effect whatever was produced in Georgia by the act in question. This contention is not well founded in point of fact, for the evidence shows conclusively that, although the prosecutor was not injured, the balls did strike the water of the river in close proximity to him, within this state, and therefore it is certain that they took effect in Georgia, although not the precise effect intended, assuming that the verdict correctly finds it was the deliberate purpose of the accused to actually shoot at the prosecutor. What the accused did was a criminal act, and it did take effect in this state. Mr. Bishop says: "The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a state or county upon whose soil he never set his foot." 1 Bishop, Crim. Proc. § 58. And see Bishop, Crim. Law, § 110. Of course, the presence of the accused within this state is essential to make his act one which is done in this state, but the presence need not be actual. It may be constructive. The well-established theory of the law is that, where one puts in force an agency for the commission of crime, he, in legal contemplation, accompanies the same to the point where it becomes effectual. Thus, a burglary may be committed by inserting into a building a hook or other contrivance by means of which goods are withdrawn therefrom; and there can be no doubt that, under these circumstances, the burglar, in legal contemplation, enters the building. So, if a man in the state of South Carolina criminally fires a ball into the state of Georgia, the law regards him as accompanying the ball, and as being represented by it, up to the point where it strikes. If an unlawful shooting occurred while both the parties were in this state, the mere fact of missing would not render the person who shot any the less guilty. Consequently, if one shooting from another state goes, in a legal sense, where his bullet goes, the fact of his missing the object at which he aims cannot alter the legal principle. Cases are numerous in which it has been held that where a person wounds another in one state or country, but the person wounded dies elsewhere, beyond its territorial boundaries, the courts of the state or country in which death occurred have jurisdiction to try the offense. A leading case on this line is that of *Tyler v. People*, 8 Mich. 320, in which there was a dissenting opinion by *Justice Campbell*. The ruling of the majority of the court, however, was approved in the case of *Com. v. Macloon*, 101 Mass. 1. *Justice Gray*, who delivered the opinion in the latter case, says, on page 7, that if one's "unlawful act is the efficient cause of the mortal injury, his personal presence at the time of its beginning, its continuance, or its result, is not essential. He may be held guilty of homicide by shooting, even if he stands afar off, out of sight, or in another jurisdiction;" and the words quoted are followed by apt illustrations. On page 17 of the same report *Justice Gray* disapproves

the dissenting opinion of *Justice* Campbell above mentioned. There is, however, a clear distinction between cases like the one just cited, where a wound is inflicted in one jurisdiction and death ensues in another, and cases like the present, where the accused in one state puts in operation a force which takes effect in another. On page 843 of 8 Mich., *supra*, this distinction is clearly stated by *Justice* Campbell. He says the doctrine of constructive presence is not applicable to a case like that with which he was then dealing, and then uses the following language which sustains our ruling in the case at bar. Speaking of constructive presence, he says: "All that it amounts to is that the crime shall be regarded as committed where the injurious act is done. A wounding must, of course, be done where there is a person wounded, and the criminal act is the force against his person. That is the immediate act of the assailant, whether he strikes with a sword or shoots a gun; and he may very reasonably be held present where his forcible act becomes directly operative." This doctrine is supported by Rorer, *Interstate Law*, 241, 243, 244, citing *Johns v. State*, 19 Ind. 421, 423, 81 Am. Dec. 408. And see Whart. Conf. L. § 825, and notes on pages 717, 718; Whart. Crim. L. §§ 278-280. In *Adams v. People*, 1 N. Y. 173, it appeared that the accused forged a paper in Ohio, upon which he procured money in New York, through an innocent agent, without going into the latter state. He afterwards voluntarily went into that state, and was indicted and tried for the crime. It was conceded by both court and counsel that he was guilty of committing the crime in the state of New York, and the question upon which the case turned was simply whether or not, inasmuch as he owed no allegiance to that state, he could be tried and punished therein. In *United States v. Davis*, 2 Sumn. 482, it appeared that a gun was fired from an American ship lying in the harbor of Raiatea, one of the Society isles, by which a person on a schooner belonging to the natives, and lying in the same harbor, was killed; and it was held that the act, in contemplation of law, was done on board the foreign schooner, where the shot took effect, and that jurisdiction of the crime belonged to the foreign government, and not to the courts of the United States. In *Hawes on Jurisdiction of Courts* (sec. 110), it is laid down that "a crime may be committed within the jurisdiction of a state, although the person committing it never was within its borders, if the act takes effect there." An interesting discussion pertinent to the question involved may be found in 6 Crim. L. Mag., beginning on page 155, in an article entitled "Dynamiting and Extraterritorial Crime." "A party
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who, in one jurisdiction, or in one county, may put in operation a force that does harm in another, may be liable in either for the offense." Brown, *Jurisdiction of Courts*, § 92. This section also contains numerous illustrations which are apt and pertinent. See also *Reg. v. Rogers*, 14 Cox, C. C. 22. The above authorities demonstrate beyond question that a criminal act begun in one state and completed in another renders the person who does the act liable to indictment in the latter. In view of these authorities, there cannot in the present case be any doubt whatever that Simpson would have been indictable in Georgia if a ball from his pistol had actually wounded Sadler. That this would be true is too well established for serious controversy. The able and zealous counsel for the plaintiff in error candidly conceded that such would be the law, but contended that, as the balls "took no effect in Georgia," the entire act of the accused was committed in South Carolina, and that he really did nothing in this state. We have endeavored to show that this contention is not sound. As we have already stated, the act of the accused did take effect in this state. He started across the river with his leaden messenger, and was operating it up to the moment when it ceased to move, and was, therefore, in a legal sense, after the ball crossed the state line, up to the moment that it stopped, in Georgia. It is entirely immaterial that the object for which he crossed the line failed of accomplishment. It having been established by abundant authority and precedent that in crime there may be a constructive as well as an actual presence, there can be, in a case of this kind, in which the act of the accused, when analyzed, is simply an attempt to unlawfully wound another by shooting, no rational distinction in principle, as to the question of jurisdiction, whether the attempt is successful or not. The criminality was complete, and the offense was perpetrated in Georgia, irrespective of results.

3. The evidence was conflicting. According to that introduced by the accused, and supported by his statement, he did not intend to shoot the prosecutor at all; but the evidence of the latter was amply sufficient to warrant the jury in concluding that the accused actually, deliberately, and without any legal excuse or justification whatever, undertook to shoot him. In view of this evidence, the jury might well have found the accused guilty of assault with intent to murder, and he cannot complain that they found him guilty of the lesser offense of shooting at another. There was no error in denying a new trial.

Judgment affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PENNSYLVANIA R. CO., *Plff. in Err.*,

v.

Howard PARRY.

(.....N. J.....)

A round-trip ticket "via Burlington branch" from a point on the main line of a railroad to a point on the branch line, with a provision that it is "not good to stop off en route" is subject to a regulation of the company making it good on the main line only upon those trains which connect with the trains on the branch, and does not entitle a passenger, on reaching the junction upon his return trip, to take an accommodation on the main line which stops at his destination, but which he is enabled to catch only because it is late, and by leaving the branch train while it stands on a Y track and walking to the depot, although he might have ridden on the accommodation train without paying any more for his ticket if he had bought separate tickets for the round trip on each line, and although by taking the accommodation he could avoid waiting a half hour or more for the so-called connecting train.

(November 20, 1893.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Circuit for Burlington County in favor of plaintiff in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train in breach of defendant's contract of carriage. *Reversed.*

Statement by *McGill, Ch.*:

The plaintiff below, Howard Parry, on the 23d of December, 1890, purchased an excursion ticket from Riverton, where he lived, to Mt. Holly, both places being in Burlington county. Riverton is on the main line of the Pennsylvania Railroad Company, between Trenton and Camden; and Mt. Holly is upon a branch line, called the Burlington Branch. The ticket purchased by Parry indicated that his route was to be "via Burlington branch," and that the ticket was "not good to stop off en route." The regulations of the Pennsylvania Railroad Company required that passengers holding such tickets, in going from Riverton to Mt. Holly and returning, should change cars at its Broad street station, in the city of Burlington, into which station both the trains of the branch, and the main lines of its railroad ran. Upon returning from Mt. Holly, in the afternoon of the day named, Parry took a train that left Mt. Holly at 4:38 o'clock, and should, ac-

cording to the company's regulations, connect at the Broad street station with a train which would leave Trenton at 5:20 o'clock. That connection required passengers destined for Riverton to wait at the Broad street station a half hour, or more, for the arrival of the train from Trenton. On the day in question, the train which Parry took at Mt. Holly reached the end of the branch line at the city of Burlington, and came to a stop upon the Y track, which connected with the main line about half a mile from the Broad street station, and there waited to allow a belated train upon the main line to pass, before it, into the Broad street depot. That train was a local accommodation, scheduled to stop at Riverton, but was not one of the connecting trains with Mt. Holly. With a view to saving the half hour's delay at the Broad street station, in waiting for the proper connecting train, Parry and a friend got off the train from Mt. Holly while it stood on the Y track, and, walking the half mile to the Broad street station, reached it in time to catch the belated train, which would stop at Riverton. Upon that train, Parry presented the return half of his excursion ticket, and was informed that it was good only on trains which connected with the Burlington Branch Railroad at the Broad street station, according to the regulations of the company, and that, as the train he was on did not make such connection, the ticket was not good upon it. Parry refused to pay his fare, and was put off the train at a way station, before Riverton was reached, without unnecessary force or indignity. Upon the appearance of the above-stated facts, in the case made by the plaintiff below, the defendant moved for a nonsuit, and, upon the denial of that motion, error is, among other things, now assigned.

Mr. S. H. Grey, for plaintiff in error:

A stop-off is not a right resulting from the contract to carry, but is a matter of consent by or contract with the carrier. To break the journey is to break the contract.

State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; *Ripley v. New Jersey R. & Transp. Co.* 31 N. J. L. 388; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Wyman v. Northern Pac. R. Co.* 34 Minn. 210; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Churchill v. Chicago & A. R. Co.* 67 Ill. 390; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 535, 6 Am. Rep. 345; *Drew v. Central Pac. R. Co.* 51 Cal. 425; *Dietrich v. Pennsylvania R. Co.* 7 Pa. 432. 10 Am. Rep. 711; *Old Creek & A. F.*

NOTE.—The above case is a peculiar one in its facts, and the decision is not likely to command universal approval. The interpretation of the contract seems unusually strict in view of the fact that the right claimed by the passenger is denied merely because he took one ticket instead of two which he might have had for the same price, and also of the fact that the carrier would not seem to be in any way injured or put to a disadvantage by carrying him on the earlier train which was an ordinary accommodation train. It seems difficult to

see any reason for denying the right claimed except to compel the passenger to pay twice for the same ride. These considerations make the construction of the contract as to what is a "connecting" train seem unnecessarily technical. For other cases involving questions remotely similar to the above, see *Gulf, C. & S. F. R. Co. v. Henry* (Tex.) 16 L. R. A. 313; *Gulf, C. & S. F. R. Co. v. Looney* (Tex.) 16 L. R. A. 471, and *note*; *Nichols v. Southern Pac. Co.* (Or.) 18 L. R. A. 55, and *note*.

Co. v. Clark, 72 Pa. 231; *Cleveland, C. & O. R. Co. v. Bartram*, 11 Ohio St. 457; *Hatten v. Newark & J. O. R. Co.* 39 Ohio St. 375; *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190.

If Parry entered the train for the purpose of testing his rights, and with a view of making a case, it has been held by respectable courts that under such circumstances there could be no recovery of damages for injury to his feelings.

Cincinnati, H. & D. R. Co. v. Cole, 29 Ohio St. 126, 23 Am. Rep. 729; *St. Louis & S. F. R. Co. v. Trimble*, 54 Ark. 354.

Messrs. John W. Wescott and Samuel K. Robbins, for defendant in error:

The right of the plaintiff to show the construction put upon this contract by the company, as evidenced by general usage, or the custom upon the road is distinctly recognized by Chief Justice Green in his opinion in *State v. Overton*, 24 N. J. L. 439, 61 Am. Dec. 671.

The conduct of the parties to a contract may be shown in order to settle its true interpretation.

Burlew v. Hillman, 16 N. J. Eq. 27.

The railroad company made an unjust discrimination against the plaintiff in refusing his ticket.

Messenger v. Pennsylvania R. Co. 37 N. J. L. 531, 18 Am. Rep. 754; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 543.

The contract is to be taken most strongly against the defendants, as the language is their own.

Dancey v. Grand Trunk R. Co. of Canada, 19 Ont. App. Rep. 664, 52 Am. & Eng. R. R. Cas. 181.

The railroad company, notwithstanding this provision, claimed to have required the holder of such ticket to stop off at Burlington station for nearly an hour, before forwarding him to his destination.

Was he required to remain at the station during this time to avoid a breach of the contract?

If he had walked from the Junction to Burlington station and taken the 5:20 train from Trenton, or if he had walked or ridden to Beverly and resumed his journey on the 5:20 train from Trenton, his ticket would have been good on that train.

Auerbach v. New York Cent. & H. R. R. Co. 89 N. Y. 281, 42 Am. Rep. 290; 8 Wait, Act. & Def. p. 161.

By either of these courses he would have stopped off en route longer and more effectually than he did in this instance.

It was the duty of the railroad company to forward the plaintiff to his destination promptly, and a serious delay like that involved in awaiting the arrival of the 5:20 train from Trenton warranted him in taking a different train, if by so doing he could expedite his journey.

Wilsey v. Louisville & N. R. Co. 38 Ky. 511, 26 Am. & Eng. R. R. Cas. 258, confirmed on appeal October 24, 1889, reported in 39 Am. & Eng. R. R. Cas. 418.

McGill, Ch., delivered the opinion of the court:

The motion to nonsuit presented to the 22 L. R. A.

court below this question: Whether the contract between Mr. Parry and the railroad company permitted Mr. Parry to quit the branch road train before it reached its destination, and, proceeding in advance of it, continue his journey in a train with which it did not connect, and was made available to him only by accidental delay. It is established by the course of judicial decision that when a person who purchases a railway ticket to a certain place takes his seat in a particular train, that goes to his destination, he cannot, without permission of the railway company, while the train is reasonably pursuing the duty of the carrier, leave it, and take another train, and complete his journey under the same contract. The reason is that his contract is entire, and neither he nor the company can be required to perform it in fragments. *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449; *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Oil Creek & A. R. Co. v. Clark*, 72 Pa. 231; *Vankirk v. Pennsylvania R. Co.* 76 Pa. 73, 18 Am. Rep. 404; *Hamilton v. New York Cent. R. Co.* 51 N. Y. 100; *Wyman v. Northern Pac. R. Co.* 84 Minn. 210; *McClure v. Philadelphia, W. & B. R. Co.* 34 Md. 532, 6 Am. Rep. 345; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Churchill v. Chicago & A. R. Co.* 67 Ill. 390; *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Hatten v. Newark & J. C. R. Co.* 39 Ohio St. 375; *Wilsey v. Louisville & N. R. Co.* 38 Ky. 511. It is not necessary that the contract of carriage should be fully set out in the passenger's ticket. The ticket is a mere token that the fare has been paid, and that the passenger has the right to be carried to the destination it indicates, according to the reasonable regulations of the railway company. Such regulations—at least, so far as they are known to the passenger—enter into the contract of passage, and it is the duty of the passenger to conform to them. The proofs of the plaintiff below very clearly exhibited that Mr. Parry was familiar with the regulations under which the defendant company was accustomed to transport passengers between Riverton and Mt. Holly upon such tickets as the one he purchased. He admits that he knew that the local accommodation train was apt to be belated, and that the train upon the branch road did not connect with it, and, hence, that the latter train would not continue to the Broad street station in Burlington until the former had passed, and that it was possible, occasionally, to catch it by quitting the branch road train while it was waiting upon the Y, and walking a half mile to the Broad street depot. Indeed, it was his accurate knowledge of the regulations of the company, and the delay they occasioned, that prompted him to disregard them, when he saw an opportunity to expedite his transit. He states that he could have purchased an excursion ticket from Riverton to Burlington and back, and another from Burlington to Mt. Holly and return, for the same price that he paid for the single excursion ticket from Riverton to Mt. Holly

and return, and in that way have secured the undoubted right to return by the local accommodation, if he could have caught it. But he did not purchase the two excursion tickets, and make his contract in that way. He chose, rather, to buy the single ticket which expressly provided that he should be transported between the terminal points of his journey "via Burlington branch," and subjected him to the regulations that he should be carried to the Broad street station, and there change to the cars of a connecting train. Under authority of the rule referred to, even in absence of the express notice upon his ticket that he should not "stop off *en route*," after he had once started in a train, it may be questionable whether it would not have been an abandonment of his contract if he had left the train, while it was duly performing its duty, at any other point than that which the regulations designated for that purpose. The notice upon the ticket simply served to call attention to that rule. But, in deciding this case, it is not necessary to determine that question. The additional fact that, with the express notice which the ticket gave before him, he quit the branch train with the deliberate intention of not again taking either it or its connecting train, appears; and, in light of such fact, his nonconformity to the regulations which entered into his contract, and consequent infraction of that contract, and abandonment of his rights thereunder, become too conspicuous to admit of doubt. There was nothing in the evidence to indicate that the regulations of the defendant company were not reasonable, and it is admitted that the train abandoned was pursuing its way as those regulations required. Under these conditions, the conductor was justified in demanding a new fare, and, upon the refusal of Mr. Parry to pay it, to remove him from the train, in the manner that was adopted. *State v. Overton, supra*. It is our conclusion that the plaintiff below should have been

nonsuited, and, hence, that *the judgment now reviewed must be reversed*.

Magie, J., dissenting:

Parry held a return ticket which expressed the contract of the railroad company to carry him from Mt. Holly to Riverton "via Burlington branch." There was no condition in the contract that he should take a continuous train, and there was no such train. Nor was there in it any condition that he should take a connecting train, and, strictly speaking, there was no connecting train with that on which he rode from Mt. Holly to Burlington. Passengers by that train were obliged to wait in Burlington for a considerable time before, in ordinary course, a train left for Riverton. The only condition of the contract affecting Parry was that forbidding him to "stop off *en route*." Had the train which brought Parry from Mt. Holly moved on to the station in Burlington, he would have been obliged to alight, and, in the absence of stipulations to the contrary, could take the next train on the main line to Riverton, even though that train was a belated train, not usually running at that time. But this train which brought Parry from Mt. Holly had in fact passed over the branch road, and arrived at the main line at the junction. When Parry alighted there, he, perhaps, forfeited his right to be carried to the station; but by such alighting, and walking the short distance to the station, he did not forfeit his right to be carried from there to Riverton, unless his act was a stopping off *en route*. Whether Parry's conduct violated the condition depended on whether he acted with intent to break the continuity of his journey. That was a question for the jury, and it was properly left to them. Finding no error, I shall vote to affirm.

Abbott, Brown, and Kreuger, JJ., concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

C. F. JEWETT PUBLISHING CO.

v.

Benjamin F. BUTLER.

(.....Mass.....)

1. **An agreement by an author to indemnify his publisher** for any costs and damages by reason of the publication is not invalid, on the ground that an unlawful publication is intended, where it does not appear that there was any intention on the part of either to write or publish anything libelous.
2. **Doubts as to the solvency of a publishing corporation** will not justify the breach of a contract to furnish it a book for publication.

3. **The disgrace attaching to the name of a corporation on account of the conduct of its former president and manager**, whose name it bears, is not sufficient ground for breaking a contract to furnish it a book for publication.

(*Lathrop, J., dissents.*)

(October 19, 1893.)

REPORT by the Supreme Court for Suffolk County for the opinion of the full court of an action brought to recover damages for breach of contract to furnish the manuscript of a certain book, written by defendant, to the plaintiff for publication. *Judgment for plaintiff.*

NOTE.—The illegality of a contract to indemnify a person against liability for publishing a libel can hardly be questioned, but the above case presents a contract easily subject to different interpretations as appears in the disagreeing opinions, but 22 L. R. A.

which is held to be merely an indemnity against possible liability for unintentional libel. In this respect the case is apparently novel as well as interesting.

The contract recited that defendant "is minded and intending to write and have published two volumes in the nature of autobiography or reminiscences of his life and the acts and doings of other public men so far as they may seem to him to elucidate the history of the country or public affairs," and stipulated that plaintiff should do the publishing. The contract also contained a clause relating to the publication of libels. Defendant agreed to furnish the material for the book within a limited time. Shortly after the contract was made, defendant furnished some manuscript, but before he supplied any more, C. F. Jewett, an agent of the plaintiff corporation and for whom it was named, absconded, having issued a larger sum of its capital stock than it was entitled to on his private account. Defendant thereupon placed the publication of his book in another house and plaintiff brought this action to recover the damages which it had sustained in preparing for the publication and in the loss of profits which it would have made from the sale.

Further facts appear in the opinion.

Messrs. E. C. Bumpus, Samuel J. Elder, and William Cushing Wait, for plaintiff:

The contract indicates no purpose to commit an illegal act. The defendant was to assume the responsibility and pay costs and damages. The assumption of responsibility does not in any sense imply that it was his purpose to commit wrong. People do not advertise a purpose to commit libel in advance. "Ordinarily when parties enter into such a contract, it is done in such a manner as in form to conceal its illegality."

Riley v. Jordan, 122 Mass. 231; *Babcock v. Terry*, 97 Mass. 432.

Because the defendant proposed to write a book "without illegal intent" as the report finds, on public men, and affairs of his time, it is fair to presume that his purpose was to tell the truth and commit no libel, rather than to willfully traduce public men of his time.

Waugh v. Morris, L. R. 8 Q. B. 202-208; *Harvey v. Varney*, 98 Mass. 118; *Guernsey v. Cook*, 120 Mass. 501; *Richardson v. Mellish*, 2 Bing. 229; *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 588; *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 494.

Doubtless if after the beginning of the publication the book had become libelous in its character the plaintiff could only have continued to publish it at his peril, after the knowledge had been brought to him. But what might have happened is of no consequence as to the condition of affairs at the time his contract was broken.

In *Gale v. Leckie*, 2 Stark. N. P. 107, where the author after beginning to prepare material for publication abandoned it and claimed that he was exonerated from his contract from fear of prosecution, *Ellenborough, Ch. J.*, says, that the withdrawal of an author from his work on the plea that he may be subject to prosecution, is insufficient without proof that the work he was doing or was to do was illegal. On the contrary it is to be presumed in the absence of evidence that it was not in violation of law.

In *Olay v. Yates*, 25 L. J. Exch. 287, where 22 L. R. A.

the printer ascertained that the book after the beginning of publication contained libelous matter, he was allowed to recover for his services up to the time of the libel.

This clause may have been put into the contract with an idea of protection if, perchance, in the course of writing an extensive work, anything should happen to get into the book that would subject the publishers to litigation; but such might well have been put in any contract relating to any book that has ever been published. Would that fact have the slightest effect upon any contract unless it should appear, in conjunction with it, that there was a wicked purpose to libel, or that the character of the book to be published would of necessity create a libel? Again, such a contract as that could not have been enforced in the event of the plaintiff's having published the book and been mulcted for libel.

Arnold v. Clifford, 2 Sumn. 238; *Shackell v. Rosier*, 2 Bing. N. C. 634. See also *Babcock v. Terry*, *supra*.

The defendant's doubts of the solvency of the plaintiff did not authorize him to terminate the contract.

Hobbs v. Columbia Falls Brick Co. 157 Mass. 109; *Morgan v. Bain*, L. R. 10 C. P. 15; *Ex parte Stapleton*, L. R. 10 Ch. Div. 586; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Boorman v. Nash*, 9 Barn. & C. 145; *Re Phoenix Bessemer Steel Co.* L. R. 4 Ch. Div. 108.

Messrs. John Lowell and E. M. Johnson for defendant.

Morton, J., delivered the opinion of the court:

The first question is whether the contract is, as the defendant contends, illegal on its face. The words relied on to show that it is are as follows: "The party of the first part agrees to accept full responsibility of all matter contained in said work, and to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work, and to pay all costs and damages arising from said suit." The presiding justice found that "the contract was made without illegal intent, unless and except so far as the words used import one as matter of law." Do the words used, as quoted above, import one as matter of law? We think not. The parties were contracting respecting a book which was not in existence, but was to be written. There was nothing in the character of the proposed work which naturally or necessarily involved the publication of scandalous or libelous matter, as was the case, for instance, in *Shackell v. Rosier*, 2 Bing. N. C. 634, referred to by the defendant. At the same time it was not impossible that, in spite of due care and good faith on the part of the author and publisher, the proposed book might contain matter which others perhaps would deem libelous. In such a case it would be no more unlawful for the parties to provide that the author should save the publisher harmless from all costs and damages to which he might be subjected by reason of the publication of the book than it would be for a patentee to agree with his licensee that he would protect him against

all costs and damages to which he might be subjected in consequence of using the patent to which the license applied. The case stands on grounds entirely different from those on which it would stand if it appeared that the parties intended to publish or contemplated the publication of libelous matter. There is nothing in the agreement fairly to show that such was their purpose. The most that can be said is that, though there was no intention to write or publish, nor any contemplation of writing or publishing, libelous matter on the part of the author or publisher, it might turn out, after the book was published, that it did contain libelous matter. But that is very far from saying that the parties had in view an illegal purpose in publishing the book. We see nothing unlawful in a contract which provides, without anything more, that the author shall indemnify the publisher for costs and damages to which he may be subjected by reason of the publication of a book to be written by the author. Moreover, it was possible in this case that the book might not contain libelous matter, although libel suits against the publisher might grow out of it. It would be hard to say, in such event, that the publisher, who might have published the book without any libelous purpose, and in the full belief that it contained nothing libelous, could not recover of the author under this clause in the contract the costs and damages to which he had been put by such suits. In order, we think, to render the contract unlawful, it should appear that there was an intention on the part of the author and publisher to write and publish libelous matter, or that the author proposed, with the knowledge and acquiescence of the publisher, to write libelous matter, or that the contract on its face provided for or promoted an illegal act. We do not think the clause in question is fairly susceptible of either construction. *Fletcher v. Harcot*, Hutton, 55; *Battersey's Case*, Winch, K. B. 49; *Betts v. Gibbins*, 2 Ad. & El. 57; *Adamson v. Jarvis*, 4 Bing. 66; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Pearce v. Brooks*, L. R. 1 Exch. 213; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Graves v. Johnson*, 156 Mass. 211, 15 L. R. A. 834.

The defendant contends, in the next place, that he was justified in his refusal to go on with the contract because of his doubts as to the solvency of the plaintiff corporation, and because of the disgrace attaching to its name in consequence of the conduct of Jewett. The first ground thus taken would seem to be disposed of by the recent case of *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109, and need not, therefore, be further considered. As to the second ground, it is to be observed that the contract was not made with Jewett personally, but with the corporation which bore his name. Moreover, Jewett has died, and it fairly may be presumed that his place as president and manager has been filled by the election of another person, so that the defendant cannot and will not be obliged to come into further association with him. It is well known that corporations are frequently organized which bear as part of their corporate name the name of some individual.

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The contention of the defendant would require us to hold that in all such cases a party making a contract with such a corporation would be justified in refusing to go on with it if the person whose name the corporation bore committed an act rendering him liable to punishment as a criminal, or bringing him into disgrace and rendering further association with him unprofitable and injurious to the other party to the contract. But a corporation does not in such a case impliedly guarantee as an element of the contract entered into with it that the person whose name it bears shall continue to be a reputable member of society. The corporation is distinct from the person whose name it bears. Its interests and those of its stockholders in contracts made by it with other parties are not to be affected by the disgraceful or criminal conduct of the person whose name it bears, and for which it is in no way responsible.

A majority of the court think the entry should be, *judgment for plaintiff for \$2,500 and interest from June 9, 1890*, and it is so ordered.

Lathrop, J., dissenting:

I am unable to concur in the opinion of the majority of the court that the contract sought to be enforced is a valid contract. The contract provides for the publication of a work to contain the author's autobiography "or reminiscences of his life, and the acts and doings of other public men, so far as they may seem to him to elucidate the history of the country or public affairs." It is in reference to a work of this character that the defendant agrees to do three things: First, "to accept full responsibility of all matters contained in said work;" secondly, "to defend at his own cost any suits which may be brought against the party of the second part for publishing any statements contained in said work;" thirdly, "to pay all costs and damages arising from such suits." The obligation of the defendant is not limited to paying legal expenses, but includes costs and damages recovered against the publisher "for publishing any statements contained in said work." While it is found that the parties acted without illegal intent, yet if the legal effect of the language used is to make the contract against the policy of the law, this court ought not to enforce it. It seems to me to be impossible to say that the language used applies only to groundless suits, and that it should be so construed. What the parties contemplated, and what they intended to provide for, was that actions might be brought against the publisher for libelous matter contained in the work; that these actions might be successfully maintained against the publisher, who would then be compelled to pay damages and costs. In this event the writer agreed to indemnify the publisher. Could such an agreement have been enforced? In my opinion, it could not, and this view is sustained by the authorities. *Shackell v. Rosier*, 2 Bing. N. C. 634; *Colburn v. Patmore*, 1 Cromp. M. & R. 73; *Gale v. Leckie*, 2 Stark. N. P. 107; *Clay v. Yates*, 1 Hurlst. & N. 73; *Arnold v. Clifford*, 2 Sumn. 238; *Odgers, Slander & Libel*, 2d ed.

8. See also *Bradlaugh v. Newdegate*, L. R. 11 Q. B. Div. 1, 12; *Babcock v. Terry*, 97 Mass. 482.

It follows that the whole contract was tainted with illegality, and neither party was bound to go on with it. *Robinson v.*

Green, 8 Met. 159, 161; *Perkins v. Cummings*, 2 Gray, 258; *Woodruff v. Wentworth*, 133 Mass. 309; *Bishop v. Putner*, 146 Mass. 489; *Lound v. Grimwade*, L. R. 39 Ch. Div. 605, 618.

CALIFORNIA SUPREME COURT.

Charles K. BREEZE *et al.*, Appts.,

v.

John BROOKS *et al.*, Resp'ts.

(.....Cal.....)

1. Permitting the record title of land to remain in another will not make a subsequent conveyance to the real owner fraudulent as to the creditors of the former where they gave the debtor credit merely on his own representations of ownership and his possession and did not rely on the records or any act of the owner.

2. The findings of the trial court should receive such construction as will uphold rather than defeat its judgment thereon.

(December 24, 1893.)

APPEAL by plaintiffs from a judgment of the Superior Court for San Mateo County in favor of defendants in an action brought to enforce a judgment recovered against John

Brooks upon lands belonging to his brother Patrick Brooks, which at the time the debt was contracted were standing in the name of John upon the public records. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. S. F. Lieb*, with *Messrs. George W. Fox and George C. Ross*, for appellants. *Messrs. E. B. Mastick and W. C. Belcher* for respondents.

Harrison, J., delivered the opinion of the court:

The plaintiffs brought this action to subject certain lands of Patrick Brooks, which he had allowed to stand of record in the name of his brother John, to their claim as creditors of John, upon the ground that the subsequent transfer from John to Patrick was fraudulent, and with intent to defraud them as creditors. Judgment was rendered in favor of the defendants, and the plaintiffs have appealed upon the judgment roll alone, claiming that, upon the findings of fact

NOTE.—*Estoppel of landowner by allowing record title to remain in another.*

The cases are not numerous in which the question of estoppel has turned simply on the fact that the record title was in one person while the beneficial title was in another.

Sale by record owner.

There seems to be no question but that if the one having the record title sells the land to a stranger who pays the purchase money to him without notice of the claim of the true owner the purchaser will acquire a good title.

The purchaser for a valuable consideration from a patentee in possession, and whose patent is recorded in the proper register's office takes free of all equitable claims as against patentee's title of which he had no actual notice, although documentary evidence of a mistake in the issue of the patent existed in the files and records of the general land office. *Schnee v. Schnee*, 23 Wis. 377, 99 Am. Dec. 183.

If a person holding the legal title permits the record title to remain in another, who sells the property to a third person who makes valuable improvements on it, the real owner will not be permitted to set up his claim. *Eldridge v. Walker*, 80 Ill. 27.

If the owner of land executes a deed with a blank space for the grantee's name and places it in the hands of an agent for the purpose of having the property sold, and the agent fills the blank with his own name and subsequently conveys the property to a third person ignorant of the facts in the case, the true owner will be estopped from claiming the title as against him. *Pence v. Arbuckle*, 22 Minn. 417.

There are also a few cases in which there were elements of estoppel in addition to the mere fact of record title in the one who sells the property. The 23 L. R. A.

decisions in these cases are analogous to those which had been made prior to the passage of the recording acts.

Before the passage of the recording acts, a grantee who concealed his deed from the world and left the grantor in possession, permitting him to deal with the property as his own, would not be permitted to assert title as against subsequent grantees, especially if he has also permitted the subsequent grantees to expend money on the faith of their title. *Wendell v. Van Besselaer*, 1 Johns. Ch. 344, 1 L. ed. 166.

So where, after a new settlement of an estate in favor of the settlor for life and after his death to his sons in tail male, the settlor makes a lease for a term of years to one ignorant of the true state of the title, one of the sons, who, knowing of the lease, fails to caution the lessee but permits him to go on and make repairs and improvements on the faith of the lease, will not be permitted to assert his title, after the death of his father, until the expiration of the lease. *Hanning v. Ferrers*, 1 Eq. Cas. Abr. 367.

And where a tenant in tail with remainder to another, not knowing of the entail, makes a settlement which is engrossed by the remainderman, who does not disclose his rights until after the death of the first taker, the remainderman will not be permitted, as against the claimants under the settlement, to set up his rights under the entail. *Mowrey v. Walsh*, 8 Cow. 238.

And where a woman, being the absolute owner of a term, is present at a treaty for her son's marriage and hears him declare that the term is to come to him on his mother's death, and signs the deed as a witness, whereby the reversion of the term is settled on the issue of the marriage after the mother's death, she will be compelled to make the settlement good. *Hunsden v. Cheyney*, 2 Vern. 150.

judgment should have been given in their favor. Upon a former appeal herein (71 Cal. 169), the judgment in favor of the plaintiffs was reversed upon the ground that the findings did not sustain it, and the action was remanded for a new trial. Unless, therefore, the facts now presented are materially different from those presented upon the former appeal, the judgment of the court below must be affirmed.

The findings of fact which were before the court on the former appeal are substantially set forth in the report of the case, and were again made by the court upon the subsequent trial, and in the same language as before. In addition thereto the court has now found that, during the time that the legal title to the land stood in John, he was generally reputed and believed in his neighborhood, and among his neighbors, and by the community generally, to be the legal and equitable owner of the land; that the deed to him was delivered to him in person by the grantors, and was taken by him to the recorder's office for record, and was recorded at his request; that, during the time that it stood of record in his name, it was assessed to him and in his name, and that he had paid certain taxes thereon; that in the year 1869 he commenced an action against the Spring Valley Water-works for damages, which, after having been partly tried, was compromised between the parties without going to judgment, under which the defendant paid him certain moneys; that at the trial thereof Patrick testified as a witness in his favor, and it was stipu-

lated by counsel for the respective parties in open court, and in the presence of Patrick, that John was the owner in fee of the land. The court also finds certain details of the transactions between John and the plaintiffs, by which he incurred the indebtedness for which he gave them the promissory note on which they recover the judgment they are now seeking to enforce, and that during all this time the only information which Patrick had that John was obtaining credit from the plaintiffs, or dealing with them, was that he was informed of an error which the plaintiffs made in September, 1872, by charging two items, amounting to about \$20, to John, instead of to himself, and of the subsequent correction of the error by transferring the items to his own account.

A comparison of the facts found at the last trial with those before the court on the former appeal shows that they do not take the case out of the principles then laid down, or call for the application of any different principles. It was then held necessary that the plaintiffs, in order to entitle them to a recovery, should show that Patrick was in some way privy to John's obtaining credit from them, or that in giving such credit they relied upon some affirmative statement or act of Patrick, other than his permitting the title to stand of record in John's name; and that the mere fact that Patrick allowed the title to the land to stand of record in the name of John was unavailing to the plaintiffs, unless they could establish, to the satisfaction of the court, that they relied there-

So if a person having title to real estate acquiesces in a sale of it by a person pretending to have title and having color of title, he will be bound by the sale, provided no fraud was practiced upon him. *Funk v. Newcomer*, 10 Md. 301.

Especially if he advises and encourages the sale. *Storrs v. Barker*, 6 Johns. Ch. 166, 2 L. ed. 88, 10 Am. Dec. 316.

If one having the legal title permits the land to be sold by one having color of title, being fully aware of his rights and intentionally or by gross negligence encouraging or influencing the purchase, he will not be permitted to subsequently assert his rights. *Morris v. Moore*, 11 Humph. 438.

Following the principle of those cases it has been held that—

If the grantee of land permits the record title to stand in the grantor and subsequently prevails upon a third person to purchase the land from the grantor, assuring him that the grantor has the legal title, he will be estopped from subsequently asserting his rights. *Money v. Ricketts*, 62 Miss. 208.

So one who, holding a bond for title to real estate, permits the former owner to sell it as his own, will be estopped from subsequently compelling a conveyance to himself from the purchaser,—especially if he received a part of the purchase price. *Breeding v. Stamper*, 18 B. Mon. 175.

If a person has consented that the legal title to lands shall, by absolute conveyance, be passed over to another, or discovers that another has fraudulently obtained the legal title and put it on the market, he cannot stand by and see third parties acquire rights upon such apparent title and afterward ask for relief. *Ford v. Loomis*, 33 Mich. 121.

If a person holding an unrecorded deed to land is present when his grantor sells the same land to a third person and assists in the sale, witnessing the 22 L. R. A.

deed, he will be estopped from subsequently setting up his own title. *Sherrill v. Sherrill*, 73 N. C. 8.

A son to whom a father deeds his property, but who neglects to put the deed on record, and who is subsequently present when the father settles the same property among all his children, without disclosing his own claim, will not, after the death of the father, be permitted to take the property from the other children. *Sasser v. Jones*, 38 N. C. 19.

In *Osborn v. Elder*, 65 Ga. 360, without discussing the question of the condition of the record title, it is decided that if one having the legal title to land is present at a sheriff's sale of it under a levy against a third person and does not disclose his title or forbid the sale, he will be estopped from afterwards claiming it.

If one having an unregistered deed to land stands by and sees it sold at auction as the land of the grantor, and permits a third person to buy it and pay the purchase money under the impression that he is getting a good title, he will not subsequently be permitted to dispute it. *Saunderson v. Balance*, 55 N. C. 322, 67 Am. Dec. 218.

If the owner of the land, whose deed is not recorded, attends and bids at a sheriff's sale of the land as the property of the former owner, he will be estopped from asserting his title as against the purchaser at the sheriff's sale. *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129.

And the same is true if he stands by and encourages another in ignorance of such title to contract for the purchase of the land with one having the legal title. *Guffey v. O'Beiley*, 38 Mo. 413, 57 Am. Rep. 424.

So the vendor who has permitted the record title to be in his vendee, and who encourages a third person to loan money on the faith of such title,

on as an inducement to give credit to John. The court says in its opinion: "The findings negative the idea that the plaintiffs, in giving credit to John, relied on any statement of Patrick that John owned the land; nor is it intimated that they examined the records of deeds, or that of the partition suit, to find out what they disclosed in reference to John's title or relied on them in any way to induce the credit which they extend to John. They seem to have relied on the facts that John lived on the land, claimed it in his conversations with them as his, and that he was insolvent, and Patrick knew it; and that is all which it is there claimed even tends to show Patrick as having been privy in any way to John's obtaining credit from the plaintiffs. . . . So far as the findings disclose Patrick did no act to induce creditors of John to believe the land was John's save that he allowed the title, upon

the record, to stand in John's name, which record these creditors never examined. It does not appear that Patrick had any knowledge that John was getting credit from any one upon the faith of his apparent ownership of the land. There was, therefore, on the part of the former, no such carelessness or negligence as amounted to even the smallest degree of turpitude; and in such a case we understand the authorities all to agree that one cannot be estopped to set up that which, but for such act, would be a good legal title to land." Instead of there being affirmative findings in their favor, as in the opinion upon the former appeal was held to be essential to a recovery by them, the findings now presented fail to show that the plaintiffs had any knowledge of the relation held by John to the land, or of his acts in reference thereto. It is not found that they knew that he was generally reputed or believed to

cannot set up his vendor's lien as against the mortgage. *Alexander v. Ellison*, 79 Ky. 148.

Giving credit to one having record title.

In *Ludwig v. Highley*, 5 Pa. 132, in which the legal title was in one in trust for another, and the creditors of the one having the legal title insisted that the true owner was estopped from asserting his claims to the property on the ground that he had permitted the other to hold himself out as the ostensible owner of the premises and thereby acquire a false credit, the court held that the rule which estops a party permitting the apparent ownership of property to remain in another from setting up title against those who have given a personal credit on the faith of it, is confined to chattels, and, in the absence of actual fraud, does not apply to realty.

The question has arisen most frequently in cases where a married woman has permitted the title to her property to stand on the record in her husband's name.

A wife who has permitted the title to her lands to stand in the name of her husband is not estopped to claim it as against a creditor of the husband, who did not extend the credit on the faith of the land. *DeVore v. Jones*, 82 Iowa, 66.

A wife who permits her husband to manage her property is not estopped to assert title to it before he becomes insolvent, from the fact that credit has been given him because of the title being recorded in his name, if there was no fraud or misrepresentation and she was not aware that the credit had been given on the faith of the property. *Marston v. Dresen* (Wis.) June 21, 1893.

But a wife who permits the title to her land to remain in her husband "because of business conveniences and considerations" will not be permitted to assert title as against one who has given the husband credit on the faith of such title and representations that the husband owned the lot. *Hopkins v. Joyce*, 78 Wis. 443.

And if a married woman who, together with her husband, is in possession of real estate, neglects to record her deed until after her husband has contracted for improvements thereon, she, by permitting him to hold himself out as the owner, is estopped from repudiating the contract so as to defeat a mechanics' lien. *Anderson v. Armstead*, 69 Ill. 452.

Judgment or attachment against one having legal title.

A recovery in tort against the owner in whose name the legal title stands will not prevent a sub-

sequent transfer of the property to the true owner. *Lillis v. Gallagher*, 39 N. J. Eq. 93.

The holder of an unrecorded deed will be postponed to an attaching creditor without notice of the deed. *First Nat. Bank of Denver v. Campbell*, 2 Colo. App. 271.

Under the Colorado statutes, the holder of an unrecorded deed is postponed to a purchaser at a subsequent sheriff's sale under a judgment against the grantor. *McMurtree v. Riddell*, 9 Colo. 497.

Notice to one dealing with the land.

That the title of the true owner is not on record is immaterial, if the person dealing with the property has notice of it. *Copeland v. Copeland*, 23 Me. 525.

The mere fact that the wife has permitted the title to her property to stand in the name of her husband for two years will not estop her from asserting her claim to the proceeds of its sale as against the claim of one who purchased knowing of her claim to damages for the husband's deceit in making the sale. *Brown v. Wright* (Ark.) 21 L. R. A. 467.

If land is conveyed to a trustee to secure the payment of a debt and subsequently a third person assumes the debt and takes a conveyance from the debtor of his equity of redemption which he sells to one who immediately takes possession, and subsequently the trustee, having the legal title, sells the property at auction to one who is notified of the true state of the case, the owner in possession will not be estopped from asserting his rights by the fact that the legal title was in the trustee. *Mayo v. Leggett*, 96 N. C. 237.

If the true owner is in possession of the land, the fact that a mortgage is given by the one in whose name the legal title stands and that the true owner did not notify the mortgagee of his claim, will not defeat his rights as against the mortgagee. *Jowers v. Phelps*, 33 Ark. 465.

But if the owner in possession is asked in regard to his rights and fails to disclose them, thereby permitting a purchase to be made from the one holding the legal title, he will not be permitted to assert his rights. *Yates v. Hurd*, 8 Colo. 343.

So the fact that the real owner is in possession of the property and that the one in whose name the title stands gives a mortgage on the property without authority will not defeat the title of the mortgagee, if the real owner, by silence when learning of the mortgage, misled the mortgagee to his injury. *Lathrop v. Groton Sav. Bank*, 31 N. J. Eq. 273.

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be the owner, or had any information of the litigation between him and the Spring Valley Waterworks, Jr of what was done by him or by Patrick during that litigation; and it cannot, therefore, be said that it appeared to the trial court that they in any way relied thereon in giving credit to John. On the contrary, the court finds that the plaintiffs believed the statements of John, that he was the owner of the land, and knew that he was in exclusive possession of the property, "and relied on said statements, and were wholly ignorant of the fact that he (John) was not the equitable owner thereof, or that said Patrick had or claimed to have any interest therein, and solely by reason of said statements, apparent ownership, and belief, gave said John said credit, and would not have given him credit except for said statement, belief, and apparent ownership." Neither do the facts found by the court show that Patrick had any knowledge that John was obtaining credit with the plaintiffs upon the faith of his apparent ownership of the land. The court does not find that he had any such knowledge, and its finding that he knew of the charge to him of certain items which should have been charged to himself, and the subsequent correction of the mistake, cannot be construed as equivalent to a knowledge that they were charged to John upon any faith in his ownership of the land. We are not at liberty to assume, as is urged on behalf of appellants, that because of the relation between Patrick and John, and of the knowledge which Patrick had of John's re-

lation to the land, and his knowledge that he was dealing with the plaintiffs, he must have known that they gave him this credit upon their faith in his apparent ownership of the land. The findings of the trial court are to receive such a construction as will uphold, rather than defeat, its judgment thereon; and whenever, from the facts found by it, other facts may be inferred, which will support the judgment, such inference will be deemed to have been made by the trial court, and upon an appeal from that judgment this court will not draw from those facts any inference of fact contrary to that which may have been drawn by the trial court for the purpose of rendering such judgment. The trial court, in this case, had before it the opinion of this court on the former appeal, and must be deemed to have made its findings of fact from the evidence before it, in the light of what was then held to be essential to a recovery by the plaintiffs. Its failure to find from the evidence the facts then declared essential to a recovery, as well as its own construction of the findings, which it has made by rendering a judgment thereon in favor of the defendants, must be regarded as its own conclusion that the evidence was insufficient to justify such findings as, under the former opinion of this court, would authorize a decision in favor of the plaintiffs.

The judgment is affirmed.

We concur: **Paterson, J.; Garoutte, J.**

MISSISSIPPI SUPREME COURT.

LOUISVILLE, NEW ORLEANS &
TEXAS R. CO., *Appt.*,

J. F. PATTERSON.

(89 Miss. 421.)

A railroad passenger holding a first-class ticket may recover damages

from the company if his request to the conductor for a seat in a first-class coach is met by an explosion of profane and contemptuous wrath and he is compelled to stand, although passengers in the car are occupying more seats than they are entitled to.

(October Term, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Claiborne County

NOTE.—Right of passenger to a seat.

The right of a passenger to a seat is generally recognized.

The contract of carriage requires the furnishing of a seat in the usual mode of conveyance, and a carrier cannot require the surrender of a ticket upon proffer of transportation alone, but it must in addition proffer a seat. *St. Louis, I. M. & S. R. Co. v. Leigh*, 45 Ark. 393, 55 Am. Rep. 558.

In *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, the court impliedly recognized the right of a passenger to a seat by stating that it is well-recognized law that carriers of passengers may lawfully require those seeking to be carried to purchase tickets when convenient facilities to that end are afforded by the carrier to exhibit them to persons designated by the carrier for that purpose, and surrender them after securing their seats in the car or vehicle used for transportation when required by the person in immediate charge of the transportation.

And in *Hardenbergh v. St. Paul, M. & M. R. Co.*, 89 Minn. 3, the court states that it is too well established to need citation of authorities that a railroad company must provide those whom it carries with

the usual, reasonable accommodation for comfort in traveling, including seats.

A statute requiring a railroad company to furnish passengers with proper accommodations includes seats, and a failure to provide seats will prevent the company from taking advantage of a rule prohibiting passengers from standing on the platform. *Willis v. Long Island R. Co.* 22 Barb. 399.

But in *Camden & A. R. Co. v. Hoosey*, 99 Pa. 422, 44 Am. Rep. 120, it was held to be such contributory negligence to stand on the platform of a car as to preclude a recovery for injuries received in being thrown therefrom, although there was not sufficient room inside to obtain a seat.

A passenger who, upon entering the train finds persons standing in the aisles may take a seat in a drawing-room car without liability to ejectment by the persons in charge of it; and before doing so he is not compelled to ask the conductor for a seat, although some of the seats in the ordinary coach are occupied by baggage, if it is not plainly apparent that the seats so occupied were more than sufficient for the persons standing. *Thorpe v. New York Cent. & H. R. Co.* 78 N. Y. 404, 33 Am. Rep. 323.

in favor of plaintiff in an action brought to recover damages for alleged breach of defendant's contract to provide plaintiff with a seat in its car, and to treat him respectfully. *Affirmed.*

Plaintiff, a white man, purchased a first-class ticket between two points on defendant's road. He went into a coach provided for white passengers having first-class tickets. He found the seats occupied with baggage and passengers, some of whom were asleep and occupying more room than they were entitled to. The conductor informed him that he could not get a seat in that car. He went into another car provided for colored passengers, in which the conductor refused to permit him to remain. He then went into the smoker, but being uncomfortable went back to the first-class coach and insisted that the conductor should procure for him a seat. The conductor replied in an angry tone and with profanity, that he could get no seat there. Plaintiff left the train at the first stopping place and brought

this suit for damages. He recovered in the justice's court. Defendant appealed to the circuit, where plaintiff recovered a verdict and judgment for \$75, whereupon defendant again appealed.

Messrs. Mayes & Harris for appellant.

Mr. T. Dabney Marshall, with *Mr. C. A. French*, for appellee:

Passengers are entitled to equal accommodations who hold the same class of tickets.

See Acts 1883, § 3, p. 46.

A carrier is bound to use the utmost care in providing safe and sufficient vehicles and means of transportation of passengers, and in their management.

Lawson, Car. p. 16, § 15.

Every person who has been injured by the negligent performance of the work of carrying is entitled to an action against the carrier.

Addison, Torts, § 1288, p. 1008.

Riding on a car platform against the rule of the company, and without reasonable excuse, has been held negligence *per se*. But not where

The rule setting apart a particular car for ladies and their escorts cannot be enforced against persons who are not provided with seats in other cars but, in such cases in the selection of the persons to go into the ladies' car, the object of the regulations may be regarded and observed, and the officials may select those to be admitted into that car. *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 Am. Rep. 495.

And that decision was recognized in *Bass v. Chicago & N. W. R. Co.*, 39 Wis. 633, 42 Wis. 654, 24 Am. Rep. 437.

It seems that in some instances the tickets themselves call for seats, as in *Dietrich v. Pennsylvania R. Co.*, 71 Pa. 422, 10 Am. Rep. 711, where it is stated that a ticket reading "good for one seat" meant a seat on the train which the passenger first entered to be carried.

A distinction seems to be made between long-distance carriers and those where only short trips are to be made, under circumstances where some of the passengers may prefer to stand.

Thus in a case where a woman sixty-seven years old was compelled to stand in a ferry boat crossing between Camden and Philadelphia and was thrown down and injured by reason of the boat striking an obstacle, an effort was made to hold the ferry boat responsible for failure to provide her a seat, and the court stated that it did not appear that a less number of seats was provided than was customary and sufficient for those who ordinarily preferred to be seated while crossing that ferry, and that no circumstances were disclosed that would have justified a finding that a proper degree of care required the company to provide seats sufficient for the accommodation of all the passengers that its boat could safely carry, or of such number of passengers as ordinarily traveled in it. *Burton v. West Jersey Ferry Co.* 114 U. S. 474, 29 L. ed. 215.

The duty to provide for the comfort of passengers is so strongly recognized that in *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224, it is stated that to allow undue numbers to enter a car is a great wrong.

While in *Gordon v. Manchester & L. R. Co.*, 52 N. H. 602, 13 Am. Rep. 97, it appeared that a train ran past a station without making the scheduled stop, in a suit by a passenger, holding a ticket, for damages, the court excused the company upon the ground that there had been such a large number of persons to take passage on the train at prior stations that they, together with those waiting at the station where plaintiff wished to take passage, would have dangerously overloaded the train.

It is not the duty of the passenger to furnish a

seat for himself, but the duty devolves upon the carrier. *Willis v. Long Island R. Co.* 84 N. Y. 670.

And attempting to pass from one car into another while the train is in motion under the instructions of the conductor, who is attempting to provide a seat, will not prevent a passenger from recovering damages for injuries received by being jostled by a brakeman on the platform. *Louisville & N. R. Co. v. Kelly*, 32 Ind. 371, 47 Am. Rep. 149. And a similar decision was made in *McIntyre v. New York Cent. R. Co.* 37 N. Y. 234.

But a passenger who goes from one car to another of a moving train to find a seat does not, while upon the platform, take the risk of collision with another train. *Dewire v. Boston & M. R. Co.* 2 L. R. A. 166, 148 Mass. 342.

Rights of passenger when seat is refused.

A person cannot demand free transportation because he is compelled to stand, but if he boards the train knowing that it is overcrowded, he may be compelled to pay his fare or to leave. *Memphis & C. R. Co. v. Benson*, 35 Tenn. 627.

A person who, on failure to obtain a seat, refuses to pay fare and is told to leave the train at the next stopping place but who there secures a seat cannot, while recognizing the original contract of transportation, refuse fare for the distance he was compelled to ride without a seat, although it may be possible for him to abandon that contract and rely on a contract of carriage from the point where the seat was secured. *Davis v. Kansas City, St. J. & C. B. R. Co.* 53 Mo. 317, 14 Am. Rep. 457.

A passenger who, upon finding the seats all occupied, refuses to surrender his ticket or pay fare without being furnished a seat and abuses the conductor in a violent manner and with profane language may lawfully be ejected from the car. *Pittsburgh, C. & St. L. R. Co. v. Van Houten*, 43 Ind. 90.

A passenger to whom a carrier refused to furnish a seat may leave the train and sue for breach of the carriage contract, but he cannot insist on remaining in the train without delivery of his ticket, and if he attempts to do so the company may lawfully eject him therefrom. *St. Louis, I. M. & S. R. Co. v. Leigh*, 45 Ark. 338, 55 Am. Rep. 558.

But refusal to pay fare until a seat is provided does not entitle the company to treat the one making such refusal as a trespasser who can be ejected from the train at any place, but a reasonable opportunity must be given him to leave in a suitable and reasonable place. *Hardenbergh v. St. Paul, M. & M. R. Co.* 39 Minn. 3. H. F. F.

the car is so crowded and there is not room to be had within.

Whittaker's Smith, Neg. p. 42; *Wills v. Lynn & B. R. Co.* 129 Mass. 351.

Appellee was not guilty of negligence in this instance, for the conductor would not provide him with a seat in the first class car.

A failure to perform a statutory duty is negligence *per se*.

Whittaker's Smith, Neg. p. 44.

A carrier of passengers must provide cars or vehicles sufficient as to strength and other requisites for their safe conveyance, and he is liable for the slightest negligence or fault in that regard.

Pennsylvania Co. v. Roy, 102 U. S. 451, 26 L. ed. 141.

A passenger in a railway train is entitled to the ordinary comforts of a seat therein, and is not bound to pay fare, or surrender his ticket, if he has one, until a seat be furnished to him.

2 Rorer, Railroads, p. 968; *Illinois Cent. R. Co. v. Able*, 59 Ill. 181; *Davis v. Kansas City, St. J. & C. B. R. Co.* 53 Mo. 817, 14 Am. Rep. 457; *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627.

If he would claim damages for not being carried according to contract, which is implied by the ticket, he should leave the train at the first suitable opportunity.

Davis v. Kansas City, St. J. & C. B. R. Co. supra; *St. Louis, I. M. & S. R. Co. v. Leigh*, 45 Ark. 363, 55 Am. Rep. 558; *Memphis & C. R. Co. v. Benson*, supra; *Barden v. Boston, O. & F. R. Co.* 121 Mass. 428; *Bishop, Noncont. L.* § 1091.

This is just what appellee did.

A railroad company is bound to furnish its passengers reasonable and proper accommodations for traveling, and if it has an insufficient number of cars so that passengers are compelled to ride on the platform it is liable for injuries received by them while riding there.

Field, Priv. Corp. § 544; *Wills v. Long Island R. Co.* 34 N. Y. 670.

The carrier must provide every passenger with a seat.

Lawson, Rights, Rem. & Pr. § 1890; *Base v. Chicago & N. W. R. Co.* 86 Wis. 450, 17 Am. Rep. 495, 39 Wis. 686, 42 Wis. 654, 24 Am. Rep. 487; *Wills v. Long Island R. Co.* 33 Barb. 899, 34 N. Y. 670; *Hardenbergh v. St. Paul, M. & M. R. Co.* 89 Minn. 8.

The passenger is not bound to find himself a seat. This is the carrier's duty. He has no right to have him stand in the aisle of the car.

Wills v. Long Island R. Co. supra; Lawson, Rights, Rem. & Pr. § 1890.

If he rides on a train, and refuses to pay his fare or surrender his ticket, for want of a seat, and is ejected, he may not recover for the ejection but only for the breach of contract to furnish a seat.

St. Louis, I. M. & S. R. Co. v. Leigh, 45 Ark. 368, 55 Am. Rep. 558; Lawson, Rights, Rem. & Pr. § 1890.

Appellee had no right whatever to remove valises in order to provide himself with a seat.

Lawson, Rights, Rem. & Pr. § 1890; *Thorpe v. New York Cent. & H. R. R. Co.* 76 N. Y. 402, 32 Am. Rep. 325.

Woods, J., delivered the opinion of the court:

The appellee paid for a seat in a first-class coach, and was entitled, as matter of right, to have the servants of the railway company who were in charge of the train furnish him such seat, unless a sudden and unusual influx of passengers rendered this impracticable. It is perfectly clear from all the evidence in this case that the conductor in charge of the train could and should have made provision for seating the appellee. It is equally certain that a proper application of the appellee to that effect provoked not only a refusal from the conductor, but subjected the audacious passenger to an explosion of profane and contemptuous wrath from that official. That a jury awarded the trivial sum complained of is proof positive that no undue prejudice existed against the corporation. Let the company thank God, and take courage.

Affirmed.

NEW JERSEY SUPREME COURT.

Silas MATTHEWS

v.

DELAWARE, LACKAWANNA & WESTERN R. CO. *et al.*

(.....N. J.)

*1. One injured by a collision between a locomotive of a railroad company and a car (in which he was a passenger) of a street-railway company may maintain a joint action against both companies if the collision was produced by the neglect of the railroad company to give notice of the approach of the locomotive, concurring with the neglect of the railway company to observe proper care in crossing the railroad track.

2. Although such duties are diverse,

*Headnotes by MAGIE, J.

NOTE.—The opinion in the above case, although brief, very clearly presents the law on the question of joint liability for injuries received in a railroad collision.

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and the neglect to perform each is separate and disconnected, yet, as the wrongdoing of one company unites with that of the other in causing injury, the tort is joint, and one or both tortfeasors may be sued.

3. If the jury negative the negligence charged against one of such tortfeasors, a verdict against the other is not objectionable.

(November 10, 1893.)

CASE CERTIFIED by the Circuit Court for Essex County for the advisory opinion of the Supreme Court after the granting of orders, upon plaintiff to show cause why a verdict against the defendant railroad company should not be set aside and a new trial granted, and upon defendant the Newark Passenger Railway Company to show cause why a verdict in its favor should not be set aside and a new trial granted, in an action brought to recover damages for personal injuries alleged to have resulted from the joint negligence

of the two defendants. *Discharge of both rules advised.*

Statement by Magie, J.:

Matthews, the plaintiff, brought an action of tort in the Essex circuit against the defendants to recover damages for an injury received in a collision between a locomotive of the railroad company and a car (in which he was a passenger) of the railway company. There was a verdict in favor of the railway company and against the railroad company. The railroad company obtained a rule to show cause why the verdict against it should not be set aside. Plaintiff obtained a rule to show cause why the verdict in favor of the railway company should not be set aside. The rules were consolidated and certified to this court for its advisory opinion.

Mr. R. Wayne Parker for plaintiff.

Mr. Flavel McGee for defendant Delaware, L. & W. R. Co.

Mr. Samuel Kalisch for defendant Newark Pass. Ry. Co.

Magie, J., delivered the opinion of the court:

Counsel for the railroad company first urges that the verdict finding it to have been negligent was not supported by evidence, or was contrary to the weight of evidence. It is unnecessary to review in detail the case. The discussion of counsel was thorough and exhaustive, and much consideration has been given to the evidence. The conclusion reached is that there was evidence of the neglect of the railroad company to give due notice of the approach of its train sufficient to go to the jury, and, although there was much opposing evidence, it did not so preponderate as to require or justify a new trial on this ground.

It is next claimed that the verdict awarded excessive damages. The amount awarded was large, but, considering the proofs of injury, it was not so large as to indicate mistake or misconduct on the part of the jury. The verdict ought not to be disturbed on that ground.

It is lastly contended in behalf of the railroad company that the verdict against it should be set aside, because there was no proof of joint negligence on the part of the two defendants. The claim is, as I understand from the argument, that these defendants cannot be jointly sued for an injury occasioned by such a collision, unless the neglect which caused the collision was of a joint duty owed by both defendants, and that, on failure of proof of a joint duty and joint neglect, neither defendant can be held. If this contention is sound, it is obvious that the declaration was demurrable, for it charged that the railroad company owed to plaintiff a duty to give notice of the passage of its trains across the tracks of the railway company, and that the railway company owed to him a duty to take precautions in carrying him across the tracks of the railroad company, and it averred that each company had neglected to perform the several duties thus charged, and that thereby the collision which

injured plaintiff occurred. But the contention is wholly inadmissible, and the declaration would plainly have been good on demurrer. The error arises out of a misconception as to the nature of a joint tort. If two or more persons owe to another the same duty, and by their common neglect of that duty he is injured, doubtless the tort is joint, and upon well-settled principles each, any, or all of the tortfeasors may be held. But when each of two or more persons owe to another a separate duty, which each wrongfully neglects to perform, then, although the duties were diverse and disconnected, and the negligence of each was without concert, if such several neglects concurred and united together in causing injury, the tort is equally joint, and the tortfeasors are subject to a like liability. This doctrine was announced in this court by the chief justice in *Newman v. Fowler*, 37 N. J. L. 89. The like doctrine was applied by the court of appeals in New York to a case identical with that under consideration. *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492. That case has been mentioned with approval in *Barrett v. Third Ave. R. Co.* 45 N. Y. 628; *Slater v. Mercereau*, 64 N. Y. 188; *Arctic F. Ins. Co. v. Austin*, 69 N. Y. 470, 80 Am. Rep. 221. See also *Cooper v. Eastern Transp. Co.* 75 N. Y. 116. The same view is taken in other courts. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; *Union Transit Co. v. Shacklet*, 119 Ill. 232; *Cartersville v. Cook*, 129 Ill. 152, 4 L. R. A. 721; *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178. I have not discovered any dissent from this doctrine, except in Pennsylvania, the courts of which state, while admitting the general rule, make an exception of cases where the injured party was the passenger of a carrier whose negligence concurred with the negligence of another in producing the injury. The reason of this exception, however, is that those courts adhere to the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, which has always been repudiated in New Jersey, and is now expressly overruled in England. *The Bernina*, L. R. 12 Prob. Div. 58, 13 App. Cas. 1. The Pennsylvania cases are *Lockhart v. Lichtenhaler*, 46 Pa. 151; *Carlisle v. Brisbane*, 113 Pa. 544, 57 Am. Rep. 488; *Dean v. Pennsylvania R. Co.* 129 Pa. 520, 6 L. R. A. 148; *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329; *North Pennsylvania Co. v. Mahoney*, 57 Pa. 187.

The declaration therefore set out a good cause of action against two joint tortfeasors, and there can be no doubt that in such an action one defendant may be held liable alone if the proof justify it. The verdict against the railroad company should not be disturbed.

The verdict in favor of the railway company is also questioned by the plaintiff.

There was strong evidence of its negligence tending to produce plaintiff's injury, but it was encountered by contradictory evidence. The question was fairly submitted to the jury, and no sufficient reason to disturb their verdict appears.

Let the Circuit Court be advised to discharge both rules.

PENNSYLVANIA SUPREME COURT.

A. M. HOOVER *et al.*

v.

PENNSYLVANIA R. CO., *App't.*

(156 Pa. 220.)

1. Giving lower rates for transportation of coal to a manufacturing company than to a coal dealer is not undue or unreasonable discrimination, in violation of Const. 1874, § 8, of the Act of 1883, which further specifies that the equality of rates required shall be for "a like service from the same place, upon like conditions and under similar circumstances," where the manufacturing company consumes the coal in creating products which furnish a large amount of additional transportation to the carrier,—and especially where the carrier was bound to give such company the lower rate by a contract made years before the coal dealer began business.
2. It is a matter of public history that along the valleys of the Lehigh and Schuylkill rivers there are great numbers of blast furnaces, rolling mills, rail mills, foundries, machine shops, and numerous other manufacturing establishments which consume enormous quantities of the coal output of the state, and at the same time immensely large industry in buying and selling coal for domestic consumption is prosecuted in every village, town, and city in this region.
3. A manufacturing company violates its right to accept lower rates for the transportation of coal than are given to a coal dealer if it sells coal, even to its own employes; and the carrier on notice of such sales must charge such company the same rates that are charged to coal dealers.
4. Notice by a carrier of special rates to other shippers entitled thereto by difference of conditions need not be given to regular shippers in order to protect the carrier from the charge of unreasonable discrimination.
5. The amount of injury suffered by a shipper on account of lower rates given to another shipper for which he may recover from the carrier, under the Act of 1883, cannot be taken without proof to be the difference in the rates charged.

(July 19, 1893.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Huntingdon County in favor of plaintiffs in an action brought to recover the statutory damages for alleged discrimination against plaintiffs in freight rates. *Reversed.*

In 1881 defendant contracted with the Bellefonte Iron & Nail Company to haul coal under certain conditions from the Snow Shoe district to its works for 80 cents per ton. The agreement was that the coal was to be billed at the usual public rate of 50 cents per ton, and a rebate of 20 cents per ton would be paid by

the railroad company to the nail company. In 1889 plaintiffs became retail coal dealers in Bellefonte, and having been charged the regular tariff rates on their coal, without the rebate, and having learned of the contract between the railroad company and the coal company, brought this suit under the Act of June 4, 1883. Defendants presented points which, together with their answers, were as follows:

1. The agreement to charge a uniform rate to the Bellefonte nail works, made in 1881, was binding on the defendant; and its performance was not an undue and unjust discrimination against the plaintiffs. *Answer:* So far as to the contract being binding on the defendant in 1889 and up to 1891, we are not prepared to affirm the point. This action is not brought to enforce that contract. The question of the contract is, therefore, immaterial and irrelevant. We cannot say, as matter of law, that the contract was binding upon the company. Its terms seem to be indefinite, and whether they could or could not have retreated from it is a question that is not important here; and if it be, we cannot say it was binding upon them. But whether or not the performance of that contract resulted in undue and unjust discrimination against these plaintiffs is a question we submit to you in our general charge. If it operated in a certain manner it would be undue and unjust, and if it did not operate in that manner it would not be undue and unjust. For further answer we refer to our general charge as to the fact of discrimination.

2. The defendant has made no undue charge or unjust discrimination against the plaintiffs if they were charged the same as other buyers and sellers of coal. *Answer:* This point we cannot affirm. The fact involved in the point will be for the determination of the jury.

3. A lower charge to a manufacturer of nails is not an unjust discrimination to a buyer and seller of coal only. *Answer:* We cannot affirm that as a principle of law. It may be or may not be, according to the circumstances of the case; but whether, in this case, it resulted in an undue and unjust discrimination must be determined by you under the evidence.

4. As there was no undue discrimination in furnishing facilities for transportation, treble damages cannot be recovered in this case; and the verdict must be for the defendant. *Refused.*

5. Under all the evidence in the case the verdict must be for the defendant. *Answer:* We refuse this point because, as the case is presented by the plaintiffs, we submit the question of undue and unjust discrimination to you.

A verdict was returned in favor of plaintiffs and defendants appealed, assigning for error the answers to the above instructions, and also that the judgment was unlawful as conflicting

NOTE.—An exceedingly interesting and valuable discussion of the right of a carrier to discriminate in rates between classes of patrons on account of other advantages to the carrier in building up one class of business along its line is presented in the above case which is clearly the most important if 22 L. R. A.

not the first on the precise question involved. For a note on the question of a carrier's common-law right to discriminate, see *Louisville, E. & St. L. Consol. R. Co. v. Wilson* (Ind.) 18 L. R. A. 106; also the case of *Cowden v. Pacific Coast S. S. Co.* (Cal.) 18 L. R. A. 221.

with the Constitution, art. 8, § 7, which forbids any special law regulating labor, trade, mining, or manufacturing.

Messrs. David W. Sellers and W. & J. D. Dorris, for appellant:

The agreement to charge a uniform rate to the Bellefonte nail works, made in 1881, was binding on defendant; and its performance was not an undue and unjust discrimination against plaintiffs.

Coxe v. Lehigh Valley R. Co. 8 Inters. Com. Rep. 460; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92; *Hersh v. Northern Cent. R. Co.* 74 Pa. 182; *Munkall v. Pennsylvania R. Co.* 92 Pa. 150; *Borda v. Philadelphia & R. R. Co.* 141 Pa. 484.

A railroad company may increase its business by special rates to shippers.

Baxendale v. Great Western R. Co. 5 C. B. N. S. 336; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 386; *Fitchburg R. Co. v. Gage*, 12 Gray, 398; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 408, 13 Am. Rep. 457.

As there was no undue discrimination in furnishing facilities for transportation, treble damages cannot be recovered in this case; and the verdict must be for defendant.

Wigton v. Pennsylvania R. Co. 25 W. N. C. 357.

The Act of 1883 is special with regard to the trade of a common carrier considered as a division of labor or a pursuit, or relatively to the railroad as a special method of domestic transportation. For centuries the pursuit of a common carrier has been private like that of an innkeeper. Each owes duties to the public, but this does not make the pursuit public.

Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co. 142 Pa. 581.

Mr. George B. Orsady, for appellees:

When a contract of this character is made and plead as a protection, the railroad company is bound to know who the other party to the contract is, and what the effect of enforcing it would be; their duty to the public as a common carrier is not discharged by simply calling a selected friend, a manufacturer of nails, an iron and nail company, or a corporation; they must go farther and allow all of the class, to which the other party in fact belongs, to have the benefit of the same favors. It must be public and not secret; and as in this case, must not be made with one who buys and sells anthracite and bituminous coal in the open markets to all comers, in addition to making muck bar and nails, and by reason of secret rebates is enabled to undersell business rivals in the coal trade.

The contract between a railroad company and a shipper that the latter shall pay the regular established rates of freight the same as all other shippers, and that the company shall pay back to him by way of rebate a certain proportion of freight so charged and paid, whereby a less rate of freight is paid than by the public generally, is void and against public policy.

Indianapolis, D. & S. R. Co. v. Erwin, 118 Ill. 250, 27 Am. & Eng. R. R. Cas. 8; *Rice v. Atchison, T. & S. F. R. Co.* 3 Inters. Com. 22 L. R. A.

Rep. 263; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *Hutchinson*, Carr. § 297.

The contention that the company can designate a favored shipper by a particular name and secretly arrange for repayment of freight charges, under the facts in this case, can find no parallel. All are intended to stand equal before the bulletin board of freight charges.

Camblos v. Philadelphia & R. R. Co. 4 Brewst. 563.

The effect of a reduced rate to a favored dealer is to reduce the plaintiff's profits to the extent of such reduction, making an undue and unjust discrimination.

Goodridge v. Union Pac. R. Co. 37 Fed. Rep. 182.

A jury is to determine whether the rebate under the circumstances of the case, amounts to an unjust discrimination to the injury and prejudice of the plaintiff.

The reasonableness of a freight charge is a question of fact; and in general what amounts to undue preference is a question of fact and not of law.

Hutchinson, Carr. § 447; *Houston & T. C. R. Co. v. Rust*, 58 Tex. 98; *Root v. Long Island R. Co.* 4 L. R. A. 331, 2 Inters. Com. Rep. 576, 114 N. Y. 800, 11 Am. St. Rep. 643, 40 Am. & Eng. R. R. Cas. 55.

By goods of the same class is meant, goods similar in those qualities which affect the risk and expense of carriage; by shipment under the same circumstances, is meant that the goods are conveyed under like circumstances, where the route, risk, and expenses are, in the opinion of the jury, the same, otherwise not.

Paxon v. Illinois Cent. R. Co. 56 Iowa, 427, 6 Am. & Eng. R. R. Cas. 591.

The provision for treble damages to the party injured is not intended as compensation alone, but with it a penalty intended as a punishment for violation of law; they are regarded as a unit and recovered in one action.

Herriman v. Burlington, C. R. & N. R. Co. 57 Iowa, 187.

The statute is but declaratory of the common law, and the penalty imposed is within legislative power to compel observance of a charter duty.

Shipper v. Pennsylvania R. Co. 47 Pa. 338; *Audenreid v. Philadelphia & R. Co.* 68 Pa. 370, 8 Am. Rep. 195.

The claim that the words "this provision," refer only to the "furnishing facilities for transportation," is untenable.

Wigton v. Pennsylvania R. Co. 25 W. N. C. 357.

Discriminations based solely upon the amount of freight shipped without reference to any conditions tending to increase cost of transportation are in favor of capital, contrary to sound public policy, in violation of that equality of rights guaranteed to every citizen, and a wrong to disfavored party.

Kinsley v. Buffalo, N. Y. & P. R. Co. 37 Fed. Rep. 181, in which case *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309, is approved in full.

Scofield v. Lake Shore & M. S. R. Co. 43 Ohio St. 571, 54 Am. Rep. 846, 23 Am. & Eng. R. R. Cas. 612; *Rothschild v. Wabash R. Co.* 15 Mo. App. 242.

A railroad has no right by any discrimina-

tion not grounded in reason, to put any single dealer, whether a large dealer or a small dealer, to any distracted advantage.

Providence Coal Co. v. Providence & W. R. Co. 1 Inters. Com. Rep. 368.

Although permitted to establish its rates for transportation, a common carrier must do so without injurious discrimination as to individuals.

Vincent v. Chicago & A. R. Co. 49 Ill. 85.

A rebate secretly paid to certain shippers being an unjust discrimination against others shipping the same class of goods, under the same conditions, at the same rate, without rebate, is illegal at common law.

Cook v. Chicago, R. I. & P. R. Co. 75 Iowa, 169, 9 Ry. & Corp. L. J. 8, 45 Am. & Eng. R. R. Cas. 297; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, 2 Am. Rep. 31; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430, 18 Am. Rep. 72; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 18 Am. Rep. 457; *Messenger v. Pennsylvania R. Co.* 87 N. J. L. 531, 18 Am. Rep. 754; *Sinking Fund Cases*, 99 U. S. 719, 25 L. ed. 501.

Even where the rate charged is reasonable the tendencies of modern authorities and recent legislation is to stamp discrimination as unjust and unlawful, if it subjects others to unreasonable disadvantages or is made in order to give one a preference.

Ragan v. Aiken, 9 Lea, 609, 40 Am. Rep. 684.

A contract in consideration of a greater quantity of freight being furnished, and agreeing to make a rebate on published tariff on such freights, is contrary to public policy and void.

Scotfield v. Lake Shore & M. S. R. Co. supra.

A regulation, to be valid, must operate on all alike. If it deprives any persons of the benefits of the road, or grants exclusive privileges to others, it is against law and void.

Sandford v. Catawissa R. Co. 24 Pa. 378, 64 Am. Dec. 667; *Cumberland Valley R. Co's App.* 62 Pa. 218.

Railroad companies are common carriers, receiving from the state a delegation of a portion of its sovereign powers for the public good. Being public agents and in the place and stead of government, exercising public duties, they are therefore subject to the legislative and judicial authority to correct the abuse of their privileges and powers.

Scotfield v. Lake Shore & M. S. R. Co. supra; *Ang. & A. Corp.* p. 694.

An act of assembly to be repugnant to the Federal or state Constitution on the ground that it impairs the obligation of the contract, must operate directly on the contract and literally impair its obligations.

Erie & N. E. R. Co. v. Casey, 26 Pa. 287; *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Cooper v. Telfair*, 4 U. S. 4 Dall. 14, 1 L. ed. 721; *Moore v. Houston*, 3 Serg. & R. 178; *Bakin v. Raub*, 12 Serg. & R. 339; *Com. v. Smith*, 4 Binn. 123.

Green, J., delivered the opinion of the court:

The third section of the seventeenth article of the Pennsylvania Constitution of 1838 is

"Sec. 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made, in charges for, or in facilities for, transportation of freight or passengers, within the state, or coming from, or going to any other state. Persons and property transported over any railroad shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates." For the purpose of enforcing the foregoing provision of the constitution, the Legislature enacted the law of the 4th of June, 1883 (Pub. Laws, 73). The first and second sections are as follows: "Section 1. That any undue or unreasonable discrimination by any railroad company or other common carrier or any officer, superintendent, manager, or agent thereof in charges for or in facilities for the transportation of freight within this state or coming from or going to any other state is hereby declared to be unlawful. Sec. 2. No railroad company or other common carrier engaged in the transportation of property, shall charge, demand, or receive from any person, company, or corporation, for the transportation of property, or for any other service, a greater sum than it shall receive from any other person, company, or corporation for a like service from the same place upon like conditions and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies, or corporations alike, for such transportations and services, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company liable to the party injured for damages treble the amount of injury suffered."

The action in the present case was brought to recover treble damages, under the second section of the Act of 1883, for an alleged unjust and unreasonable discrimination against the plaintiffs in charges for freights on coal shipped from Snow Shoe to Bellefonte, within this state, over lines of railroad owned or controlled by the defendant company. The period of time covered by the claim of the plaintiffs was from September, 1889, to April, 1891, and it was alleged that the plaintiffs were overcharged 20 cents per ton on 10,607 tons carried over the defendant's road during the time named. Substantially the defense set up by the defendant was that in the year 1881 certain citizens of Bellefonte and vicinity, having in contemplation the erection of a manufacturing plant at Bellefonte for the manufacture of nails, waited upon the defendant company, through Gov. A. G. Curtin, who represented them, and en-

deavored to make, and did make, a special contract that if the plant was erected the company should not charge them more than 80 cents per ton for all coal shipped from Snow Shoe to the works at Bellefonte; that such contract was made, and the plant was then erected, and the manufacture of nails thereat was carried on from 1881 until and after the time covered by the plaintiffs' claim; that the plaintiffs were coal dealers only, who merely bought and sold coal, and returned no freight to the defendant as the product of any manufacturing operations; that they did not do any business as coal dealers, in fact, did not come into existence, until the year 1889, eight years after the nail company was organized and commenced business, and while the defendant company was subject to, and bound by, the terms of their contract with the nail company; and that the plaintiffs were not discriminated against at all, because they were charged only the same freights as were charged to all others who were coal dealers only, and it was contended, as matter of law, by the defendant, that the discrimination in the rates of freight between the nail company and the plaintiffs was not, in view of all the circumstances of the case, an undue or unreasonable discrimination, within the meaning of the constitutional provision or of the Act of 1883. In reply to points put to the court on the trial on this subject the learned judge who tried the cause charged the jury that the question of unjust discrimination was a question of fact to be determined by them, and he refused the defendant's point on that subject; but he did, nevertheless, also instruct the jury, as matter of law, that the distinction between a dealer and a manufacturer, set up by the defendant, was not a defense, and would not exempt the defendant from the penalties of the Act of 1883. He said: "The defense claim, as an exemption from the penalty of this act, the fact that the one may be classed as a manufacturer, and the other simply as a dealer. I do not regard the law as making that classification. I think that the classification which the Act of 1883 intended was a classification relating to the carriage, and not to the shipper himself. It may charge more for one kind of freight than for another. It may charge more for live freight than for wood, coal, iron, or ore. It may charge more for a certain portion of its road than it does for others. These things are governed largely by the expense to which the common carrier is subjected. Common carriers may charge more when they ship but a small quantity than they do when they ship by wholesale. . . . But I do not think the law, or the policy of the law, permits them to classify the kind of dealer; that is, that they may make a discrimination between the character of the consignor or consignee ordinarily. . . . The evidence here is that each shipment was by carloads, during the same period of time, and under like circumstances. The fact that one party was a manufacturer and the other party were coal dealers we think is not material in this case." The same idea was repeated, and a positive instruction was given that, upon the facts

stated in the plaintiffs' point, "the service and conditions were alike, and the circumstances the same." We regard this as a binding instruction to the jury upon the law of the case, which left them no discretion but to find for the plaintiffs; the only question for them being the amount of damages to be found.

After a very patient examination of all the testimony and of all the authorities cited on both sides, we find ourselves unable to agree with the learned court below either as to their interpretation of the law or their judgment upon the facts. So far as the law of the case is concerned, there is no doubt that the Act of 1883 does not prohibit all discrimination. It prohibits only discrimination which is undue or unreasonable, and the prohibited discrimination is further limited by the consideration that it must be "for a like service, from the same place, upon like conditions, and under similar circumstances." If, therefore, the discrimination in a given case is upon conditions which are not alike, and circumstances which are not similar, the act is inapplicable, and its penalties are not incurred. Nor can we regard this question as a question of fact for the jury alone. The ascertainment of the actual facts of the case, of course, is for them, but where these are established by undisputed testimony, or are presented by proper points which cover the facts in evidence, the resulting question is whether the facts established, or undisputed, or exhibited in properly drawn points, bring the case within the operation of the words or necessary meaning of the statute; and that, of course, is a question of law for the court, for the question then is one of interpretation. Do the words of the statute extend to and embrace the established facts of the case, or do they not? If they do not, the statute is not applicable; if they do, it is, and the court alone, as in all other similar cases, must determine that question. It is beyond the function of the jury.

Let us now recur to the well-established and the undisputed facts of the case, and inquire whether there are any, and, if so, what, differences in the conditions and in the circumstances which attended the shipping of the coal to the plaintiffs and to the Bellefonte Iron & Nail Company, respectively. In the first place, we find the undisputed testimony of Gov. Curtin to the effect that in 1881, and prior to the erection of the nail works, he called upon the defendant's officials, for the purpose of having them agree to carry the coal for the prospective works at 80 cents per ton. This testimony is clear, distinct, positive, and entirely uncontradicted, and it was followed by proof that the contract was carried out by the defendant after some delay in the adjustment. Gov. Curtin said: "I went to Philadelphia for the purpose of having the arrangement made. I there saw Mr. Creighton, who was the freight agent of the Pennsylvania Railroad Company and, after some time in negotiating, he agreed that the freight should be reduced to thirty cents per ton where the amount consumed per day was twenty tons or more. He wrote me a letter, in which it was settled and fixed at thirty

cents per ton." He then explained the loss of the letter, and his search for it, and said: "But of the contents of the letter I am perfectly clear in my recollection of it, and it was one of the inducements which contributed to the erection of the nail works in this place. There were other parties in this place engaged in other industries which would have had a right to the reduction, notably Valentine's works in operation, and the glass works, when they used the quantity indicated." As the court below charged directly against any effect being attached to the subject-matter of this testimony, the defendant is entitled to have it regarded as proof of an established fact; and, this being so, we have the following differences in the conditions and circumstances attending the shipments to the plaintiffs and the nail works, respectively: (1) The defendant, when it began carrying coal for the plaintiffs, in September, 1889, was bound by the terms of a contract made with the nail works eight years before, and during all the intervening time the plaintiffs were not even in existence as a firm, and were doing no coal business whatever. We know of no reason why that contract was not binding on the defendant, especially as Gov. Curtin testified, without contradiction, that all the other industries at Bellefonte were entitled to the benefit of it, if they took the requisite quantity of twenty tons daily. This being so, the defendant's hands were tied, and it could not charge the nail works 50 cents a ton if it had desired to do so. This constituted a most material difference in the conditions and circumstances of the shipments. In an action by the nail works to recover the 20 cents a ton higher charge, if it had been made, to equalize it with the rate charged to the plaintiffs, it would have been no defense to say that a company of coal dealers had lately come into existence who were getting coal over the same road from the same point, and therefore the defendant would be obliged to charge 50 cents per ton thereafter. (2) The nail works were bound to take twenty tons every day, while the plaintiffs were under no such obligation. (3) The plaintiffs were dealers in coal merely, while the nail company was a manufacturer of fabrics, and itself consumed the coal it received. They were therefore not competitors in the same business, and a lower rate to the manufacturer would not, under the contract, affect the business of the plaintiffs injuriously. It is true there was proof that the nail company did sell some coal to their own workmen, but, as it is not shown that the defendant had any knowledge of this fact, they cannot be held responsible for it. (4) The business of the plaintiffs paid but one freight to the defendant, while the business of the nail company paid not only that freight, to wit, for hauling the coal to the nail works, but also, in addition to that, another, and entirely independent, freight, to the defendant on all the products manufactured by the nail company. This was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and

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strong that where an additional freight is obtained by means of the lower charge, the discrimination is justified, both at common law and under the statutes. The importance of this factor in the discussion is at once manifested by certain testimony given by the plaintiffs, through one of their witnesses, L. E. Munson, who was the superintendent of the Bellefonte Iron & Nail Company. On examination by counsel for the plaintiff he was asked: "Question. What did you say the capacity of the nail works was as to outgoing freight?" Answer. About thirty tons a day; thirty or forty tons a day. Q. That would be three hundred kegs, would it? A. We have a capacity of five hundred kegs. Q. That was your outgoing freight? A. I suppose part of the time we made a hundred thousand kegs a year; from seventy-five to one hundred and twenty-five thousand kegs a year. Q. Would that mean about one car a day on a three-hundred kegs basis? A. Yes, sir. Then we shipped considerable muck bar. Q. Were you shipping muck bar at the time you were shipping nails? A. Sometimes; when we were making nails out of steel rods. Q. Were you making muck bar at the time you were making nails? A. Yes, sir. Q. Were you making bar iron, and shipping it, at the time you were making nails? A. Yes, sir." As the foregoing testimony was given by the plaintiffs, and was not at all contradicted by the defendant, the plaintiffs are bound by it, and it must be taken as establishing the fact which it develops; and the fact thus established is of the greatest possible consequence in the case. It entirely destroys, in our opinion, the fundamental allegation of the plaintiffs that the shipments of coal to the plaintiffs and the nail works were made "upon like conditions, and under similar circumstances;" for the shipments of coal to the plaintiffs yielded but one freight to the defendant, while the shipments to the nail works yielded not only the same incoming freight on the coal of at least twenty tons a day, but an additional outgoing freight of thirty to forty tons a day of fabrics manufactured by the nail works. In view of this testimony, how can it possibly be said that the conditions of the two shipments are alike, and their circumstances similar? That a railroad company may lawfully secure to itself so important an addition to its business by making a lower charge to one customer than to others is fully established by the authorities, as we shall presently see. (5) The manufacture and sale by the nail works of nails and muck bar were outside of, and entirely harmless to, the business of the plaintiffs, and hence a lower price for the coal consumed by the nail works was neither an undue nor an unreasonable discrimination against the plaintiffs, because it was an immaterial circumstance as affecting their business. This is self-evident. The plaintiffs did not deal in nails or muck bar, and the sale of those commodities by the nail company necessarily could have no effect upon the plaintiff's business, which was the selling of coal to persons who consumed it. (6) As to all persons who did sell coal at Belle-

fonte, they were charged the same freights precisely as were charged to the plaintiffs. This is the undisputed testimony.

Let us now see what is the voice of the authorities upon the subject of discriminations in freight charges by carrying companies. The subject is an old one. Prior to any statutes in England or in this country, the common law had pronounced upon the rights and duties of carriers and freighters, and in the enactment of statutes little more has been done than to embody in them the well-known principles of the common law. It happens, somewhat singularly, that the very question we are now considering, of a discrimination in the rates charged to coal dealers and to manufacturers who use coal as a fuel, does not appear to have arisen; and yet it is very certain that such discrimination does prevail, and has prevailed for a long time, on all lines of railway and canal. It is highly probable that the absence of litigation upon such discrimination is due to the general sentiment of its fairness and justness. Within the writer's knowledge, in the section of the state in which he lives, a much greater difference between the rates charged to dealers and those charged to manufacturers by the coal-carrying companies has always existed, and now exists, without any question as to its justness or its legality. It is matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast furnaces, rolling mills, rail mills, founderies, machine shops, and numerous other manufacturing establishments, which consume enormous quantities of the coal output of the state, and, at the same time, in every village, town, and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the state is without doubt equally true throughout the interior and western portions of the commonwealth, where similar conditions prevail. Yet from no part of our great state has ever yet arisen a litigation which called in question the legality or the wisdom or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for, except upon the theory that such discrimination as has thus far transpired, has not been felt to be undue or unreasonable, or contrary to legal warrant. In point of fact, it is perfectly well known and appreciated that the output of freights from the great manufacturing centers upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products, which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which

enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this, a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of the business which has no existence in the business of carrying coal to those who are coal dealers only. Thus a blast furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire bricks, and other materials, for the maintenance of its structures and the conduct of its business none of which are necessary to a mere coal-selling business. These are some of the leading considerations which establish a radical difference in the conditions and the circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them is that the establishment of manufacturing industries and the conducting of their business necessitates the employment of numbers of workmen and other persons whose services are needed and these with their families create settlements and new centers of population resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling. In fact that business is one of the results of the manufacturing business, and is not a co-ordinate with it. The business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent.

These considerations are generic, and are suggested for the purpose of illustrating the differences between the fundamental conditions and circumstances of the two industries we are considering. Recurring now to the authorities, we find that the British Statute of 17 & 18 Vict., chap. 81 (1854), is perhaps the earliest instance of direct legislation upon this subject. That statute prohibited "undue or unreasonable preference or advantage" in transportation charges, but lacked the restricting words "from the same place, upon like conditions, and under similar circumstances," which appear in our Act of 1893. Yet it was held in *Ransome v. Eastern Counties R. Co.*, 1 C. B. N. S. 437, and *Oxlade v. Northeastern R. Co.*, Id. 454, that it was competent for a railway company to enter into a special agreement for the carriage of goods for a particular individual or company at a lower rate in respect of large quantities of goods and longer distances than for one who sends them in small quantities and shorter distances. In *Ransome's Case* it was said by Cresswell, J., in delivering the opinion of the court: "After a good deal of considera-

tion, we think that the fair interests of the railway ought to be taken into the account." In the case of *Nicholson v. Great Western R. Co.*, 5 C. B. N. S. 386, the same doctrine was held, and it was also held that the second section of the Railway Traffic Act (17 & 18 Vict. chap. 31) was not contravened by a railway company carrying at a lower rate, in consideration of a guaranty of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. Crowder, J., said in the opinion: "When the statute speaks of 'undue and unreasonable preference or advantage,' and 'undue or unreasonable prejudice or disadvantage,' it uses language implying that there may be advantage to one person or one class of traffic and prejudice to another, which would not be within the act of parliament. The preference and prejudice must be 'undue' or 'unreasonable' to be within the statute, and although, in the case now before the court, it is quite manifest that the Raubon Coal Company have many and important advantages in carrying their coal on the Great Western Railroad, as against the complainants and other coal owners in the forest of Dean, still the question remains, are they 'undue' or 'unreasonable' advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Raubon Coal Company." The justice then proceeds to show that it was to the advantage and profit of the railway company to carry coals for the Raubon Company at a lower rate than for the complainants, and concludes, in the language of the syllabus above quoted, that this was no violation of the act. All of the foregoing cases recognize the proposition that if the interest of the railway company was subserved by charging the lower rate to the one company than to other, the act was not violated. That conclusion was reached in a case where the complainant was in the same business with the favored company, and was injuriously affected by the discrimination, but the court held that this was permissible if the interests of the railway company were thereby subserved. With how much greater force can it be said that here, where there is no competition in the disposal of the coal of the plaintiffs and the products of the nail company, and also where the inducement to the defendant to make the lower rate for the nail company is a largely increased traffic on the defendant's road, neither the letter nor the spirit of our Act of 1883 was violated.

The doctrine of the cases above cited was also declared in the case of *Baxendale v. Great Western R. Co.*, 5 C. B. N. S. 386, where Cockburn, J., said: "If an arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, a court might uphold such an arrangement as an ordinary incident of

commercial economy, provided the same advantage were extended to all persons under the like circumstances." This latter incident would of course be essential where all of the favored class were in the same business. In the case of *Messenger v. Pennsylvania R. Co.*, 37 N. J. L. 531, 18 Am. Rep. 754, cited for the appellee, the court was careful to say that "it must not be inferred that a common carrier, in adjusting his price, cannot regard the particular circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference in that respect to some over others for carriage in the course of his business." In that case there was a very clear preference to one party over all others in the same business by the railroad company giving him a specific drawback upon freights on hogs carried from the same points, and, of course, as this was direct preference over all others, it was in violation of the law. But that decision has no application to this case. In the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 268, 36 L. ed. 699, 8 Inters. Com. Rep. 92, it was held that the issue by a railway company engaged in interstate commerce of a party-rate ticket for the transportation of ten or more persons at a rate less than that charged to a single individual for a like transportation on the same trip did not make an unjust or unreasonable charge, nor an unjust discrimination, now give an undue or unreasonable preference or advantage to the purchasers of the party-rate ticket, within the meaning of the several provisions of the Interstate Commerce Act of 1887. There was much discussion of the general subject of the prohibition of the general statute in the opinion of the Supreme Court of the United States in this case, from which it will be instructive to present some quotations. The English Traffic Act of 1854, above referred to, was fully considered, and the Cases of *Oxlade and Ransome*, and others hereinbefore cited, were recognized and followed. Among other things, it was said by *Mr. Justice Brown*, who delivered the opinion: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2, to make an unjust discrimination. Indeed, the possibility of just discrimination and reasonable preferences is recognized by these sections in declaring what shall be deemed unjust. . . . In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must

accomplish the same thing indirectly, by a special-rate rebate, or other device; but in either case it must be for a "like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible. In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge. . . . But, in so far as relates to the question of 'undue preference,' it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619, 28 L. ed. 269.

In the case of *Fitchburg R. Co. v. Gage*, 12 Gray, 398, the right to discriminate upon the basis of a carriage for a certain time, and in certain quantities, was declared. The claim of the shipper was for an equality of charges for shipments of ice with charges for shipments of bricks, because they were of the same class of freight; but the claim was not allowed. The court said, by way of illustration of the principle upon which there might be a lawful discrimination of rates upon the same class of goods: "If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time, or in certain quantities, for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all other persons and parties to the same advantage and relief." And this court said in the case of *Shipper v. Pennsylvania R. Co.*, 47 Pa. 338: "We are not prepared to say that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign, in favor of home products over those which are extraterritorial; especially when the railroad lies wholly within the state. Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things, may be."

These cases are cited as illustrations of various reasons and principles upon which lawful discriminations may be made even in charges for the carriage of the same goods over the same roads, and to be used for the

same purposes. But in the present case, where not only a particular quantity must be furnished to the railroad every day, but the goods at the point of delivery are to be used for totally different purposes, which do not conflict or compete with each other, the reason for a discrimination has an infinitely greater force. In *Hutchinson on Carriers* (page 353), after a protracted review of all the cases, (and they are very numerous), the writer sums up the result thus: "Mere inequality in charges does not, therefore, of itself amount to an unjust discrimination. It only becomes such when a discrimination is made in the rates charged for transportation of goods of the same class, of different shippers, under like circumstances and conditions. So a mere reduction from the established rate is not necessarily an unjust discrimination, but it becomes such when it is either intended, or has a natural tendency, to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly of the business."

We come now to consider the case of *Borda v. Philadelphia & R. R. Co.*, 141 Pa. 484. It was an action of case brought against the Philadelphia & Reading Railroad Company by the plaintiffs, who were shippers of coal, to recover damages for alleged illegal discriminations in the freight charged to the plaintiffs on shipments of coal over the defendant's road, as against lower rates charged to other shippers over the same road. The case was, by agreement of the parties, referred to Mr. Peter McCall as referee, who made a most exhaustive and elaborate report denying the claim of the plaintiffs, and his report was affirmed by this court. As the shipments had been made prior to the adoption of our Constitution of 1874, a preliminary question arose, whether it was the duty of the defendant to carry without discrimination. The referee held that such was the duty of the defendant, saying: "I regard it, then, as settled law in this state that a railroad company, a common carrier, owes a duty of equality to every citizen; and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable. Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule; for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue, or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination

made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case." The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire.

The claim of the plaintiffs was to recover damages to the amount of upwards of \$60,000 for unjust discrimination in favor of Audenried & Co., rival coal shippers to the plaintiffs, by the payment to Audenried & Co. of rebates on coal shipped from Port Richmond to points beyond New Brunswick at the rate of \$1.65 for steamer coal, and other rates for other grades. It was proved that these rebates were paid under agreements between Audenried & Co. and the defendant, made at the beginning of the season, and to continue throughout the season, and the referee was of opinion, and so found, that these contracts for continuous shipments during the whole season at fixed rates constituted such a difference in the conditions and circumstances of the shipments for Audenried & Co. and the plaintiffs, respectively, as to justify the discrimination, and prevent it from being illegal. In expressing his conclusions the referee says: "The defendant's case denies that the discrimination was willful, and made with any such design as imputed by the plaintiffs. It rests upon the ground that the payment of the drawbacks to Audenried & Co. was under an honest and bona fide belief that they were entitled to them, under an arrangement by which, in consideration of their having made contracts early in the spring for delivery of coal at fixed prices throughout the season, they were allowed the drawbacks in question. . . . On the whole, I am of opinion, upon the best consideration I have been able to give the subject, that the defendant did not pay to Audenried & Co. the drawbacks complained of in the first and additional count of the declaration willfully, and with intent to enable them to increase their business at the expense of the plaintiffs, but that it paid the same in good faith, under the belief that Audenried & Co. had made contracts in the spring at a fixed price for the delivery of the coal. . . . I am of opinion, therefore, that the defendant could legally have allowed the drawbacks to Audenried & Co. which it did allow, if that firm had had contracts made in the early part of the season for delivery of coal in the eastern market at fixed prices. In that case, although the service rendered, to wit, the transportation, would have been the same as that rendered to the plaintiffs, yet the circumstances were different, and the difference of circumstances would have justified the discrimination." While this court did not review the testimony taken before the referee, because it

was not before us, we affirmed the judgment in favor of the defendant upon the report, conceding the facts to be as found by the referee. It will be perceived, therefore, that in that case the circumstance that the coal was shipped for Audenried & Co., under contracts made at the beginning of the season, at fixed prices, and to continue throughout the season, was held a sufficient reply to a charge of unjust discrimination, although the commodity shipped was the same, to wit, anthracite coal, and the shipments were between the same points, to wit, from Port Richmond to points east of New Brunswick, and the plaintiffs were engaged in the same business as Audenried & Co., whereas here the plaintiffs were not engaged in the same business as the Bellefonte Nail Company. There could not be any competition between them in the products sold, and the rate at which coal was carried for the nail company was a matter of absolute indifference to the plaintiffs. We repeat again that we do not regard the sales of coal by the nail company to its own employes as of any moment in the case, (1) because there is no proof that they were made with the knowledge of the defendant, but there is positive and uncontradicted proof that they were made without such knowledge; (2) because the defendant is not responsible for such sales by the nail company; (3) because the coal carried by the defendant for the nail company was not carried for purposes of sale at retail, but for the purpose of manufacturing nails and muck bar; (4) because there is no proof that the plaintiffs sustained any damage by reason of the sales of the nail company to their employes. But it must be understood, and we so decide, "that a manufacturing company has no right to engage in the business of selling coal, even to its own employes; and if it does so, and the transporting company is notified of such selling, it must thereupon cease to carry coal to the manufacturing company at any less rate than it charges to the coal dealers, or incur the penalties of unjust discrimination.

The ruling of the court below would require that coal carried to blast furnaces, rolling-mills, rail mills, founderies, and all other manufacturing enterprises, should be carried for the same price as the coal carried to any retail dealer in the same locality, though the quantity consumed by the former might extend to many thousands of tons each year, while the quantity carried for the latter might be a few hundred tons only, and although the manufacturing companies gave back to the carrier many thousands of tons of freight each year, while the retail dealer gave back none, and although the business of the manufacturer in no wise competes with the business of the dealer. We think the differences in these respects between these two kinds of business are such as to justify a discrimination in the rates of freight charged to each, and the conditions of the two are not alike, and their circumstances are not similar, within the meaning of our Act of 1883, and therefore there can be no recovery in this case. The fact that the payment of the rebates was not known to the plaintiffs is of no possible consequence, both because they had

no right to know it, under our present ruling that the circumstances were not similar, and the conditions not alike, and also because, if the discriminating charge was lawful, the absence of notice to the plaintiffs would not make it unlawful. The same point was made and ruled in the *Borda Case*. The referee said: "But in point of law I do not think that the duty of giving notice to the world of every special rate rests upon the carrier, under penalty of being guilty of unlawful discrimination by his omission to give such notice. How and to whom is such notice to be given?"

It remains only to be added that differences of freight rates on coal to manufactures and to mere dealers are, and have been for many years, in universal practice, and not a single case other than this has as yet reached the courts of last resort in England or in the United States, questioning the entire legality and propriety of such differences, and that circumstance is ample proof that both the professional and the lay mind have assented to the practice.

Speaking upon a similar subject,—the difference in passenger rates upon ordinary tickets and thousand-mile tickets or go and return tickets,—the Supreme Court of the United States, in the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, said: "In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public,—it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them." On the question of damages the court below charged the jury: "If the nail works paid twenty cents less freight per ton on their coal, they had that much of an advantage over others; and the law would seem, in the mind of the court, to fix that excess as the measure of the plaintiffs' damages." We think this was serious error. The Act of 1883 contains no language justifying an instruction that the party injured can recover three times the amount of the difference in the rates charged. The words of the act are: "Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered." The "amount of injury suffered" is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, but, in any event, it must be a subject of proof, and there was no proof in the case of the actual damage sustained. How does it follow that because the defendant company paid in 1889 to the nail company a rebate of some \$6,000 on all the shipments that had been made from 1881, and a few sums thereafter, the plaintiffs suffered damage to any extent? In point of fact the nail company paid the full freight

of 50 cents a ton net during all these years, and their claim for rebates was not adjusted until 1889. How, then, does it appear that damage was suffered by the plaintiffs in consequence of the payment of the rebates to the nail company? It does not appear that the plaintiffs sold their coal for any less than the current market price at any time except when they and the other dealers were engaged in a war of prices, and sold it, far below actual cost in a struggle to capture the market, and it does not appear but that the plaintiffs would have sold their coal at 20 cents less than they did if they had received the rebate. The natural inference is that that is precisely what they would have done in the contest for the market. But of all this there is not a word of testimony, and yet it is only actual damage that they can recover. The proof for the defendant was that they never cut the market price to their men, but maintained it even when the coal dealers of the town were slaughtering each other's trade by selling below cost. As three times the actual damage is the penalty the defendant would have to pay if the judgment were sustained, they have a right to require very clear and definite proof as to what the actual damage was. When blast furnaces and great iron mills are built, they are not placed in cities or towns, but in the open country, where land is abundant and cheap, and of course on the line of a railroad. When they are established there is no population at the place of erection. The railroad companies are very willing to make as favorable terms as possible for freights on all the materials that are brought to the plants, and on all products that are carried from them, because they get a largely increased business from such enterprises. When the works are erected, houses are built for the men and officials of the companies. After that come the usual accessories required to supply the wants of the population, to wit, merchants, tradesmen, mechanics, butchers, bakers, grocers, and, among others, coal dealers. But the moment the last of these arrive, if the principles which prevailed in the court below in this case are correct, the whole freight system agreed upon between the transporter and the manufacturer theretofore must be changed and advanced to the freight rates charged to the retail dealers, or else all the rates charged to such dealers must be lowered to conform to the rates charged to the manufacturer. If this is not done, the manufacturer incurs the risk of being visited years afterwards with claims for treble damages, which may embrace any period of six years, and, as all the dealers have the same right of action in this regard that any of them has, and every town or city along the line has some or many retail coal dealers and manufacturing establishments also within its limits, it is easy to see that the aggregate of such claims many soon absorb the entire property and assets of the strongest transporting companies of the state. We do not find anything in the law that renders necessary or possible any such results as these, and we think it wiser and better to administer the law so that the rights and interests of all may

be conserved within rational and sensible limits.

We sustain the first, second, third, and fifth assignments of error. The fourth and sixth

assignments have no merit, and are not sustained.

Judgment reversed.

ILLINOIS SUPREME COURT

William E. KOPP *et al.*, *Appts.*,

v.

Cora E. REITER.

(146 Ill. 487.)

A deed placed in escrow but not delivered cannot be regarded as a sufficient memorandum of a parol agreement for the sale of the land to satisfy the statute of frauds, where, it does not recite the terms of the contract.

(March 31, 1898.)

A PPEAL by defendants from a judgment of the Circuit Court for Cook County in favor of complainant in an action brought to cancel a certain contract and trust deed as a cloud on complainant's title. *Affirmed.*

NOTE.—Undelivered deed as memorandum to satisfy statute of frauds.

There appears to be some conflict of authorities as to whether an undelivered deed will satisfy the statute of frauds, but some cases that sustain such a contract do so on the ground that the deed embodies the substance of the contract, giving parties consideration, description and terms of sale. *Jenkins v. Harrison*, 86 Ala. 845; *Ma Gee v. Blankenship*, 96 N. C. 563; *Bowles v. Woodson*, 6 Gratt. 78; *Griel v. Lomax*, 89 Ala. 430; *Johnston v. Jones*, 85 Ala. 288.

And the same is held where the deed supplies the terms of contract, taken in connection with other writings. *Thayer v. Luoce*, 23 Ohio St. 62.

The same was held in *Work v. Cowhick*, 81 Ill. 317, although one of the judges in this case puts his decision on the ground that the statute of frauds does not apply to a sale made by an executor under an order of court, under Act July 1, 1874.

But other cases hold without discussing the question whether the terms of the contract are fully recited in the deed that a deed which is not delivered will not of itself constitute a memorandum of contract so as to satisfy the statute of frauds, in an action by the grantor against the grantee. *Sands v. Thompson*, 43 Ind. 18; *Graham v. Theis*, 47 Ga. 479; *Caggar v. Lansing*, 48 N. Y. 550, reversing 57 Barb. 421; *Allebach v. Godshalk*, 116 Pa. 329, 19 W. N. C. 445.

And that it is not sufficient, even if vendor has it registered, although the vendee had altered with his own hand a draft of the conveyance. *Hawkins v. Holmes*, 1 P. Wms. 770.

So an undelivered deed destroyed by consent of vendee will not be held to be a sufficient contract where the land is attempted to be sold under execution against the vendee. *Sullivan v. O'Neal*, 66 Tex. 423.

A deed from A to B undelivered is not evidence in favor of C in an action by him against A for breach of the contract of sale where there is no writing to connect A and C and B never performed his part. *Henderson v. Beard*, 51 Ark. 433.

And a deed undelivered is not of itself sufficient to satisfy the statute of frauds, in an action to compel an exchange of lands, and this is held on the ground that the contract is not complete without delivery. *Nichols v. Oppermann*, 6 Wash. 618.

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Statement by **Magruder, J.:**

The original bill in this case was filed in the circuit court of Cook county on July 8, 1891, by the appellee Cora E. Reiter, against the appellant William P. Kopp, the appellee Edward Reiter, and B. F. Cronkrite and Henry M. Bacon, for the purpose of removing the contract and trust deed herein-after described as clouds upon her title to a lot owned by her, and situated in the town of Hyde Park, in said county. Subsequently, the appellants William A. Hammond and Frank C. Vierling, claiming to be the real purchasers of the lot in Kopp's name, were made defendants. Answers were filed to the original bill, and a cross-bill and amended cross-bill were filed by Kopp, Hammond, and Vierling against Cora E. and Edward Reiter,

And the same was held in an action by vendee against the vendor. *Overman v. Kerr*, 17 Iowa, 485.

And the same was held in an action by a vendee against his vendor, where a deed by vendor and mortgage by vendee had been executed but not delivered. *Wier v. Batdorf*, 24 Neb. 83; *Comer v. Baldwin*, 16 Minn. 172; *Parker v. Parker*, 1 Gray 409.

And the same applied in an action by the executor of a vendor against the vendee. *Day v. Lacasse*, 85 Me. 242.

So it was held in an action against a vendor to compel specific performance, that a deed which is not delivered and that does not contain the whole contract, there being no other memorandum in writing, will not satisfy the statute of frauds. *Thomas v. Sowards*, 25 Wis. 631.

And the same was held in an action by vendee against the vendor to compel specific performance. *Campbell v. Thomas*, 43 Wis. 437, 24 Am. Rep. 427; *Swain v. Burnette*, 89 Cal. 564.

An undelivered deed was not sufficient to satisfy the statute of frauds, in a suit by the vendee against another purchaser from his vendor with notice, where a letter offering a certain price for the property which was not described was accepted. *Freeland v. Charnley*, 80 Ind. 132.

So a bill of sale of personalty and crop setting forth that it was on a tract of land which "is this day conveyed by me to F. P." that is signed together with a deed that is undelivered will not be a sufficient contract in an action by vendee against vendor. *Popp v. Swanke*, 68 Wis. 364.

So where possession of the property has been taken under an undelivered deed, the same was held sufficient coupled with the fact of part performance. *Parrell v. McKinley*, 9 Gratt. 1, 68 Am. Dec. 212; *Hart v. Carroll*, 85 Pa. 508.

And where the possession of an executed deed has been obtained by the vendee by fraud, if such deed is relied upon by the vendor, it will be regarded as an executed contract, in a suit by vendor for the purchase money. *Smith v. Arthur*, 110 N. C. 400.

So a deed executed in blank and left in escrow to be filled when sale is made may after delivery be enforced as a contract to convey. *Blacknall v. Parish*, 59 N. C. 70, 78 Am. Dec. 232.

L. T.

praying for a specific performance of said contract, which cross-bills were answered by the defendants thereto, and in the answers the statute of frauds was pleaded. The bill was afterwards dismissed as to Cronkrite upon his delivering into the hands of the clerk of the court the said contract and the \$250 therein mentioned. The cause was referred to a master to take the evidence and report his findings thereon. Upon the hearing, the circuit court decreed in favor of the complainant in the original bill, granting the relief therein prayed, and dismissed the cross-bill, ordering the clerk to pay over the \$250 to said Kopp, and directing Bacon, the trustee, to release the trust deed. From this decree the case is brought here by appeal.

On December 27, 1890, and prior thereto and thereafter, the appellee Cora E. Reiter was the owner in her own right of the lot in question. On that day her husband, Edward Reiter, entered into a written contract with said Kopp, agreeing to sell the lot to him for \$5,000, Kopp paying \$250 down as earnest money, and agreeing to pay \$2,750 within five days after the title should be examined and found good, provided a warranty deed conveying a good title should then be ready for delivery, and, for the balance, to give his note for \$2,000, payable in one year, with interest at the rate of 6 per cent per annum, secured by a trust deed upon the property; an abstract of title to be furnished within a reasonable time, etc. Before December 27th, Edward Reiter had placed a sale board upon the lot, offering it for sale in his own name, and had also authorized the real estate firm of B. F. Cronkrite & Co. to place their sale board upon it. Reiter and Kopp were brought together by George E. Farley, an employé of Cronkrite & Co., at whose office the contract was drawn by Farley, and with whom the earnest money and the contract were left. On December 31, the abstract was delivered to Kopp. Within ten days thereafter, Kopp presented to Cronkrite & Co., as the only objection to the title raised by his attorney, a written memorandum suggesting that an affidavit be obtained showing the death of a party whose death was recited in a deed in the chain of title. On January 7, 1891, Farley drew up a warranty deed and a note and trust deed, as above specified. The warranty deed was executed on January 7th or 8th, by Mrs. Reiter and her husband, but was retained by the latter and never delivered; nor does it appear that it was ever approved by Kopp, or submitted to him or seen by him. The note and trust deed appear to have been thereafter executed by Kopp, but were never delivered to or received by Reiter, though he examined the original drafts before their execution. Reiter never obtained the required affidavits, and treated the objection to the title as trivial, claiming that it was made for delay only. Matters remained in this condition, Reiter calling at the office of Cronkrite & Co. several times to know why the money and note and trust deed were not ready, and Kopp calling to ask if the affidavit was obtained, until January 16, 1891, when the residence of Mr. and Mrs. Reiter was destroyed by fire. On the morning of January 17th, which was

Saturday, Mrs. Reiter told her husband that she was tired of the delay, and that, unless the matter was closed that day, she would not allow the deed to be delivered. Accordingly he went, during the forenoon of that day, to the office of Cronkrite & Co., and demanded that the matter be closed. Farley at once telephoned to Kopp, who was at work in a bank, informing him of Reiter's presence and demand. Upon being told that the affidavit was not yet procured, Kopp answered that he would waive the production of the affidavit, as he was to receive a warranty deed, but could not leave the bank, and would not be able to pay the money until Monday, January 19th. When this answer was communicated by Farley to Reiter, the latter stated that the transaction must be completed on that day (Saturday), or not at all. On Monday, Kopp came to the office of Cronkrite & Co. to pay the money and exchange the papers, but was told that it was too late. On Wednesday, January 21st, he tendered to Mr. Reiter the \$2,750 and the note and trust deed, and demanded the deed, but Reiter refused to deliver the deed, or to accept the money and securities. On January 21st, Kopp recorded a copy of the contract, and also the trust deed. Some days afterwards, Reiter destroyed the deed.

Messrs. George R. Grant and Charles E. Pope for appellant.

Messrs. Ashcraft & Gordon for appellee.

Magruder, J., delivered the opinion of the court:

Under the facts, did Mrs. Reiter, the owner of the lot, make any such contract for its sale and conveyance as a court of equity will compel her to perform? Section 2 of the Statute of Frauds provides as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, etc., . . . unless such contract or some memorandum or note, thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 1 Starr & C. Anno. Stat. chap. 59, § 2, p. 1192. It cannot be contended here that there has been any such part performance of a parol contract by payments, possession, and improvements as will take the case out of the statute of frauds. The purchaser, Kopp, never took possession of the lot, nor made any improvements upon it. The only payment he made was that of the earnest money, \$250. This amount, however, was not paid to Mrs. Reiter, but to Cronkrite & Co., who never had any authority from her, written or otherwise, to make sale of the lot, or to take any other steps in regard to it. We have held in a number of cases that, in order to ascertain what sort of writing is sufficient to meet the requirements of the statute as above quoted no form of language is necessary, if only the intention can be gathered, and that any kind of writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, will suffice, but that the writings, notes, or memoranda must

contain on their face, or by reference to others, the names of the parties, vendor and vendee, a sufficiently clear and explicit description of the property to render it capable of being identified from other property of like kind, together with the terms, conditions (if there be any), and price to be paid, or other consideration to be given; and such writing, note, or memorandum must be signed by the party to be charged, or, if signed by an agent, the authority of such agent must be in writing, signed by the party to be charged, and the contract or memorandum or note thereof made by the agent must also be in writing, and signed by him. *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Cositt v. Hobbs*, 56 Ill. 231; *Wood v. Davis*, 82 Ill. 811; *Albertson v. Ashton*, 102 Ill. 50; *Chappell v. McKnight*, 108 Ill. 570; *Lasher v. Gardner*, 124 Ill. 441. The only writing ever signed by Mrs. Reiter in this case was the warranty deed which she executed on or about January 7, 1891, and which remained in the hands of her husband, and was never delivered to Kopp, or to Vierling or Hammond. We do not think that this deed can be regarded, under the facts disclosed by the record, as such a memorandum or note of a contract for the sale of the land as is sufficient to take the case out of the statute of frauds. The contract of December 20, 1890, was executed by and between Mr. Reiter and the appellant, Kopp, but not by Mrs. Reiter, the owner of the lot. She gave her husband no written authority to act as her agent for the sale of the lot, or to sell it, or to sign any contract for the sale of it. We think that the findings of the master, to whom the cause was referred, and whose report was confirmed by the court below, are sustained by the evidence. He finds in his report that, before said contract was executed, Mrs. Reiter was not consulted about it, and did not consent to it, and did not even give her husband any parol authority to sell the lot. The testimony shows that she was opposed to selling the lot, and reluctantly executed the deed at the request of her husband. Although he informed her of the execution of the contract after he had signed it, yet it was never shown to her, and she never saw it until the hearing of the cause. The master has found, and the evidence shows, that the deed was not executed with reference to the previous written contract between Reiter and Kopp, but with the understanding that Mr. Reiter was to deliver it upon receiving \$3,000 in money and a note and trust deed for \$2,000. The deed simply purported to convey the premises from the grantors to the grantee for a consideration of \$5,000, but it did not recite the terms of the contract, or in any manner refer to the contract. Counsel for appellant disclaim any reliance upon the undelivered deed as a conveyance of title, but contend that it is such written evidence of the contract of sale as satisfies the statute of frauds, whose object and meaning "is to reduce contracts to a certainty, in order to avoid perjury on the one hand (by the setting up of parol evidence, which is easily fabricated), and fraud on the other" (*Welford v. Beasley*, 8 Atk. 503); that

the nondelivery of the deed, regarded as such written evidence, is immaterial; that it is immaterial whether Mrs. Reiter did, or did not, intend to charge herself thereby; and that the deed was an admission in writing of what the contract was. It is true that an undelivered deed is sometimes resorted to in order to help out the requirements of the statute of frauds, but it can hardly be said that the circumstances under which such a deed can be so used are disclosed by the facts in the present record. The language of the statute is, "some memorandum or note thereof." The word "thereof" refers back to the word "contract." There must be some memorandum or note in writing of the contract. Hence, if an undelivered deed executed by the owner can be regarded as meeting the requirements of the statute, it must be a memorandum or note of the contract, or in other words, must refer to the terms and conditions of the contract.

In *Caggar v. Lansing*, 43 N. Y. 550, it is said: "The counsel . . . insists that the deed executed by the intestate, and delivered in escrow, is a contract for the sale of the land executed by the intestate. This position cannot be sustained. The deed purports to be a conveyance of all the intestate's interest in the premises, for a consideration therein expressed of \$1,000, but is wholly silent as to the terms of the contract pursuant to which it was made." In *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427, it was held that one who had deposited a deed with a third person, with directions to deliver it to the grantee on the happening of a certain event, but had made no valid executory contract to convey the land, could revoke the directions to the depository, and recall the deed at any time before the conditions of the deposit had been complied with, provided those conditions were such that the title did not pass at once to the grantee upon delivery of the deed to the depository; and it was there said: "If a person, who has made a parol agreement to sell land, sign an instrument in the form of a conveyance of such land to the vendee, and deposit it in escrow, if such instrument contains the terms of the parol agreement including the consideration, it is a sufficient compliance with the requirements of the statute of frauds." In *Swain v. Burnette*, 89 Cal. 564, it was held that an undelivered deed, executed in pursuance of an oral agreement of sale, cannot be regarded as a sufficient memorandum to satisfy the statute of frauds, unless it is shown to have contained a memorandum of the oral agreement. *Freeland v. Charnley*, 80 Ind. 132; *Parker v. Parker*, 1 Gray, 409; *Overman v. Kerr*, 17 Iowa, 485; *Cannon v. Cannon*, 26 N. J. Eq. 316; *Johnston v. Jones*, 85 Ala. 286.

Many of the cases cited as authority for the position that a deed executed by an owner of land, but not delivered, is a sufficient memorandum of a contract of sale, under the statute, will thus be found, upon examination, to refer to deeds containing the terms of the contract. In the case at bar, however, as has already been stated, the deed executed by Mrs. Reiter and her husband was a simple conveyance of the lot for a consideration of

\$5,000, and was silent as to the terms of the contract of December 27, 1890. Where the owner of land has signed a written contract of sale, or some writing amounting to such a contract, but has failed therein to properly describe the property, a deed executed by him, but not yet delivered, may be looked to as a part of the transaction, and may be made to aid the prior agreement, and secure its enforcement, by supplying the defect in such description. Thus, in *Jenkins v. Harrison*, 66 Ala. 345, to which reference is made by counsel for appellant, a memorandum in writing, purporting to contain the terms of a contract for the sale of land, and signed by both of the parties, failed to describe the property with the certainty and definiteness required to a specific performance, but deeds, inoperative for want of delivery, were executed by the parties a few days afterwards, which did correctly describe the land; and it was held that such undelivered deeds, and the memorandum signed by the parties, might, when taken together, satisfy the requisitions of the statute of frauds, the court saying: "When the memorandum . . . is taken and read, as it must be, in connection with the deeds subsequently executed, there is no doubt or uncertainty as to the terms of the contract for the sale of the lands. True, the deeds do not expressly refer to the memorandum, but they were all executed as parts of a single transaction, between the same parties, having reference to the same subject-matter." In *Work v. Cowhick*, 81 Ill. 817, property was struck off to appellant as the highest bidder at an administrator's sale, and the administrator's deed of the land, and a note signed by the purchaser, in which she promised to pay to the administrator the purchase money "for land purchased by Elizabeth Worth this day at administrator's sale," were left with a third person to be held until the purchaser should obtain personal security on the note, and execute a mortgage, at which time the deed was to be delivered. It was held, in a suit by the administrator against the purchaser for a failure to carry out the sale, that the making of the deed and the signing of the note might be regarded as one transaction, and that together they constituted such proof as amounted to a compliance with the statute of frauds; the description in the deed indicating what land was referred to by the imperfect description

in the note. So, in *Wood v. Davis, supra*, written authority to an agent to sell land, and the terms of a contract of sale, were embodied in letters written by the owner, who also sent to the agent an executed deed to be delivered, but which was never in fact delivered, and when, after refusal by the agent to consummate the trade, suit for damages was brought by the purchaser against the owner, it was held that such a contract was established as took the case out of the operation of the statute of frauds, and that, although the memoranda contained no description of the land, the description in the undelivered deed could be referred to to supply the defect.

It is manifest, however, that all these cases differ from the case at bar. Here, the undelivered deed executed by Mrs. Reiter cannot be used to supplement, or supply any defect in, a prior contract of sale, or a prior note or memorandum of a contract of sale, because there was no prior contract or note or memorandum which she had signed, or to which she was a party, or which she had authorized to be made. The contract of sale, therefore, entered into, was made by Mr. Reiter, without either written or parol authority from her. Nor can her undelivered deed, subsequently destroyed, be regarded as a ratification of the agreement made by her husband, because it was not made in pursuance of that agreement, or to carry it out, but without any reference to it. Where, as is the case here, the owner of land, without making a valid executory contract to convey it, deposits a deed of it with a third person, to be delivered to the grantee upon certain terms, he may cancel the instructions given to such third person, and recall the deed, at any time before the specified terms have been complied with; nor can such deed, invalid as a conveyance for want of delivery, be considered as a memorandum in writing, signed by the owner, agreeing to convey the land therein described, so as to authorize a decree of specific performance. A deed which has not been delivered is not, by its own force, and aside from any contract to which it may be related, a sufficient writing to meet the requirements of the statute of frauds.

For these reasons we think that *the decree of the Circuit Court was right, and the same is accordingly affirmed.*

PENNSYLVANIA SUPREME COURT.

Re Henry GIBBS' ESTATE.

APPEAL OF W. F. HALSTEAD, Guardian of Mary E. Clapp and Henry Clapp.

(157 Pa. 59.)

1. A corporation is an artificial person created by law as the representative of those

persons, natural or artificial, who contribute to or become holders of shares in the property intrusted to it for a common purpose.

2. A corporation de facto is an apparent corporate organization, asserted to be a corporation by its member and actually acting as such, but lacking the creative fiat of the law.

3. The foundation of a partnership is a contract expressed or implied. It results

NOTE.—Presumption as to incorporation.

1. In civil cases.

The exercise of corporate acts and user will not afford presumption of incorporation, there must
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be also a law or charter under which such corporation might be created. *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 488.

And user alone will not suffice to establish a cor-

from the act of the parties, not from the act of the law.

4. The burden of proving that a bank was a partnership is on the one who asserts it, especially where the proof shows its organization under the name of the Home Savings Bank, with a president, cashier, and board of directors.

5. Proof that a person purchased shares in a bank, which was then organized and doing business, and received dividends declared by the directors and paid to him in a cashier's check, does not show any liability as a partner.

(October 2, 1893.)

APPEAL by W. F. Halstead as guardian of Mary E. Clapp and Henry Clapp from a decree of the Orphan's Court for Bradford County dismissing exceptions to the report of an auditor appointed to settle the accounts of E. B. Gibbs, deceased, who disallowed a claim against such estate presented by appellant. *Affirmed.*

Henry Gibbs was a stockholder in the Home Savings Bank. W. F. Halstead, as guardian, was a depositor in said bank to the amount of \$2,900.46. The bank failed and the guardian claimed to recover the amount of his deposit from the estate of Henry Gibbs on the ground

that it was a partnership, and that, as one of the partners, Henry Gibbs was liable for the debts of the bank. From the auditor's report the following facts appear:

The exceptants to the account of the administrator ask to take out of the funds for distribution the sum of \$36,167.58 and interest. This request is based on the position that the Home Savings Bank was not a corporation, or a limited partnership or a joint-stock association, and therefore was a common partnership. That, being a common partnership, and Henry Gibbs having been a stockholder therein, his individual estate is liable for the entire amount of money deposited in said bank during the time said Gibbs was a member thereof, and unpaid, with what interest may be due thereon.

The first question is, Have the exceptants proved this was a partnership, of which Henry Gibbs was a member at the time they deposited their money in this bank, and for all the debts and defalcations of which his estate is liable?

The evidence offered by them shows that in September, 1873, a bank was opened at South Waverly in this state; that it had over its door the name "The Home Savings Bank;" that it organized by electing a board of directors and a president and cashier; that its capital stock was divided into shares of one hundred dollars; that to each holder of stock it issued certificates of stock, saying upon their face that the

poration, as people cannot create corporations merely by acting as such; there must be at least an organization under some existing charter or law. *Welch v. Old Dominion Min. & R. Co.* 81 N. Y. S. R. 916.

De Witt v. Hastings, 8 Jones & S. 463, holds this also, and that stock issue is not recognized as an act of user.

So acts of user alone will not establish a corporation in an action by a bank to recover money paid out by mistake on checks. *United States Bank v. Stearns, 15 Wend. 814*.

So transacting business by a president and secretary will not raise the presumption of incorporation. *Clark v. Jones, 87 Ala. 474*.

And issuing a policy of insurance, using the name "Penn Mutual Life Insurance Company of Philadelphia," and having a president, secretary, and treasurer, will not raise the presumption of incorporation of an insurer where the premium note payable to an individual was claimed to belong to a foreign insurance corporation which had not complied with the laws of the state where suit was brought. *Cunyus v. Guenther (Ala.) Nov. 2, 1892*.

So an act of incorporation will not be presumed in an action against certain trustees, elders, and deacons of a church, sued individually on a contract under their seals, which does not show that the organization was incorporated. *Ernst v. Bartle, 1 Johns. Cas. 319*.

The exercise for years by the Yearly Meeting of Quakers of certain acts which are not such as corporations are alone competent and individuals incompetent to perform, will not authorize the presumption of incorporation so as to give power to take a devise. *Greene v. Dennis, 6 Conn. 262, 16 Am. Dec. 58*.

Orville & V. R. Co. v. Plumas County Supra, 87 Cal. 361, claims that there are no cases holding that no proof is required of the corporate existence of a plaintiff suing as a corporation except in states where the pleading waives that proof.

But the exercise of corporate acts and rights for 23 L. R. A.

many years will afford the presumption of incorporation where there is a charter. *Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 844*.

And the same applies where a school district claimed to have been organized under a general act. *Robie v. Sedgwick, 36 Barb. 319*.

And the same applies to a religious organization claiming a devise. *Chittenden v. Chittenden (N. Y. Sup. Ct.) 1 Am. L. Reg. 538*.

United States Bank v. Dandridge, 25 U. S. 13 Wheat. 70, 6 L. ed. 554, holds that a charter may be presumed to have been given to persons who have long acted as a corporation and assumed the exercise of the powers of a corporate body, although this question was not directly involved in the case.

Where the question occurs on pleadings, incorporation may sometimes be presumed. This, however, may arise from estoppel although not expressly given as a reason in such decisions.

As defendants alleged to be a corporation will be presumed to be incorporated, where they have recognized the corporate existence and acted as corporations. *Tipton Fire Co. v. Barnheisel, 22 Ind. 88, 5 Am. & Eng. Corp. Cas. 94*.

So where the defendant is sued as a corporation and answers as such. *Derrinbacher v. Lehigh Valley R. Co. 21 Hun. 612, 59 How. Pr. 283*.

It will be presumed on demurrer to a petition by the "Bennington Iron Company" that this is the name of an incorporated company having a right to sue in that name. *Bennington Iron Co. v. Ruthertford, 18 N. J. L. 105, 35 Am. Dec. 523*.

There being public and private statutes relating to the incorporation of trustees of the Methodist Episcopal Church in Wisconsin it is presumed that trustees of such a church are incorporated where they sue as plaintiffs alleging that the society is "duly organized." *Skinner v. Richardson, 76 Wis. 464*.

So an association suing as a corporation, pursuing corporate forms of action, will be presumed to be incorporated under Cal. Civ. Code, § 358, providing that due incorporation claimed in good faith

bank was organized under act of the legislature of Pennsylvania; that its authorized capital was \$100,000; that these certificates had on their back blank powers of attorney for transfer, and in all respects were in the form and style usually adopted by banks; that these certificates when issued, were signed by the president and cashier, and to some of them the seal was affixed. It had a seal which was affixed to all cashier's checks; that said bank registered in the office of the auditor general, under section 1 of Act of June 7, 1879; that it filed these separate reports in said office of its net earnings or income under the 10th section of said Act; that it also filed in said office at least six reports for publication, covering the four quarters of the year in accordance with the requirements of the Act of April 16, 1850, and April 17, 1861; that it paid dividends to its stockholders; that it failed and passed into the hands of a receiver; that none of the certificates of stock, certificates of deposit, books of account with customers, bills, letters, checks or drafts bore upon their face the names of any member other than the president and cashier, and the person to whom addressed or issued; that the transfer of any stockholder's interest was at his own option, and neither such transfer nor the death of any stockholder worked any change in the name or conduct of the business; that so slight was the effect upon the business of the death of Mr. Gibbs, that a large amount of claims have been presented before the auditor for allowance, for money

deposited after his death; or deposited before and re-deposited and new certificates therefor issued after his death. What is there in all this evidence from beginning of the business to the failure tending to prove a partnership? What in it all inconsistent with a corporate existence? Only one thing has been urged upon the auditor, and that is to be found in the form of the reports made by the bank to the auditor general of its net earnings or income under § 10 of Act 1879; and the position was taken that the provisions of this section only apply to unincorporated banks. While it is true that in the printed portion of these reports the word "firm" is used instead of "corporation," yet remembering that these printed forms were not made by the bank, but were sent to it from the auditor general's office; and that they were made and returned under an act which is not applicable solely to unincorporated banks, but applies to those which are incorporated as well, and as at most it was only the declaration of one member in the absence of and without the knowledge of any others, the auditor does not deem this single fact sufficient to overcome the preceding evidence of the incorporation, or, more accurately, to prove the partnership.

This comprises the affirmative evidence of the exponents. It is supplemented by some of a negative character, showing that searches in the office of the recorder of deeds in this county have failed to find any record of this bank as a limited partnership; and that searches in the auditor general's office have proved

shall not be inquired into collaterally. *Lakeside Ditch Co. v. Crane*, 80 Cal. 181.

In an action against a railroad company to recover a statutory penalty allowed against any person obstructing a highway, it will be presumed that it is an incorporated company, and as such is allowed under another statute to cross highways, and no penalty is provided for the same. *Cummins v. Evansville & T. H. R. Co.* 115 Ind. 417.

And where plaintiffs claim that defendants are liable as partners and not as an incorporation the presumption will be against such claim, if plaintiff has the evidence relating thereto in his control in another state and fails to produce it. *Hallstead v. Curtis*, 18 L. R. A. 370, 143 Pa. 364.

2. In criminal cases.

In criminal prosecutions where the corporation is not a party but the question of incorporation arises incidentally, as in embezzlement, incorporation will be presumed from user and exercise of corporate privileges and acts. *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121.

And the same was held in a prosecution for burglary. *State v. Thompson*, 28 Kan. 333, 33 Am. Rep. 165.

And for larceny. *People v. Barrio*, 49 Cal. 342; *Braithwaite v. State*, 28 Neb. 332; *Smith v. State*, 28 Ind. 322.

So in a prosecution for destroying a vessel with intent to injure the underwriters. *United States v. Amedy*, 24 U. S. 11 Wheat. 322, 6 L. ed. 502.

So in a prosecution for arson with intent to defraud the insurance company. *People v. Hughes*, 20 Cal. 237.

And for obtaining money from a corporation by false pretenses. *Reg. v. Langton*, L. R. 2 Q. B. Div. 296.

So in forgery of draft on a corporation. *People v. Frank*, 28 Cal. 507.

So in a prosecution for counterfeiting bank 22 L. R. A.

notes, or having in one's possession counterfeit notes on an incorporated bank. *Reed v. State*, 15 Ohio, 217; *Sasser v. State*, 13 Ohio, 453; *People v. Chadwick*, 2 Park. Crim. Rep. 163; *People v. Davis*, 21 Wend. 309; *People v. Ah Sam*, 41 Cal. 645.

And in *State v. Carr*, 5 N. H. 397, it was held that in a prosecution for passing counterfeit money of a bank of another state it is sufficient to show that such a bank was chartered, and it is wholly immaterial whether the corporation had complied with the requisites of the charter or not.

And incorporation will be presumed from user and exercise of corporate privileges and acts, in a prosecution for stealing bank bills, but some evidence must be produced from which incorporation may be presumed. *Johnson v. People*, 4 Donio, 364; *People v. Caryl*, 12 Wend. 547.

And *Jones v. State*, 5 Sneed, 246, in a prosecution for counterfeiting required a copy of the bank charter to be produced, under Tennessee Penal Code, § 70, providing that a copy of a charter of a corporation legally authenticated should be shown in evidence of its existence.

And *Stone v. State*, 20 N. J. L. 401, holds that in a prosecution for having a blank unfinished note on an incorporated bank with intent to issue the same as genuine, strict proof of incorporation must be produced.

And in *People v. Stearns*, 21 Wend. 406, and *State v. Calvin*, R. M. Charit. (Ga.) 151, where the charge was forgery, the charter of the corporation was in fact proved.

But *Brown v. State*, 11 Ohio, 276, holds in a prosecution for acting as an officer of an unincorporated bank, that since all the laws incorporating banks in Ohio are public laws, the jury being supposed to know these laws may presume that the bank operated by the accused was not incorporated, if such was the fact, thus throwing the burden of proving it to be incorporated on the accused. I. T.

equally futile in finding any record of its incorporation. From these two negatives the auditor is urged to find an affirmative. In other words, as no record can be found showing this bank to have been a limited partnership or a corporation, it must have been a simple partnership.

Upon the certificates issued to Mr. Gibbs each time he acquired stock in this bank, it declared it was organized under "Act of the legislature of Pennsylvania." If this was true, a search among those local acts of the legislature which filled our pamphlet laws prior to 1874 might have been better rewarded.

But is it true that if this was not a corporation or a limited partnership it follows necessarily that it was a common partnership? This has been urged with much force, and the auditor admits that he entertained that belief at the outset of this case; but from authority consulted and reflection, he has come to a different conclusion. A partnership *inter se* cannot result from any aggregation of negatives. The formation of such a partnership is a positive action and cannot exist without an agreement of some kind among all its members. Parsons in his work on Partnership, in discussing who are liable as partners, says: "The first thing to be remembered is that persons may be charged as partners of a firm, on either one of two perfectly distinct grounds; one of them is that the person actually is a partner, the other is that he has with his own knowledge and consent held forth as a partner to the person having a claim, or to the public generally." Upon which of these two distinct grounds can Mr. Gibbs be charged as a partner in this case? Certainly not upon the first; for no articles of partnership and no agreement to be partners, and no agreement of any kind existed between Mr. Gibbs and the other stockholders; and no person can be a partner in fact in a partnership having no existence. If, then, this estate is to be charged, it must be upon the second ground above mentioned. But the evidence fails to show any holding forth of him as a partner by the bank or by himself. His name nowhere appears in any business transaction of the bank with others; he took no part in its management or control; he never held any official position therein; no one of these complainants knew that he was a stockholder therein at the time of depositing their money; the bank never represented to any one of them that it was a partnership, and none of them dealt with it as such, and the evidence does not show that Mr. Gibbs had any knowledge of the transactions between the bank and these claimants, or had a personal acquaintance with them. But on the contrary the weight of the evidence tends to show that this bank held itself out to the world and to Mr. Gibbs as a corporation and nothing else.

But, it is said, Mr. Gibbs took dividends on his stock, and hence his estate is liable in this case. As tending to discharge the burden resting upon the claimants, to prove that this bank was a partnership instead of a corporation, the fact of the receipt of dividends does not go far; because the taking of dividends is as consistent with the corporate, as with the partnership relation.

Nor does this fact standing alone and dis-

connected with any agreement between the stockholders, or any holding forth of Mr. Gibbs as a partner by the bank or by himself, or with any credit given to the bank by the claimants knowing Mr. Gibbs to be in any way connected therewith, make his estate liable in the opinion of the auditor.

Profits can only exist after payment of all liabilities; and how any one who shares only in what may remain after all creditors are secured, takes from them any security, is not quite plain. This is especially true of the banking business. Every man buying stock in a bank that is conducted upon usual and sound banking principles, as he has a right to expect it will be, knows that he will get no dividends, only such as may remain after all liabilities are deducted. When a person induces others to credit a firm upon the assurance or belief that he is a member thereof, his property should make good any loss thereby sustained by such creditor, whether such person receives any dividend or not; but to hold one who puts money into a business and draws out no part of the principal, and but a small part of the interest, liable for all debts, should rest upon better reason than that he has reduced the creditors' security. Mr. Gibbs' purchase of this stock and the receipt of dividends thereon, did nothing to lessen the amount these exceptants may or have realized on their claims. He put in \$6,000, and drew out \$1,820, thereby making the fund for creditors \$4,180 larger. That this fund was diverted or misappropriated, does not make him liable; it not having been done by him or by any agent of his, in fact or in law. It has been said in support of these claims that there must be a liability somewhere, that persons doing business in this state must do it subject to the liability either of incorporators, partners, or individuals. Suppose this is admitted. Is there a want of all liability here? If this bank were solvent to-day, and these claimants brought suit against it as a corporation, what would prevent their recovery? Having declared to the world for nearly eighteen years that it was a corporation, and having induced these parties to trust it as such, what court would now permit it to defend on the ground that it was not incorporated, and thereby allow it to benefit by its own fraud?

Messrs. Willard, Warren & Knapp and Mercur & Mercur, for appellant:

Rightfully dividends can only be paid out of profits.

5 Am. & Eng. Encyclop. Law, 725; 1 Bouvier Law Dict. 439.

Profit is the excess of receipts over expense, but for the purpose of business, and of facilitating annual divisions of profits, a distinction is made between ordinary and extraordinary receipts and expenses; and whilst all extraordinary expenses are frequently defrayed out of capital, and out of money raised by borrowing, the ordinary expenses are defrayed out of the returns of the business; and the profits divisible in any year are ascertained by comparing the ordinary receipts with the ordinary expenses of that year.

2 Lindley, Partn. § 791, p. 1055.

A participant in profits directly as such is as

to third persons a partner, whatever may be the arrangement between the partners.

Edwards v. Tracy, 62 Pa. 374; *Caldwell v. Miller*, 127 Pa. 446.

The declarations and acts of an officer or a member of a partnership firm even, are binding upon the other members, if done within the scope of the business of the partnership.

Loudon Sav. Fund Soc. v. Bagerstown Sav. Bank, 36 Pa. 498, 78 Am. Dec. 390.

The directors of a company, and such other persons if any, as may be entrusted with the management of its affairs, are its only agents.

1 Lindley, Partn. § 244, p. 322.

The admissions of one partner with reference to a partnership transaction are evidence against the firm.

1 Lindley, Partn. § 264, p. 344; *Welsh v. Speakman*, 8 Watts & S. 257; *Taylor v. Henderson*, 17 Serg. & R. 453; *Johnston v. Warden*, 8 Watts, 101; *Reed v. Kremer*, 111 Pa. 482; *Brown v. Beecher*, 120 Pa. 590.

So a bank is bound by the declarations of its officers within their particular range.

Whart. Ag. §§ 679, 683, pp. 449, 451; *Harrisburg Bank v. Tyler*, 8 Watts & S. 378; *Spalding v. Bank of Susquehanna County*, 9 Pa. 28; *Bank of Monroe v. Field*, 2 Hill, 445; *United Brethren Mut. Aid Soc. of Pennsylvania v. McDermond*, 12 W. N. C. 73.

It is shown by the reports that the Home Savings Bank did by its duly authorized officers, hold themselves out to the public that their business was a partnership.

The Home Savings Bank was therefore a joint stock company or a partnership.

According to Parsons, page 541, Collyer, page 1198, and Cook on Stock & Stockholders, section 508, it was a joint-stock company. We are inclined, however, to think, although it possess many of the elements of a joint-stock company, it is nearer a partnership.

Oliver's Estate, 9 L. R. A. 421, 186 Pa. 58.

But whether it is a joint-stock company or a partnership, the liability of the appellant is practically the same.

Cook, Stock & Stockholders, § 508; *Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 111; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; *Witherhead v. Allen*, 8 Keyes, 562.

All unincorporated banks are partnerships. *Hess v. Werts*, 4 Serg. & R. 859; *Witmer v. Schlatter*, 2 Rawle, 359; *Ridgely v. Dobson*, 8 Watts & S. 118; *Beaver v. McGrath*, 50 Pa. 479; *Re Fry's Account*, 4 Phila. 133; *Protchett v. Schaefer*, 11 Phila. 166; *Thomson's Estate*, 5 W. N. C. 14.

So are unincorporated joint-stock companies.

Kramer v. Arthurs, 7 Pa. 165; *Hedge's App.* 63 Pa. 273; *Clarke's App.* 107 Pa. 436; *Oliver's Estate*, *supra*.

The shareholders are therefore each personally liable for all the debts of the bank.

2 Lindley, Partn. § 1083, p. 1421; 1 Lindley, Partn. § 376, p. 518.

Where persons enter into articles of association for banking purposes, and without any charter assume a name, open a stock book, subscribe for shares of stock, and a portion pay small sums thereon, hold meetings, elect directors, publish the names of such directors, 23 L. R. A.

enter into and transact business as a bank, they are all liable as partners.

Pettis v. Atkins, 60 Ill. 454.

As to creditors, each member of an insolvent voluntary association is liable for all the debts the same as in ordinary partnerships.

Hodgson v. Baldwin, 65 Ill. 532; *Boston & A. R. Co. v. Pearson*, 10 Rep. 81; *Jessup v. Carnegie*, 12 Jones & S. 261; *Shamburg v. Ruggles*, 83 Pa. 148; *Clark v. Fletcher*, 96 Pa. 416; *Shamburg v. Abbott*, 112 Pa. 6; *Christy v. Still*, 131 Pa. 492; *Weiterhausen v. Shaner*, 29 Pitts. L. J. 213.

No partnership is limited in Pennsylvania unless it be formed in strict compliance with the acts of assembly relating to limited partnerships.

Andrews v. Schott, 10 Pa. 47; *Richardson v. Hogg*, 88 Pa. 155; *Vandike v. Rosskam*, 67 Pa. 330; *Maloney v. Bruce*, 94 Pa. 249; *Elliott v. Himrod*, 108 Pa. 579; *Hite Nat. Gas Co's App.* 118 Pa. 436; *Hill v. Stetler*, 127 Pa. 145; *Vanhome v. Corcoran*, 4 L. R. A. 386, 127 Pa. 255; *Sheble v. Strong*, 128 Pa. 815.

Participation in the profits must be considered as evidence tending to establish a partnership relation, and in the absence of other proof is to be regarded as sufficient to make out a partnership.

Meehan v. Valentine, 19 W. N. C. 206.

A partnership may be created without any express agreement to that end.

Parsons, Partn. pp. 8, 9; 1 Lindley, Partn. § 17, pp. 19, 20; *Cook, Stock & Stockholders*, § 508; *Re Mendenhall*, 9 Nat. Bankr. Reg. 497; *Whipple v. Parker*, 29 Mich. 369; *Foster v. Pray* (Minn.) July 17, 1886; *National Union Bank of Watertown v. Landon*, 45 N. Y. 412.

Two things must be shown to establish the existence of a corporation *de facto*, viz.: first, the existence of a charter or some law under which such a corporation with the powers assumed might be created; second, a user by the party assuming to be such corporation, of the rights claimed to be conferred by such charter or law.

Methodist Episcopal Union Church v. Pickett, 19 N. Y. 482.

Persons who enter into a contract in the name of a corporation which has no legal existence become individually liable thereunder. One who contracts with others under a corporate name believing that he is contracting with a corporation, when none in fact exists, is not, in a suit against such persons, to enforce the contract, estopped to deny that they were a corporation.

Glenn v. Bergmann, 20 Mo. App. 343; *Hurt v. Salisbury*, 55 Mo. 810; *Sheble v. Strong*, *supra*.

A corporate creditor seeking to enforce the payment of his debt, may ignore the existence of the corporation (alleged) and may proceed against the supposed stockholders as partners, by proving that the prescribed method of becoming incorporated was not complied with.

Cook, Stock & Stockholders, § 233.

Messrs. D'A. Overton and M. F. Elliott, for appellee:

The finding of fact by an auditor that a party sought to be charged as a partner was not a partner, either in fact or as to third parties,

being approved by the court below, will not be reversed in the supreme court except for clear error.

Boffenmyer's Estate, *Hess's App.* 180 Pa. 540; *Stevens v. Philadelphia Ball Club*, 11 L. R. A. 860, 142 Pa. 52.

A partnership is not the necessary result of an abortive attempt to organize a corporation, or of the purchase of stock in good faith by a person in an institution which he has reason to suppose is legally incorporated.

Gartside Coal Co. v. Maxwell, 22 Fed. Rep. 197, 6 Am. & Eng. Corp. Cas. 359; *Morawetz, Priv. Corp.* § 740; *Blanchard v. Kavill*, 44 Cal. 440; *Fay v. Noble*, 7 Cush. 188; *Spahr v. Farmers Bank of Carlisle*, 94 Pa. 429; *Cochran v. Arnold*, 58 Pa. 899; *Stevens v. Philadelphia Ball Club*, *supra*.

Williams, J., delivered the opinion of the court:

This case involves substantially the same question that was heard and determined in *Hallstead v. Coleman*, 143 Pa. 354, 13 L. R. A. 370. The appellant seeks to charge the estate of Henry Gibbs with money deposited by him, as guardian, in the Home Savings Bank, located at South Waverly, on the theory that the bank was a general partnership, and that the decedent was one of the partners. The appellees deny that the Home Savings Bank was a partnership, and assert that the decedent purchased shares of stock in the bank as and for the shares of stock in an incorporated bank, and not otherwise. At this point it seems desirable to define the words over which the contest extends.

First. What is a corporation? The several answers given by text-writers may be reduced to the following formula: A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property intrusted to it for a common purpose. As it is the creature of positive law, its rights, powers, and duties are prescribed by the law. Beyond the legitimate purposes which it was created to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad, or engage permanently in any other business than that for which it was created. It has neither the legal capacity nor the right to do so; and if it undertakes to go in any direction beyond its corporate powers its acts are *ultra vires*. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law, and the best evidence of the existence of a corporation is the grant of corporate powers by the commonwealth.

Second. What is a corporation *de facto*? It is an apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative fiat of the law. In *Taylor, Priv. Corp.* 145, it is said that a *de facto* corporation may exist "when a body of men are acting as a corporation under color of apparent organi-

zation, in pursuance of some charter or enabling act." Their organization may be imperfect, so that upon a quo warranto they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but as to parties dealing with them, and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota—*Finnegan v. Knights of Labor Bldg. Assn.*, 51 Minn. —, 18 L. R. A. 778, — it was held that a *de facto* corporation exists when these three things concur, viz., a law under which the alleged corporation might be created, an attempt to organize under the law, an assumption and exercise of corporate powers under such attempted organization. In *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482, only two things were held necessary, viz. "the existence of a charter or law under which a corporation with the powers assumed might be lawfully created, and a user by the party to the suit of the rights claimed to be conferred by such a charter or law." Where there has been a substantial compliance with the law, the corporation is, of course, *de jure*. Where there has been no substantial compliance, but there has been nevertheless an assumption and exercise of corporate powers in pursuance of an attempted organization, the alleged corporation is such *de facto* only. The Minnesota courts hold the correct rule, and three things are necessary to create the liability: A law or charter under which an organization *de jure* might be effected; an attempt to organize, which falls so far short of the requirements of the law or charter as to be ineffectual; an assumption and exercise of corporate powers notwithstanding the failure to comply with the law or charter.

Third. What is a partnership? Perhaps the best definition is that given by Story: A relation created by a "contract between two or more persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce, and divide the profits between them." Its foundation is a contract, express or implied. It results from the act of the parties, not from the act of the law. *Hedge's App.* 63 Pa. 273; 17 Am. & Eng. Encyclop. Law, 829. See also *Modderell v. Keefer*, 8 Watts & S. 63; *Channel v. Fussitt*, 16 Ohio, 166; *Murray v. Bogert*, 14 Johns. 818, 7 Am. Dec. 466; *Phillips v. Phillips*, 49 Ill. 437. But as to third parties one may be held liable as a partner by implication of law arising upon his own acts, contrary even to his own intention. Thus the officers and acting members of a corporation *de facto* may be liable as partners if their conduct has led others to trust the concern upon that basis. *Stafford Nat. Bank v. Palmer*, 47 Conn. 443. But without a contract of partnership, or such acts and declarations as lead others to infer its existence, and to extend credit on that basis, there is no foundation on which liability as a partner can rest. The best evidence of the existence of a partnership is the contract creating it. If proof of the contract is not within reach, its existence may be inferred from proof of contribution to the partnership stock. If direct proof of contribution cannot be had, it may be inferred from par-

ticipation in profits. In the absence of all this, the acts and declarations of the parties sought to be charged may be resorted to. Participation in profits is not conclusive proof of the existence of the partnership relation (*Edwards v. Tracy*, 62 Pa. 374); but both in England and in this country it is cogent evidence upon the question. It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason, such as compensation for services rendered by him as agent, broker, salesman, or otherwise, the *prima facie* is overcome. So, if the participation in the profits is referable to some other relation than that of partnership between the participants, such as membership in a joint-stock association or a corporation, the effect of proof of participation will be overcome.

In the light of these well-settled rules, let us consider briefly the position of the parties, and the important findings of fact made by the learned auditor in this case. The claimant's right to share in the fund in court rested on the theory that the Home Savings Bank, in which the money of his wards had been deposited, was a partnership, and that the decedent was a partner. The burden of proving the fact that the bank was a partnership was on him; and, as was said in *Hallstead v. Coleman*, 143 Pa. 354, 13 L. R. A. 370, "until that proof was given, the defendants were not called upon to enter upon their defense." The proof made upon this subject showed the organization of a bank under the name of the Home Savings Bank, with a president, cashier, and a board of directors. This is the mode of organization usually adopted by corporations, and did not tend to prove a partnership. It was then shown that the decedent bought and held certificates of stock in the bank, after its organization, which recited, not the formation of a partnership, but the organization of a bank under the laws of the state, and the division of its capital into shares of \$100 each. This is not the usual way in which partnerships are created and partners admitted. It is the usual way in which stocks are issued and transferred in corporations. Proof was then made of the receipt by the decedent of several dividends upon his stock. These did not purport to be shares in the profits of firm business, but dividends, declared in the manner usual among corporations, upon the stock of the bank; and were paid by dividend checks drawn under the authority of a board of directors. The only other evidence was the returns made by the officers of the bank under the Tax Law of 1879, which threw very little light upon the character of the organization of the bank. Upon this proof the questions for the auditor were whether the bank was shown to be a partnership, and the decedent a partner. The bank did business for a number of years, and then failed. Its books and papers were in the hands, or subject to the control of, the receiver. The manner of its organization was not shown. The partnership agreement, if any such existed, was not produced. No proof was given that the officers or stockholders claimed or

held out to the public that the stockholders were partners, or the bank a partnership enterprise. It was not alleged that the decedent participated in any manner in the business, or exercised any control over it. The whole case against him rested on the fact that he had purchased shares in a bank, then organized and doing business, and received dividends declared by the directors, and paid to him in a cashier's check. We are not surprised that the learned auditor was led to ask, "What is there in all this evidence, from the beginning of the business to the failure, tending to prove a partnership?" nor that he answered his own question by holding that this proof was insufficient to establish *prima facie* the existence of the partnership relation. On the other hand, there was much tending to show that Henry Gibbs understood that he was the holder of stock in an incorporated bank, and that the bank assumed and exercised corporate powers, and was dealt with by the public as a corporation. The form of its certificates, the manner of their transfer, the election of directors by the stockholders, the management of the business of the bank by the directors and the officers elected by them, the mode of declaring and paying dividends, were all suggestive of a corporation. They were not suggestive of a partnership. We are unable, therefore, to say that the auditor erred in finding that the bank was not shown to be a partnership. The learned judge who heard the exceptions to this report seems to have concurred with the auditor, and we require, under such circumstances, to be satisfied that a mistake was made before interfering with the findings. We are not so satisfied; but are of opinion that the state of the evidence justified the auditor's conclusion. This disposes of the whole case. It is said with earnestness and energy that this is a case in which the depositors deserve protection. We assent to this proposition. We can extend protection to them, however, in accordance with the established rules of law, and in no other manner. What the Home Savings Bank was in its organization, in what capacity those who held its stock were liable to its depositors, are questions not now before us. It may have been a corporation *de jure*, a corporation *de facto*, a joint-stock association, or a general partnership, so far as we are able to declare. What we say is that the evidence in this case is not sufficient to make a case, *prima facie*, against Henry Gibbs as a partner, or the bank as a general partnership. It does not appear that the bank was organized as a partnership, conducted business as a partnership, or held itself out to the public as such. It does not appear that Gibbs understood the bank to be other than what his certificates of stock indicated, or that he treated the business of the bank as that of a firm, or exercised the slightest control over or influence upon it, or misled the appellant or any other depositor by act or word as to his relation to it. What does appear is that he purchased shares of stock in the usual manner, and received some dividends thereon. These circumstances are naturally referable to the relation of a stockholder to a

corporation; and, standing alone, are not proof, *prima facie*, of the appellant's proposition that the bank was organized as a partnership, and that the purchase of shares of stock made Gibbs a partner. If he had received profits from a business apparently conducted by a partnership, he would have been put upon his explanation, and, failing to make one, would have been held to be a partner. The burden in that case would have been on him. Having received dividends, declared by a board of directors upon the stock into which the capital of the bank was divided, he could rest securely upon the apparent character of the transaction and the inferences naturally to be drawn from it. The burden of explanation necessary to give another character to the dividend declared, and to the stock on which it was paid, was on him who asserted that such other was the true character of these circumstances.

It was also said in the argument that the recitals in the stock certificates are not evidence of actual incorporation as against a stranger. This must be granted. They do not prove incorporation; but the appellees are not bound, upon the evidence in this case, to prove incorporation. The significant question is, Where is the proof that this bank was organized or conducted as a partnership concern? The certificates do not prove that, but the inferences naturally drawn from them tend the other way. It will not do for the appellant to say: "We have shown that the decedent was a stockholder in this bank, and received dividends upon his stock. Now you must show that the bank was incorporated,

or be liable to us as a general partner." This is attempting to change the burden of proof. Again, the learned counsel says: "This is the sole fact [the form of the certificate] that is before the court, and if it is sufficient to authorize a court to find an incorporation in this case, why is it not in any other?" The court below did not find that the bank was a corporation. That question was not before it. It was alleged by the appellant to be a partnership, but the auditor and the judge of the court below regarded the evidence in support of that allegation insufficient to justify a finding that the bank was not "organized by act of the legislature of Pennsylvania" as its certificates alleged, but by the parties as copartners. The appellant failed, not because the bank was held to be a corporation, but because it was not shown to be a partnership. Until evidence in support of the appellant's position is given sufficient to lead fairly to the conclusion that the bank was organized as a partnership, or that Henry Gibbs contracted to become a partner when he bought his stock, or that he led the public by his acts and declarations to deal with him or the bank on the basis of his being a partner, there is nothing that makes it the duty of his representatives to enter upon a defense, or that makes it possible for the court to decide upon the character of the bank. In such a state of the evidence the court can only say as the court below said in this case, "it is not shown that the bank is a partnership," and for that reason the claimant fails. The assignments of error are not sustained, and *the decree is affirmed.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Eva T. ENGEL

v.

NEW YORK, PROVIDENCE & BOSTON
R. CO.

(.....Mass.....)

**A railroad track owned, maintained,
and repaired by a manufacturing**

company and used by a railroad company only under a license or invitation to deliver freight under a contract is not a part of the railroad company's "ways," within the meaning of Stat. 1887, chap. 270, § 2, creating a liability for the death of an employé by reason of any defect in such ways.

(December 5, 1893.)

NOTE.—Liability of railroad company to employé for injuries received in the line of his duty from defective track not owned by the master.

This question seems to have arisen in very few cases. So far as the courts have passed upon the question they seem to agree that if the employer has practically made the track where the injury occurs its own it will be held responsible for its condition; as stated in the brief and dissenting opinion in *ENGEL v. NEW YORK, PROVIDENCE & BOSTON R. CO.*

In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, the court says that the authorities are quite uniform that one railroad track using the tracks of another for the purposes of its business should be responsible to passengers and owners of property by reason of the defective condition of such tracks, and further states that the same rule should apply between the railroad company and its employés.

So it has been held that it is no defense to a railroad R. A.

road company sued for an injury to a servant by reason of an unsafe track, that the track is owned by another company and only used by the employer under a contract which binds the owner to make repairs to be paid for jointly by the two companies. *Smith v. Memphis & L. R. Co.* 18 Fed. Rep. 304.

So in a case where the employé was injured by a defect in the roadbed while attempting to couple cars, it was held that the fact that the track where an injury occurred did not belong to the master was no defense, if it negligently used the defective track. *Little Rock & Ft. S. R. Co. v. Cagle*, 53 Ark. 347.

And it has been stated that where the employé of a railroad company is directed to use the road of another company in the business of his employer, he has the right to treat such road as the road of the company employing him; and every railroad company whose employés use the road of another company under its direction or for its benefit owes it as a duty to such employés to see that such road is not in a condition which will unneo-

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County which resulted in a verdict in favor of defendant in an action brought to recover damages for the death of defendant's employé because of an alleged defect in its way, within the provisions of Statute 1887, chap. 270, § 2. *Judgment on the verdict.*

The facts sufficiently appear in the opinion. *Messrs. Frank M. Forbush and John W. Keith*, for plaintiff:

The wooden structure crossed the track at a height less than that required by the statute and did not have any guards as required by the statute.

Pub. Stat. chap. 112, §§ 120, 160.

The way was constructed and used for the special purpose of moving freight by the means of railway cars. Its operation was confined to the exclusive use of the defendant corporation. The defendant corporation received compensation for the transport of freight over this particular track in the same manner as for similar transport of freight over its main line or any other tracks operated and controlled by it.

In *Com. v. Boston & L. R. Co.*, 126 Mass. 61, under circumstances far from presenting the strength of the plaintiff's contention in the case at bar, the court found the place of the accident to be upon a way operated and maintained by the defendant.

In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, Taylor, J., in delivering the opinion of the court, says: "The authorities are quite uniform, that where one railroad company uses the track of another company for the purpose of transporting passengers or property, the company transporting the persons or property is liable for any damages which may be sustained, either by the passenger or by the owners of the property so transported, caused by any defects in the road of the other company so used. . . . We are also of the opinion that the same rule should apply as between the railroad company and its employés."

This decision was upheld when the same case again came before the supreme court of Wisconsin in 49 Wis. 609.

The same doctrine is laid down in *Little Rock & Ft. S. R. Co. v. Cagle*, 53 Ark. 847.

See also *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9.

It may be observed that the machinery or plant, etc., need not be the property of the employer, the words of the act being apparently chosen so as to avoid this restriction.

Roberts & Wallace, Employer's Liability, 3d ed. p. 248.

In *John v. Bacon*, L. R. 5 C. P. 487, 39 L. J. C. P. 865, the defendant was held liable for the state of a hulk belonging to a third person, which he was allowed to use for his own purposes, on the ground that it was under his control, and that he had invited the plaintiff to come on board it.

Mr. William A. Gile, for defendant:

The provision of Pub. Stat., chap. 112, § 120, is as follows: "If the railroad is constructed to pass under the way—no bridge for any purpose shall be 'constructed over a railroad at a height less than eighteen feet above the track of said railroad, except by consent in writing of the board.'"

This section must be held to mean the way referred to in the preceding or 119th section, which is a "highway or other way," and it has been held this does not include a private way.

See *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen, 444.

The fact that the defendants used the track of the Washburn & Moen Manufacturing Company for the purpose of receiving and discharging the freight of that manufacturing company does not make that track a part of the ways, works, and machinery within the meaning of the Employers' Liability Act.

The "ways, works, and machinery" for which an employer can be held responsible must be "something provided by the employer."

Coffee v. New York, N. H. & H. R. Co. 155 Mass. 21.

Where there was a defective track used by one corporation over which it has no control, said track does not by the occasional or frequent use of said track render the corporation using said track liable for its defects as a part of their ways, works, and machinery.

Trask v. Old Colony R. Co. 156 Mass. 298.

Knowledge of a defect and appreciation of the danger by an employé is a defense under the Employers' Liability Act.

essarily endanger their lives or limbs. *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9.

If private parties owning a spur track have allowed it to be and remain out of repair and in a dangerous condition for use for railroad purposes, a railroad company voluntarily running its trains upon it is responsible for injuries to its employés by reason of the defective condition of the track, although the trains were running carefully and slowly, and it is immaterial that a state statute requires the delivery of goods at their destination over the tracks not belonging to the carrier. *Stetler v. Chicago & N. W. R. Co.* 49 Wis. 609.

A distinction was made in *Trask v. Old Colony R. Co.*, 156 Mass. 298, which seems to have been developed somewhat more fully in *ENGEL v. NEW YORK, PROVIDENCE & BOSTON R. CO.*

In *Trask v. Old Colony R. Co.*, 156 Mass. 298, it was held that while it may not be necessary to render the employer liable for injury to the employé 22 L. R. A.

that the track should belong to him, yet it should at least appear that he has control of it and that it is used in his business by his authority, express or implied, and it was therefore held that the mere fact that the employer in exchanging cars with another company occasionally runs its engines on to the latter's track will not render it liable for injuries to the employé, if the employer has no control over the track so used.

Another distinction is that a railroad company sending its locomotive engineer (employed by the month) with one of its engines to haul temporarily for another company the trains of the latter over the line of such latter company, is not responsible to the engineer for the bad condition of the track nor for the want of adaptation of the engine to the track, it not being alleged that the employer company knew of such bad condition or want of adaptation, and concealed its information. *Dunlap v. Richmond & D. R. Co.* 81 Ga. 138. H. P. F.

O'Maley v. South Boston Gas Light Co. 158 Mass. 185.

Holmes, J., delivered the opinion of the court:

This is an action brought under Stat. 1887, chap. 270, § 2,* to recover damages for the death of the plaintiff's intestate through an alleged defect in the condition of the defendant's ways. The question is whether the cause of the accident is within the statute. The deceased was killed by being knocked off a car of the defendant by a slanting bridge or chute over the track between two buildings of the Washburn & Moen Manufacturing Company, in that company's yard. The track was that company's track, owned, maintained, and repaired by it, the bridge of course was its bridge, and the defendant came on the track only as licensee or invited under a contract by which the defendant delivered freight in the Washburn & Moen Company's yard on certain terms. A majority of the court are of opinion that the track was no part of the defendant's ways, within the meaning of the statute.

We could not come to a different result without repudiating the reasoning of *Trask v. Old Colony R. Co.*, 156 Mass. 298, 304, and the tests sanctioned by that case and by *Coffey v. New York, N. H. & H. R. Co.*, 155 Mass. 21, 28. See also *Regan v. Donovan*, 159 Mass. 1. The track is not provided by the defendant, or subject to its control. In the language of Roberts & Wallace (Employer's Liability, 3d ed. 249), the defendant had not adopted it as its own. We are not dissatisfied with these tests, and we think that neither the language of the statute nor good sense would permit us to hold an employer liable under the act for defects which he cannot help, in a place out of his control, to which his employés once in a while may be called for a few minutes. It will be understood that our view by no means requires ownership as a condition of the defendant's liability.

The words of the act are, "which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways . . . were in proper condition." These words mean that the defect must be one which the employer has a right to remedy if he does discover it, and of a kind which it is possible to charge a servant with the duty of setting right. They cannot be made clearer by discussing the principles of common-law liability, or by referring to decisions upon a wholly different kind of statute, like *Com. v. Boston & L. R. Co.*, 126 Mass. 61.

Our decision may not leave the plaintiff remediless. If there was a defect, it is pos-

*Giving a right of action against the employer for the death of the employé where, in the exercise of due care and diligence, he is killed by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition.

sible that there may be a liability on the part of the Washburn & Moen Company. *Finnegan v. Fall River Gas-Works Co.* 159 Mass. 311; *Osborne v. Morgan*, 130 Mass. 102, 104, 39 Am. Rep. 437.

Judgment on the verdict.

Knowlton, J., dissenting:

The opinion of the majority of the court puts upon an important clause of the Employers' Liability Act a construction which seems to me wrong. The track on which the plaintiff's intestate was killed was of the same kind, and used by the defendant in the same way, as ordinary side tracks constructed for the delivery of freight to manufacturing companies having works near the line of a railroad. It was used by the defendant in the transportation of freight for hire. Freight carried over the defendant's railroad was received and delivered at the works of the Washburn & Moen Manufacturing Company without extra charge, the price paid for transportation to and from other stations including the transportation over this track. Freight sent away by other railroads or received from them was carried over this track by the defendant for a stipulated price paid by the Washburn & Moen Manufacturing Company. There can be no doubt that if the defendant had owned the track it would have been a part of its ways and works, within the meaning of the statute. Is such a track any the less a part of the ways and works of a railroad company, as between the company and its employés, if it is hired from a third party, or furnished for use by the owner of the freight? If it is owned and kept in repair by the freight owner, that fact presumably is taken into account in fixing the terms on which the freight is carried, and its use by the carrier in his business is in that way paid for by the carrier as much as if it were hired from a third party. The statute is intended to define the rights and liabilities of employer and employé. The question what constitutes the ways, works, or machinery is a question which arises only between employer and employé, and should be answered in such a way as to give effect to the meaning of the statute. The employé finds a track of this kind used like other side tracks belonging to the corporation, adapted to the convenient transaction of its freighting business. Ordinarily, he has no means of knowing whether the track is owned and maintained by the railroad corporation or by the manufacturer whose freight is brought over it. All he can see or know is that it is connected with, and used in, the business of the corporation in delivering freight. Whether an additional price is paid for the transportation of its cars or of the cars of other railroads over that track he does not know, nor is it important for him to know. It is a place specially fitted for the work of his employer, on which his employer sets him at work, and in which the employer presumably has rights for the time being. It ought to make no difference under the statute how the employer procures the ways, works, or machinery connected with and used in his business, or by what kind of title he holds them. So long as they

are connected with his business, and used in it, it is his duty to have them safe, so that his employes may not be unnecessarily exposed to danger. If another owns and furnishes them, and agrees to keep them safe, it is his duty, as between him and his employé, to see that the owner properly does what he agrees to do.

It is a general rule at the common law that a railroad corporation is liable for an injury to a passenger, or for loss of freight, arising from a defect in a track of another corporation over which it runs its cars, as if it owned the track. As between the two corporations, the only duty to maintain the track in repair under their contract may be upon the owner of the road, but, as between the first-mentioned corporation and a passenger or owner of freight, it is the duty of the carrier to have the track safe, whether it owns it or hires it. *McElroy v. Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794; *McCluer v. Manchester & L. R. Co.* 13 Gray, 124, 74 Am. Dec. 624; *Feital v. Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 631; *Wabash, St. L. & P. R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705; 2 Redf. Railroads, 4th ed. § 204. See also *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90, 18 L. ed. 591; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424; *Webb v. Portland & K. R. Co.* 57 Me. 117, 128.

The duty of a railroad corporation to furnish for its employes safe tracks, cars, locomotive engines, and other machinery, tools, and appliances with which its business is to be carried on, is similar in kind to its duty to passengers in these respects, although the degree of care required is less. In either case its duty is the same when the tracks, cars, and engines are hired or used under a license from others, as when they are owned by the employer. *Spaulding v. W. N. Flynt Granite Co.* (Mass.) 34 N. E. Rep. 1134; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9; *Stetler v. Chicago & N. W. R. Co.* 46 Wis. 497, 49 Wis. 609; *Little Rock & Ft. S. R. Co. v. Cagle*, 53 Ark. 347; *Smith v. Memphis & L. R. Co.* 18 Fed. Rep. 304. In *Stetler v. Chicago & N. W. R. Co.*, 46 Wis. 497, the facts were similar to those in the case at bar. An ice company laid and maintained a track to its icehouse, which was used by the defendant corporation in taking cars to and from the icehouse at the request of the company. The plaintiff was injured while assisting in the work of transporting the cars, and the defendant was held liable to its employé for the defective condition of the track, which the ice company ought to have kept in repair. The court says in the opinion: "The authorities are quite uniform, that where one railroad company uses the track of another company for the purpose of transporting passengers or property, the company transporting the persons or property is liable for any damages which may be sustained, either by the passengers or by the owners of the property so transported, caused by any defects in the road of the other company so used. . . . We are also of the opinion that the same rule should apply as between the railroad company and its employes. . . . In 23 L. R. A.

the case at bar there would seem to be every reason for holding that the same rule should apply. The company, when the accident happened, was running its trains over a short line of road, which terminated at the main track of its road, which was never used as a railroad for any purpose except as the trains of the defendant ran over it, and for all practical purposes was of no use as a railroad except as used by the defendant. . . . He was directed by the proper agents of the defendant to assist in running its cars and engines over it. As between itself and its employes, who were directed to use the road in the business of the defendant company, such employes have the right to treat the road as the company's road, and the company, as to its employes was bound to see that such road, whilst so used for its benefit by its employes, was in such condition as not to unnecessarily endanger their lives or limbs." I am of opinion that a railroad company is liable for an injury to its employé in such a case at the common law, and the reason for holding it liable seems to me equally applicable to the clause of the Employers' Liability Act under which this action is brought. Indeed, there is an additional reason for giving such a construction to this clause in the language which in terms includes not only the ways, works, and machinery that belong to the employer in the ordinary sense, but those which he permits to be used in his business. See also Stat. 1893, chap. 359.

In determining whether he was negligent in not discovering or remedying the defect, of course the fact that another primarily has the duty of keeping the works in a safe condition is important, for then he is only required to use reasonable care and supervision to see that this duty has been done. To that extent, under his contract with the owner, he has a right in the track and a kind of control of it. In *Coffee v. New York, N. H. & H. R. Co.*, 155 Mass. 21, 23, a case arising under this statute, Mr. Justice Allen says, in giving the opinion of the court: "The want of ownership by the defendant is not of much significance; but by the terms 'ways, works, or machinery connected with or used in the business of the employer,' we understand something in the place, or means, appliances, or instrumentalities provided by the employer, for doing or carrying on the work which is to be done." Was not the track in the present case something in the place, or means, appliances, or instrumentalities provided for the employé by the employer for carrying on the work which the employé was hired to do? In the recent case of *Spaulding v. W. N. Flynt Granite Co.* (Mass.) 34 N. E. Rep. 1134, an action at common law, it was held that the defendant was liable for the defective condition of a borrowed car as if it had owned the car; and Mr. Justice Holmes, in giving the opinion, refers to *Coffee v. New York, N. H. & H. R. Co.*, *supra*, in such a way as plainly to imply that in this respect the same rule applies to cases under the Employers' Liability Act as to those at the common law. The language of the opinion in *Trask v. Old Colony R. Co.*, 156 Mass. 293, should be read in its application to the facts.

In that case the arrangements of the two roads called for a delivery of cars by one road at the terminus of its line, and the reception of them by the other at the same point at the terminus of its line, and in the transaction of its regular business neither company had any contract or arrangement to use the line of the other. Neither road was obliged, under its contract, to go upon the tracks of the other, and neither was under any obligation to keep its tracks in repair for the use of the other. The passage of a car or engine beyond the terminus of the road then running it was not in the nature of a regular, authorized use of the track of another corporation in its business, and the track was in no proper sense connected with or used in its business. There was rather an occasional, and almost accidental, running of its engines or cars beyond its own track in doing a business, the regular prosecution of which did not extend beyond its own line. The defendant had no control nor right of control, nor right to demand a safe condition of the track of the other railroad. But in the present case the track is furnished to the defendant as a place on which to do its regular business for pay, and the defendant has the control of it in the sense that it has a right to insist on its being kept in a safe condition for the transaction of the business which it has agreed to do.

The doctrine contended for by the defendant, as I understand it, comes to this: If a manufacturer, instead of owning the ways, works, and machinery necessary to be used in his business, arranges with another person who owns a manufacturing establishment to furnish it for his use, and to keep it constantly in good condition, and if one of his employes is instantly killed, by a defect negligently suffered to be in the ways, works, or machinery which he is using under this arrangement, he will not be liable under the statute because the ways, works, and machinery are not his. The owner will not be liable under the statute, for he is a stranger to the manufacturing business carried on there, and the person killed is not his employé. Neither the employer nor the owner of the establishment will be liable at the common law, for the common law permits no recovery for a death resulting from negligence. The widow and children of the deceased employé will therefore be left remediless. It seems to me that such a construction of the statute tends to defeat the purpose of the legislature. In the present case the deceased brakeman was not an employé of the Washburn & Moen Manufacturing Company, and in my view of the law the plaintiff can have no remedy against that corporation.

WASHINGTON SUPREME COURT.

E. C. NEUFELDER, Assignee, etc., of C. H. Knox, *Appt.*,
v.

GERMAN AMERICAN INSURANCE CO., *Resp't.*

(6 Wash. 386.)

1. A foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served.

2. A fund kept by a foreign insurance company in one state for the payment of losses in that and another state, is subject to garnishment at the instance of creditors of an insured in the latter state to the amount of the debt of the company for a loss upon a policy issued in the latter state, although no portion of such fund has been specifically appropriated to such loss, under a statute providing that any credit or other personal property in the possession or under the control of any person, or debts owing the defendant, may be attached.

(May 10, 1893.)

NOTE.—The *status* of a debt for the purpose of garnishment, which is a matter of much importance and much doubt in the law, is here held as in many prior cases to be at the residence of the debtor. The same is held in the recent Wisconsin case of *Bragg v. Gaynor*, 21 L. R. A. 161, and is recognized in *Douglass v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 118. But vigorous opinions to the contrary have been expressed in other jurisdictions as shown by the note to *Illinois Cent. R. Co. v. Smith* 29 L. R. A.

A PPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Strudwick, Peters & Van Wyck, for appellant:

There is a distinction between process to subject tangible property of the defendant, in the hands of a garnishee, to the payment of a debt, and process to enforce the payment of a debt due from the garnishee to the defendant.

Boisford v. Simmons, 32 Mich. 352.

The California court in said attachment proceedings did not acquire any jurisdiction over the person of the defendant, and there being no property of defendant in that state, at that time, its proceedings were void as against the plaintiff, and constitute no bar to this action.

A policy of insurance is a chose in action, *i. e.*: "a right of proceeding in a court of law to procure the payment of a sum of money." 8 Am. & Eng. Encyclop. Law, p. 235.

It is therefore personal property.

Knox is, and at all times has been, a nonresi-

(*Miss.*) 19 L. R. A. 577. The only hope of uniformity in the law on this subject must rest on the federal courts, and probably could be reached only by deciding that garnishment of a debt due to a nonresident without any service on him is not due process of law. It seems difficult to justify a proceeding which condemns or appropriates a debt without notice to the creditor or opportunity to protect his property right therein.

See also 23 L. R. A. 445, 650; 27 L. R. A. 651; 30 L. R. A. 364; 36 L. R. A. 549, 640; 40 L. R. A. 237; 41 L. R. A. 331; 42 L. R. A. 283; 44 L. R. A. 101; 45 L. R. A. 257; 48 L. R. A. 452.

dent of California, and a resident of Washington, and no personal service of process of the California court was ever made upon him, but the service of process in the attachment cases was made upon him by publication in a newspaper, and by mailing a copy of the summons to said Knox, and said Knox never appeared in said actions. Any personal judgment therefore rendered by the California court against said Knox must be invalid.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

In proceedings against one as garnishee, it is necessary that both the person sought to be charged and the property in his hands, which is the subject of the attachment, be brought within the jurisdiction of the court.

Louisville & N. R. Co. v. Dooley, 78 Ala. 524; *Buchanan v. Hunt*, 98 N. Y. 560; *Jones v. Comings*, 6 N. H. 497; *Commercial Nat. Bank of Chicago v. Chicago, M. & St. P. R. Co.* 45 Wis. 172; *Carpenter v. Tatro*, 86 Wis. 298; *Morgan v. Neville*, 74 Pa. 52; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747.

Unless this is done, the proceedings are void. *Drake, Attachm.* 6th ed. §§ 87a, 87b, 692, 698, 711 (5).

There is a distinction between movables, that is visible, tangible personal property, and debts choses in action, like the right to recover upon a policy of insurance.

Guillander v. Howell, 85 N. Y. 662.

A chose in action cannot be said to have any *situs* in the place where the debtor resides; as a general principle it is payable at the residence of the creditor.

Ibid.

On the contrary, so far as it has a *situs*, the highest authorities hold that the domicil of the creditor decides and controls the *situs* of the debt.

Whart. Conf. L. § 868; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Keyser v. Rice*, 47 Md. 211, 28 Am. Rep. 448.

The *situs* of this debt must be controlled and fixed by one or more of the following considerations:

1. The *lex loci contractus*.
2. The domicil of the debtor.
3. The place of payment of the debt.
4. The domicil of the creditor.

The *lex loci rei sita* has no application to this discussion because that doctrine seems to apply only to visible, tangible chattels, and not to choses in action.

Guillander v. Howell, *supra*.

I. This contract was made and entered into by the defendant outside of the jurisdiction of the courts of the state of California, and within the jurisdiction of the courts of the state of Washington.

II. Mr. Wharton in his Conflict of Laws, section 361 (2) says: "Because the debtor's domicil is the place of payment it has no necessary connection with the terms of the debt. It may be that in jurisdictions where debtors are only suable in their domicil it may be supposed to give the applicatory law. It is not so where debtors are suable wherever they can be found."

The domicil of this debtor, insurance company, so far as this contract evidenced by this policy of insurance is concerned, and for all

the purposes of this action, was and is the state of Washington.

The general rule that the *situs* of a debt is at the domicil of the debtor, has an exception in the case of debts due by a corporation chartered in one state and doing business in another under the laws of the latter. When such corporation, by the laws of the latter state has property there and an agent to accept service and can be compelled by judicial process to pay its debts there, that is its domicil as to debts payable in said state.

Brantley, Pers. Prop. § 819; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 188, 38 L. ed. 879.

III. Said policy of insurance provided that said policy, at the execution thereof by said corporation, through its president and secretary, would not be valid unless countersigned by its duly authorized agent at the city of Seattle. This provision of the policy made the debt thereby evidenced, in case of loss, payable at Seattle.

May, Ins. 2d ed. § 66; *Whart. Conf. L.* § 899; *Am. & Eng. Encyclop. Law*, p. 551.

IV. The weight of authority seems to be conclusive that the domicil of the creditor controls the *situs* of the debt.

Whart. Conf. L. §§ 859-864; *Smith v. Buchanan*, 1 East, 6; *Caskie v. Webster*, 2 Wall. Jr. 131; *Braynard v. Marshall*, 8 Pick. 194; *Mead v. Dayton*, 28 Conn. 38; *Clark v. Connecticut Peat Co.* 85 Conn. 308; *Pond v. Cooke* 45 Conn. 132, 29 Am. Rep. 668; *Goodwin v. Holbrook*, 4 Wend. 377; *Guillander v. Howell*, 85 N. Y. 657; *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540; *Poe v. Duck*, 5 Md. 1; *Keyser v. Rice*, 47 Md. 203, 28 Am. Rep. 448; *Klein v. French*, 57 Miss. 662; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

This debt, in the absence of personal service upon the assured C. H. Knox was not subject to the process of the California courts, unless the debt was payable within that state.

Missouri Pac. R. Co. v. Maltby, 34 Kan. 125; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Bebee v. Hartford County Mut. F. Ins. Co.* 25 Conn. 51, 65 Am. Dec. 558; *Toule v. Wilder*, 57 Vt. 622; *Wheat v. Platte City & F. D. R. Co.* 4 Kan. 870; 8 Am. & Eng. Encyclop. Law, 306.

The proceeding in the California court was a proceeding *in rem*.

8 Am. & Eng. Encyclop. Law, p. 1103 (6); *Drake, Attachm.* 6th ed. § 452.

Whether a person is liable to garnishment in a state, other than that of his residence, is a question of jurisdiction.

8 Am. & Eng. Encyclop. Law, 1129.

The process of the courts of a state is limited in its operation by state lines.

Ibid.; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

By reason of the contract which the defendant chose to make in this state, payable in this state, after having complied with the statutes of this state in such case made and provided, as a condition precedent to obtaining the permission of this sovereignty to do business within its limits (such conditions being imposed); the defendant, insurance company became domiciled in this state for the purposes of all debts contracted here and payable here; then

It must have been a nonresident of the state of California for all purposes connected with this action, and the *situs* of the debt it owes upon this policy of insurance, was and is in the state of Washington, and not elsewhere.

7 Lawson, Rights, Rem. & Pr. § 8595.

Messrs. Stratton, Lewis & Gilman, for respondent:

Under the California statutes the process to subject tangible property of a defendant in the hands of a garnishee does not differ from process to enforce payment of a debt due from a garnishee to a defendant.

Deering, Cal. Code Civ. Proc. §§ 542-544.

The defendant was a New York corporation; but, so far as concerns its Pacific coast business, its home was in San Francisco. San Francisco was its domicile.

The courts of a state have jurisdiction, for purposes of garnishment, over foreign corporations doing business within their jurisdiction.

Burlington & M. R. Co. v. Thompson, 81 Kan. 180, 47 Am. Rep. 497; *McAllister v. Pennsylvania Ins. Co.* 28 Mo. 214; *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 587; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Roche v. Rhode Island Ins. Co.* 2 Ill. App. 360; *Jones v. New York & E. R. Co.* 1 Grant, Cas. 457; *Fithian v. New York & E. R. Co.* 31 Pa. 114; *Barr v. King*, 96 Pa. 485; *Brauser v. New England F. Ins. Co.* 21 Wis. 512.

The California court having jurisdiction of the respondent, it had jurisdiction of the *res*, the debt due from the respondent to Knox.

Blake v. Williams, 6 Pick. 284, 17 Am. Dec. 872; *Sturtevant v. Robinson*, 18 Pick. 175; *Leiber v. Union Pac. R. Co.* 49 Iowa, 688; *Morgan v. Neville*, 74 Pa. 52; *Jones v. New York & E. R. Co. supra*; *Molyneux v. Seymour*, 80 Ga. 440, 76 Am. Dec. 662; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Ocean Ins. Co. v. Portsmouth M. R. Co.* 3 Met. 421; *Berry v. Davis*, 77 Tex. 191; *Cousens v. Lovejoy*, 81 Me. 467; *Nichols v. Hooper*, 61 Vt. 295; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 438; *Drake*, Attachm. 6th ed. § 597.

Many of the courts refuse to discharge the garnishment, even where the debt is payable in another state, and is exempt from execution by the laws of the state where payable.

Leiber v. Union Pac. R. Co. and *Morgan v. Neville*, *supra*; *Broadstreet v. Clark*, 65 Iowa, 670.

Debts due from the garnishee to the principal defendant stand on exactly the same basis as tangible property in a garnishee's hands, belonging to the principal defendant.

Molyneux v. Seymour and *Cousens v. Lovejoy*, *supra*; *Mumper v. Wilson*, 72 Iowa, 168.

Anders, J., delivered the opinion of the court:

This action was brought by the appellant to recover from the respondent the sum of \$1,000, alleged to be due upon a policy of fire insurance issued by the respondent to one C. H. Knox, the assignor of the appellant. The respondent is a corporation incorporated and existing under the laws of the state of New York, and at the time of issuing the policy under consideration was lawfully authorized to transact business in this state. It

also carried on business in Oregon, California, and other states and territories on the Pacific coast, and had a general agent for the management of its business in all of said states and territories, including Washington, whose office was at San Francisco, in the state of California. Its funds for the payment of losses were kept by this general agent or manager at San Francisco, and disbursed by him as occasion required; the local agents in the several states having no authority to pay or settle for losses, except by his special instructions. On September 11, 1890, the respondent issued a policy of insurance, whereby it insured C. H. Knox against loss or damage by fire, to the amount of \$1,000, on a stock of merchandise belonging to him, or in which he was interested, in Seattle, from the 11th day of September, 1890, to the 11th day of September, 1891, which policy was duly executed by the respondent through its president and secretary in the state of New York, and countersigned by its duly authorized agent in the city of Seattle, and by said agent there delivered to said Knox. On the 19th day of September, 1890, the property so insured was destroyed by fire, and the loss was duly adjusted at the sum of \$1,000. On the 25th day of October, 1890, the assured made a general assignment for the benefit of his creditors, in accordance with the insolvency laws of this state, to the appellant, who accepted the trust, and duly qualified as assignee. After the loss occurred, and prior to the assignment of Knox to the appellant, certain creditors of Knox, residing in San Francisco, commenced actions in the superior court of the city and county of San Francisco to recover the amounts due them, and caused the debt due from the respondent to Knox upon the insurance policy to be attached, in accordance with the laws of California, by delivering a copy of the writs of attachment to one Grant, the general agent of the company, together with a notice that the debt owing by respondent to the said Knox was attached in pursuance of said writs. The respondent admits its liability on the policy upon which this action was brought, and does not seek to evade the payment of the sum due, but contends that the levy of the garnishment process in California prior to the time of the assignment to the appellant is a bar to this action. Knox is a resident of this state, and no personal service was made upon him, nor did he enter an appearance in either of the actions in the state of California in which the attachments were levied. The service of summons was made by publication, in the manner, and for the length of time, provided by the laws of California. Upon the facts found, concerning which there is no controversy, the court below entered judgment in favor of the respondent, and the question for our determination on this appeal is whether or not the court committed error in so doing.

It is contended by the appellant that the California court never obtained jurisdiction of the debt owing by the respondent to Knox, because the *situs* of the debt was either at the domicile of the creditor or at the domicile of the debtor, and in either event was not within

the jurisdiction of the court; and the argument is that the claim of Knox against the insurance company is personal property, and as such follows the person of the owner, but that, if its *situs* was at the domicile of the debtor, still it was in this state, and not in California, for the reason that the policy of insurance was executed here, by a company doing business here, and whose domicile was therefore here, for all purposes connected therewith, and especially for the purpose of suit upon the contract. It is conceded by the respondent that by establishing agencies and doing business here, and appointing an agent upon whom service of process should be made, as required by our statute, it became amenable to all the laws of this state concerning foreign corporations, including the liability to be sued for the enforcement of its obligations; and it is not contended by the respondent that the proceedings in the California court are entitled to any faith or credit here, if that court had not jurisdiction of the respondent, and of the debt attempted to be garnished there. It is well settled that if a court has neither jurisdiction of the person of the defendant, nor of his property, it has nothing before it upon which it can adjudicate, and that any judgment it may render under such circumstances is of no validity whatever. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. But it is not necessary, in order that a valid judgment may be rendered, that both the person and the property of the defendant be within the territorial jurisdiction of the court. If property is attached, and the defendant is not personally served, and does not appear, and publication of the summons is duly and regularly made, the court has jurisdiction to render a judgment personal in form, but which affects only what is attached. But such judgment will not authorize an execution against any other property, nor can it be made the basis of an action against the defendant. *Drake, Attachm. 7th ed. § 5; Cooper v. Reynolds*, 77 U. S. 10 Wall. 808, 19 L. ed. 981.

The first inquiry, therefore, is, Was the property of Knox attached by the service of the writ and notice upon the respondent at San Francisco? And, there being no question as to the regularity of the garnishment proceedings, the answer must depend upon whether or not the respondent, and the debt owing by it to the attachment defendant, were within the jurisdiction of the court. There is no question but what the money to pay the debt was in the possession of the respondent at San Francisco, although the particular sum required had not been set apart for that purpose prior to the service of the garnishment process. The laws of California provide that any credit or other personal property in the possession or under the control of any person, or debts owing to the defendant, may be attached in the manner therein prescribed. See *Deering, Code Civ. Proc. §§ 542-544*. And under such a statute there is no doubt that a resident may be charged as garnishee in respect of a debt he owes to a nonresident. But a nonresident is not subject to garnishment, unless, when garnished, he have, in the state where the action is pend-

ing and the attachment is obtained, property of the defendant under his control, or he be bound to pay the defendant money, or to deliver to him goods, at some particular place in that state. *Hawes, Jurisdiction of Courts, § 253; Drake, Attachm. 7th ed. § 474*, and cases cited. But it is claimed by the learned counsel for the appellant that this rule is not applicable in this case, for the reason, as already stated, that the respondent cannot be deemed to have a domicile other than in this state, in respect of business transacted here, and for the further reason that the debt sought to be attached is, and always has been, at the domicile of the creditor in this state. As to the validity of the policy of insurance, if that were in issue, we should say that the contract should be interpreted by the laws of this state. 1 May, Ins. § 66; *Whart. Conf. L. § 399; 8 Am. & Eng. Encyclop. Law, 551*. But we are not prepared to say that it can only be enforced in our own courts. On the contrary, we are of the opinion that the assured himself might have brought an action on his policy in California, or in any other state where the insurance company could be legally served with process. It is no part or ingredient of the contract of insurance that it shall be enforced only in conformity to the law of the place where it is executed. *Griswold v. Union Mut. Ins. Co.*, 3 Blatchf. 281. And as, in this instance, Knox could have collected his claim against the respondent in the courts of California, it follows that his creditors there had the same right to collect it by process of garnishment, and to apply the proceeds in satisfaction of their demands against him. In fact, garnishment, while in the nature of a proceeding *in rem*, is, in effect, an action by the defendant, in the plaintiff's name, against the garnishee, the purpose and the result of which are to subrogate the plaintiff to the rights of the defendant against the garnishee. *Drake, Attachm. 7th ed. § 452*. As to the liability of foreign corporations to garnishment, we think the law is correctly summarized in 8 Am. & Eng. Encyclop. Law, p. 1181, as follows: "Except, therefore, in those states where it is held that corporations are in no event subject to garnishment, a foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served." Although the *situs* of intangible personal property may be at the domicile of the creditor for the purpose of taxation or distribution, yet for the purpose of collection a debt is ambulatory, and accompanies the person of the debtor. We think this debt was properly attached in California; and, that being so, the attachment proceedings there constitute a defense to this action. *Embree v. Hanna*, 5 Johns. 101; *Wheeler v. Riyom*, 8 Cow. 815, note a; *Andreus v. Herriot*, 4 Cow. 521; *Dittenhoefer v. Cœur d'Alene Clothing Co.* 4 Wash. 519.

In the case last above cited, this court held that where a foreign corporation does business in this state, under the laws prescribed by our legislature, and has an attorney appointed, upon whom service in any proceed-

ings in the courts in this state may be made, it thereby becomes subject to garnishment here. We have no doubt of the correctness of that decision, and are therefore bound to recognize the doctrine therein enunciated, when affirmed by courts in other states, which, like California, have statutes substantially like our own.

The further point is made by the appellant that the plaintiffs in the attachment suits, by filing their claims with the assignee (appellant), thereby abandoned any rights they may have had under the attachments. If the objection is at all available, it is certainly not applicable to the action of Isadore Leviere,

in which the amount sued for was \$2,439.21, and was made up of various assigned claims, only one of which was filed with the assignee in this state, and that only for the sum of \$279.92. The remaining attaching creditors cannot be affected by the action of those who filed their claims, and, as the amount claimed is largely in excess of the debt attached, the result would be the same to the appellant, even if we should adopt the rule of law contended for by him.

The judgment of the court below is affirmed.

Dunbar, Ch. J., and Scott and Stiles, JJ., concur.

NORTH CAROLINA SUPREME COURT.

TRINITY COLLEGE, *Appt.*,

v.

TRAVELERS' INSURANCE CO., of Hartford, Conn.

(..... N. C.)

1. **A life insurance policy constitutes a wagering contract**, in the absence of any ties of blood or marriage, between the beneficiary and the person whose life is insured, or of some contractual relation between them by reason of which damage may result to the beneficiary from the death of the other party.
2. **A college supported by a church has no insurable interest in the life of a member of that church** which will sustain a policy of insurance on his life in favor of the college, although the college paid the premiums, while the application was made by the person whose life was insured.

(October 31, 1898.)

APPEAL by plaintiff from a judgment of the Superior Court for Durham County in favor of defendant in an action brought to recover the surrender value of a policy of insurance on the life of Edward Samuel Sheppe, in which plaintiff was the beneficiary. *Affirmed.*

The complaint set out that in 1898, Edward Samuel Sheppe of Durham, N. C., applied to the defendant for a policy of life insurance for \$1,250 upon his own life for the benefit of Trinity College, a corporation sustained and controlled by the Methodist Episcopal Church South, of which church the applicant was a member. Plaintiff paid the premium and the policy was issued to it. The policy provided for cash surrender values according to the number of premiums which had been paid. Plaintiff notified the company of its intention to take such value and surrender its policy, demanding the amount thus due. Sheppe was at the time of the issuance of the policy, and continued to be until the suit was brought,

NOTE.—The above case is apparently novel although within the range of well-recognized principles. For insurance on life for benefit of betrothed wife, see note to *Alexander v. Parker* (Ill.) 19 L. R. A. 187.
29 L. R. A.

a member of the church in good standing. Plaintiff is supported and maintained by voluntary contributions from members of the church and yearly assessments levied by church conferences upon the various churches composing them. A demurrer to the complaint was sustained and plaintiff appealed.

Further facts appear in the opinion.

Messrs. Fuller & Fuller, for appellant;

In *Loomis v. Eagle Life & Health Ins. Co.*, 6 Gray, 396 (cited with approval in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 481, 24 L. ed. 258), it is said: "All therefore which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured [the beneficiary] has some interest in the life of the *cestui qui vie*; that his temporal affairs, his just hopes and well grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager."

Trinity College has some interest in the life of every member of the Methodist Episcopal Church, South, of North Carolina.

The interest need not be strictly a legal or definite one. Any substantial pecuniary interest is sufficient.

11 Am. & Eng. Encyclop. Law, p. 318.

Insurable interest implies a pecuniary interest, either present or expectant.

Cooke, *Life Ins.* § 59, p. 94; *May, Ins.* § 76, p. 139.

Where the relationship between the parties is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation (of wager policy).

Etna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287.

The relationship existing between plaintiff and any member of that church would be sufficient to constitute a good and valid consideration in law for any gift or grant from such member to said plaintiff.

Burbage v. Windley, 13 L. R. A. 409, 108 N. C. 357.

A life policy creates a vested interest in the beneficiaries named in it. The contract may

be annulled by the company for cause, but the disposal of the fund while the policy remains in force is not under the control of the insured.

Hooker v. Sugg, 8 L. R. A. 217, 102 N. C. 115; *Central Nat. Bank of Washington v. Hume*, 128 U. S. 195, 206, 33 L. ed. 870-875. *Messrs. Boone & Parker* for appellee.

Burwell, J., delivered the opinion of the court:

It is said in *Mr. May's work on Insurance* (sec. 102a) that "to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life," and that an insurable interest in the life of another is "such an interest, arising from the relation of the party obtaining the insurance, either as creditor or of surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." Accepting these definitions as those which are to be deduced from all the adjudged cases, and leaving out of consideration those cases in which the fact that there was an insurable interest was dependent upon the existence of ties of blood or marriage, we find that this author asserts substantially that, in cases where there exist no ties of blood or marriage, one can have an insurable interest in the life of another only when he is the creditor of or the surety for the assured. Under

certain conditions a partner has an insurable interest in the life of his copartner. *Connecticut Mut. L. Ins. Co. v. Luchs*, 108 U. S. 498, 27 L. ed. 800. So, one who is interested pecuniarily in the future earnings of another under a contract with him has an insurable interest in his life. *Bevin v. Connecticut Mut. L. Ins. Co.* 23 Conn. 244.

These instances, and others that might be mentioned, seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a "wagering contract," and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view. The end will not, in the eye of the law, justify the means. No error.

Affirmed.

MICHIGAN SUPREME COURT.

Calvin B. DEWEY, *Plff. in Err.*,
v.
DETROIT, GRAND HAVEN & MILWAUKEE R. CO.*

(97 Mich. 320.)

The injury to a brakeman caused by the improper loading of a flat car so that the end of the load projected does not render the railroad company liable to him, where the car itself was not defective, and the company had furnished a competent inspector to see that the cars were properly loaded.

(*McGrath, J., dissents.*)

(November 10, 1898.)

REHEARING, after a reversal, of a writ of error to the Circuit Court for Wayne

*A decision was reached and an opinion handed down in this case on July 23, 1892, by which the judgment of the lower court was reversed. The opinion and an abstract of the briefs will be found in 16 L. R. A. page 842. A rehearing was subsequently granted which resulted in the court's affirming the decree below, as shown by the opinion given herewith.

NOTE.—The above decision reverses on rehearing that reported in 16 L. R. A. 842, in respect to the relationship of fellow servants between a car inspector and a brakeman injured by projection of the load over the end of a car. For similar cases in this series, see *Jacksonville, T. & K. W. R. Co. v.* 22 L. R. A.

County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Dickinson, Thurber & Stevenson* for appellant.

Mr. Otto Kirchner, with *Mr. E. W. Meddaugh*, for appellee.

Long, J., delivered the opinion of the court:

October 21, 1890, the defendant received at Holly, from the Flint & Pere Marquette Railroad, a car loaded with lumber, for the purpose of transporting it to the Lake Shore & Michigan Southern Railway Company, in Wayne county, at which point it was placed upon the line of the Wabash transfer track. The plaintiff was in the employ of the defendant as a brakeman, and serving on the train in that capacity. He had worked for the company about one year. The train reached the Lake Shore & Michigan Southern junction about 2 o'clock in the morning, and the car was run upon the Wabash transfer track. It became necessary to couple the car

Galvin (Fla.) 16 L. R. A. 397, in which the brakeman is held to assume the risks of such improper loading, *Ford v. Lake Shore & M. S. R. Co.* (N. Y.) 12 L. R. A. 454; *Byrnes v. New York, L. E. & W. R. Co.* (N. Y.) 4 L. R. A. 151.

to a flat car on the transfer. For the purpose of doing this, the flat car was backed up by the engine to the loaded car. The plaintiff stepped in between to make the coupling, when his body was caught between the two cars. In his struggle to release himself his right hand and the lower portion of his right arm were crushed between the bumpers and drawheads of the cars, and so mangled as to necessitate amputation. It appears that the lumber upon the car received at Holly projected at the bottom at one end beyond the platform of the car for four or five inches, and a distance upwards of a few tiers only. This projection of lumber decreased the distance between the cars, and by it the plaintiff was caught as the cars came together. He claims to have had no knowledge that this lumber projected until the moment he was caught by it. It was a dark night, and he claims he could not see, even though he carried a lantern at the time. The declaration contained five counts. Plaintiff's counsel claims that his demand is founded upon several distinct theories, all involving negligence on the part of the defendant: (1) That he was injured by reason of the defective construction of defendant's flat car, which allowed the two cars to come so close together that he was caught between them, and in his alarm and confusion had his hand and arm caught between the buffers and drawheads. (2) That he was injured by reason of the projection of the lumber beyond the end of the Flint & Pere Marquette car, which, catching his body, and forcing him against the end of the flat car, so hurt and frightened him that in his struggle to escape he unconsciously placed his hand and arm in position to be caught and crushed between the buffers and drawheads. (3) That by reason of the combined effects of the projection of the timber from the one car and the improper construction of the other, he was caught and injured. (4) That he was injured by reason of the necessity of passing his hand and arm directly between the faces of the opposing buffers, because of their being improperly placed in the same horizontal plane with the drawhead upon the flat car. Upon the trial in the court below it was admitted that the car was received from the Flint & Pere Marquette Railway Company, and that at the time it was so received defendant had in its employ a person known as "car inspector," whose duty it was to inspect all cars received by defendant at Holly, and to see that they were properly loaded, and in good condition. After the arguments had been concluded, the court below remarked, substantially, that the claim that the flat car was defective in construction passed out of the case, for the reason that such defect, if it existed, was not the proximate cause of the injury. The court directed the verdict in favor of the defendant, on the ground that the car inspector was a fellow servant with the brakeman, and, inasmuch as it did not appear that the company had not used due care in his selection, it could not be held liable for his negligent inspection, even if he were negligent. The case came to this court, on error, and was argued at the June term, 1892, 16 L. R. A. 342, and by a ma-

jority reversed and remanded for new trial. Subsequently a motion for rehearing was granted, and the case has now been fully argued and further considered by the court. The writer of this opinion joined in the opinion for reversal, but since the reargument of the case, and a more full consideration of the principles involved and consequences attendant upon the rules then laid down, has concluded to revise that opinion, and write for affirmance.

The rule that the master must furnish the servant with a reasonably safe place in which to perform his work has been settled by repeated decisions of this court, and in many late cases. *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. Detroit, B. O. & A. R. Co.* 81 Mich. 423; *Roux v. Blodgett & Davis Lumber Co.* 85 Mich. 519, 13 L. R. A. 728. It is also well settled that this duty cannot be delegated to another, so as to relieve the master from personal responsibility. *Van Dusen v. Letellier*, and *Morton v. Detroit, B. O. & A. R. Co.*, *supra*. But the real point in controversy here is whether the duty of the master is to be extended, so that he may be made liable for the neglect of a car inspector in not observing that a car is improperly loaded when it is to be put into the train for transportation. There is no complaint here about the car itself. It was proper in construction, and a safe car for use in that service. Upon the first argument of the case in this court the real point in controversy was not so fully pointed out and considered as upon the reargument, and the case was regarded as very similar in principle to *Smith v. Potter*, 46 Mich. 258, which *Mr. Justice McGrath* considered as virtually overruled by the later cases cited above. There is, however, a broad distinction between *Smith v. Potter*, and the present case. In the former case the injury complained of was received by reason of a defect in the framework of the car itself, while here the accident is attributable to improper loading. In the later decisions the doctrine of *Smith v. Potter*, has been doubted, and the rule broadly stated that the master must furnish to the servant a safe place to work, and safe appliances to work with. The learned counsel for the defendant does not contend here for the doctrine of *Smith v. Potter*, but does claim that the defendant discharged its full duty to the plaintiff when it furnished safe cars and a competent inspector; that, having done this, it could not be held liable for the negligence of the inspector, as such inspector was a fellow servant of the plaintiff. The contention of defendant's counsel in this respect is correct. If a car is out of repair, so that it is in a dangerous condition for use, such fact might not be observed by the ordinary brakeman, and manifest only to a person of skill in that line. There is some reason, therefore, for holding the company liable where these circumstances are made to appear, though a competent inspector be furnished, for the master is bound to furnish safe tools and appliances, as well as a safe place to work, and cannot delegate the duty of providing them, and thus escape liability. But in regard to the proper loading of cars quite a different rule must

necessarily prevail. The master must undoubtedly exercise care in the selection of inspectors to see that cars are not improperly loaded or overburdened so that they are dangerous to employes, but, after this has been done, it cannot be claimed that the master is to be held responsible for the faithful performance of the inspector's duty. Any other rule than this would make railroad companies insurers of the lives and limbs of employes. In the present case, the projection of the lumber over the end of the car was as apparent to the brakeman, if he had taken the precaution to make observation, as to an inspector. It required no special skill or training to ascertain the fact. The duties of a brakeman are known to be dangerous, and when one enters such service he must be held to have assumed the risk of the employment. He must exercise care himself in going between moving cars to make couplings.

In an exhaustive opinion by *Mr. Justice Brewer*, reported in 149 U. S. 368, 37 L. ed. 772 (*Baltimore & O. R. Co. v. Baugh*), the doctrine here enunciated is treated, and a like conclusion reached. A case involving the same principle was before the court of appeals of New York, and decided in 1880, — *Ford v. Lake Shore & M. S. R. Co.*, reported in 117 N. Y. 638. It appeared that cars known as "gondola cars," generally used for carrying coal, and which had boxes from eighteen to twenty-four inches high, were loaded with lumber. The company had furnished suitable stakes which could have been properly fastened inside of the boxes. When the ends of the boxes were stationary, one end of the timber was laid down in the bottom of the car, and the other end projected over the end of the box in cases where the timber was longer than the box. The lumber was piled, after it reached the top of the box, so that one piece overlapped another, the pile thus constantly growing narrower across the top. The cars were loaded under the direction of a foreman of great experience, and, although they were not regular lumber cars, they were much used for carrying lumber for short distances. Plaintiff's intestate, a switchman, was injured by the lumber on one of the cars falling upon him. The cars had been properly inspected before being sent out, by proper and competent inspectors. It was held that the sole cause of the injury was the improper loading of the car through the failure of the employes to use the stakes furnished by the company, and that these employes were the fellow servants of the deceased, for whose carelessness the defendant was not responsible. The same doctrine was also laid down in *Byrnes v. New York, L. E. & W. R. Co.*, 118 N. Y. 251, 4 L. R. A. 151. There the plaintiff's intestate was in defendant's employment as a brakeman. A car loaded with lumber at a way station was to be attached to the train. It was being moved by an engine from the switch to the main track. Plaintiff's intestate got upon it to stop it, but, in consequence of the improper manner in which the car was loaded, the brake was rendered useless, a collision occurred, and he was thrown from the car and killed. In an action to recover damages it appeared that the

car and its appliances, before it was loaded, were in good condition. By the defendant's rules it was made the duty of the station master to either inspect the car himself or have some one do so before it was taken out. Had this been done, the improper loading would have been discovered. It was held that, defendant having provided a safe car and a system and competent men for its inspection, it was not liable for injuries resulting to a coemploye from neglect of their duty. This rule was also laid down in the following cases: *Toledo, W. & W. R. Co. v. Black*, 88 Ill. 112; *Louisville & N. R. Co. v. Gover*, 85 Tenn. 465; *Northern Cent. R. Co. v. Husson*, 101 Pa. 1, 47 Am. Rep. 690. The court below was correct in ruling that the defective condition of the flat car, if it was defective, had no bearing in the case. The plaintiff's injury was produced by the defective loading, and not by any defect in the car.

Judgment must be affirmed.

Hooker, Ch. J., and Grant, J., concurred with **Long, J.**

Montgomery, J.:

I concur in the result reached by *Mr. Justice Long*. My reasons are set forth in my opinion on the former hearing.

McGrath, J., dissenting:

This case was originally heard at the April term, 1892, and is reported in 16 L. R. A. 842. A rehearing was granted at the instance of defendant. The trial court, in directing a verdict, was governed by *Smith v. Potter*, 46 Mich. 258. That case is not only opposed to the clear weight of authority elsewhere, but this court has refused to follow it in a number of cases since determined. *Van Dusen v. Letellier*, 78 Mich. 492, 503; *Adams v. Iron Cliffs Co.* 78 Mich. 271, 288; *Brown v. Gilchrist*, 80 Mich. 56, 68, 65; *Morton v. Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Sadowski v. Michigan Car Co.* 84 Mich. 100, 105; *Tangney v. J. B. Wilson & Co.* 87 Mich. 453, 455; *Ashman v. Flint & P. M. R. Co.* 90 Mich. 567, 571. The principle underlying the doctrine of these later cases had been announced by *Mr. Justice Cooley* in *Quincy Min. Co. v. Kitts*, 42 Mich. 84, 89. In *Brown v. Gilchrist* the contention of the defendants was that the defendants provided plenty of suitable and good materials of which to construct the falling scaffold, and that they placed the oversight and charge of building it with a competent and fit servant. *Mr. Justice Long*, speaking for the court, in that case says: "The contract of employment with the plaintiff was that he should have a safe place to work, and the law imposed upon the defendants the duty to furnish such a place. If the scaffold had been erected under the supervision and direction of one of the defendants themselves, and the casualty had occurred, . . . then the plaintiff would have had the right to recover for such injuries, unless himself negligent. I am not prepared to say that the master, under such circumstances, can shift his responsibility by the selection of a foreman; and I do not understand that this doctrine has

ever been held by this court." The court then proceeded to discuss the cases of *Quincy Min. Co. v. Kitts*, and *Hoar v. Merritt*, 62 Mich. 388, and then concludes as follows: "That is, because the defendants had delegated the authority to Mr. Reed to select proper materials, and to direct, control, and superintend the erection, they should escape liability. If this were the rule, then the more they remained away from their business,—the greater power and authority they gave a foreman or manager to select material, employ men to build a safe and proper scaffold, upon which other servants, who had no knowledge of the manner of its construction, were to be invited to work,—the less the liability. It is the duty of the master to furnish the servant a safe place to work upon, and he cannot shift this responsibility by saying: 'The foreman whom I employed was selected with care, and for his fitness for the work intrusted to him. I pointed out to him all necessary and proper material; and, therefore, though he did not make a proper selection of material, and did not build a safe structure, my hands are clean, and no responsibility rests with me. I have discharged the full measure of my duty to the men whom he guides and controls.' Especially is this true if it appears, as in this case, that he has entrusted the entire management and control of that business in the hands of such foreman, with power to employ the men, and he himself retires from any direction and control over it. Mr. Reed apparently had this authority; and, from the manner of the accident claimed by the plaintiff, it is evident that the men selected by Mr. Reed to find the timber to support these running boards were wholly unfit to build such a scaffold. It was Mr. Reed's duty to examine this scaffold, and see that it was properly built, before sending the plaintiff there to work; and, under the authority delegated to him by the defendants, and the control he assumed of affairs there, he stands in their place, and they must assume the risks of his negligence."

It cannot be said that if Reed had been selected by the defendants to himself put up the scaffold, and his duty had been confined to that particular act, defendants could have escaped liability. In other words, it matters not, so far as the discharge of defendant's duty as master to the employé is concerned, whether Reed's negligence consisted in want of care in supervising the work, or in the performance of the manual labor connected therewith; and the defendants' liability cannot be said to rest solely upon the scope of the authority delegated to him, but rather upon the character of the act committed to his supervision. In the *Sadowski Case*, Mr. Justice Cahill says: "The rule adopted by the federal courts, and in most of the states, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow

servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." The question is very fully discussed by Mr. Justice Harlan in *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 613; by Mr. Justice Field, in *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 646, 29 L. ed. 755, 758; and by Gresham, J., in *King v. Ohio & M. R. Co.* 14 Fed. Rep. 277, 280. See also *Flike v. Boston & A. R. Co.* 53 N. Y. 549, 552, 13 Am. Rep. 545; *Crispin v. Babbitt*, 81 N. Y. 516, 87 Am. Rep. 521; *Pantear v. Tilly Foster Iron Min. Co.* 99 N. Y. 368; *Beneing v. Steinway*, 101 N. Y. 547; *Lewis v. Seifert*, 116 Pa. 628, 647; *Ford v. Fitchburg R. Co.* 110 Mass. 240, 260, 14 Am. Rep. 598; *Smith v. Oxford Iron Co.* 42 N. J. L. 467, 36 Am. Rep. 535; *Fay v. Minneapolis & St. L. R. Co.* 30 Minn. 231; *Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; *Mulvey v. Rhode Island Locomotive Works*, 14 R. I. 204.

The statute makes it the duty of municipalities to keep streets and sidewalks in a condition reasonably fit and safe for travel. Municipalities delegate the care and supervision of their streets and sidewalks to boards, commissioners, and inspectors, who are presumed to be competent; yet municipalities cannot be heard to say that their duty ends with such delegation or that the negligence of such boards, commissioners, or inspectors in respect to that duty is not its negligence.

The rule that it is the master's duty to provide the servant with a safe place to work, and when the service required of an employé is of a peculiarly dangerous character it is the duty of the master to make reasonable provision to protect him from the dangers to which he is exposed while engaged in the discharge of his duty, is not a new rule. It has been recognized by this court in numerous decisions. *Swooboda v. Ward*, 40 Mich. 420; *Parkhurst v. Johnson*, 50 Mich. 70, 45 Am. Rep. 28; *Huizaga v. Cutler & Savage Lumber Co.* 51 Mich. 272; *James v. Emmet Min. Co.* 55 Mich. 335; *Smith v. Peninsular Car Works*, 60 Mich. 501; *Adams v. Iron Cliffs Co.* 78 Mich. 271; *Brown v. Gilchrist*, 80 Mich. 56; *Sadowski v. Michigan Car Co.* 84 Mich. 100; *Palmer v. Michigan Cent. R. Co.* 87 Mich. 281, 93 Mich. 363, 17 L. R. A. 636; *Tangney v. J. B. Wilson & Co.* 87 Mich. 453; *Ragon v. Toledo, A. A. & N. M. R. Co.* 91 Mich. 879; *Cregg v. Chicago & W. M. R. Co.* 91 Mich. 624.

The legal obligation of the master in respect of his servants, as settled by the adjudicated cases, is to exercise all the care which the exigencies of the occasion require: First, to provide safe and suitable machinery, tools, and appliances, and to keep them in a suitable condition for use, and to provide a safe place for conducting the work; second, to select competent servants, and in sufficient numbers, for the service, and to see that they continue competent and efficient; third, to provide and publish proper rules for the guidance and protection of his servants in the discharge of their duties; fourth, to properly

instruct servants under age as to their duties and the hazards involved, etc., and not to subject them to the discharge of duties more hazardous than those for which they were engaged. The language of the first paragraph has been held to include safe instrumentalities and facilities for doing the work assigned the servant. In the *Ragon and Oregg Cases*, cited above, we held that reasonably safe side tracks upon which brakemen were expected to go to couple cars must be provided. *Blank v. New York Cent. & H. R. R. Co.* 60 N. Y. 607. In *Flike v. Boston & A. R. Co.*, *supra*, two heavy freight trains were sent out within a few moments of each other. The first train broke in two, and the rear portion collided with the second train, injuring an employé thereupon. The first train had but two brakemen, whereas it should have had three, but the third brakeman was late, and the train was dispatched without him. The court held that it was the duty of the company to have supplied the train with the necessary brakeman. But suppose that the train had been supplied with the necessary brakeman, but the cars had been so loaded as to prevent access to the brakes, could it be said that in that case the company would not be liable? The court in that case says: "It is claimed, by the counsel for the appellant, that the company are not liable, because the agent had, in fact, employed a third brakeman to go upon this train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, or, if attributable to the negligence of the general agent in not supplying his place with another man, such negligence must be regarded as committed while acting in the capacity of a mere coservant, within the doctrine of irresponsibility. Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery and properly dispatch the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller cannot be divided up, and a part of them regarded as those of the company, and the other part as those of a coservant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the con-

22 L. R. A.

sequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company." In *Dougherty v. Rome, W. & O. R. Co.* (Sup.) 18 N. Y. Supp. 841, strips had been nailed to the drop stakes of a flat car, so as to reach to the top of a load of lumber, and it was held that such strips were a part of the equipment of the car. In *Bushby v. New York, L. E. & W. R. Co.*, 107 N. Y. 374, the drop stakes furnished by the shipper were held to be appliances within the rule.

The simple question in this case, it seems to me, is whether the obligation of the master includes within its scope the duty of providing cars so loaded that brakemen may perform their duties in respect to them without greatly increased hazard,—whether the plaintiff in this case can be said to have been furnished with proper facilities for his work. The duty of inspecting the car itself, and that of the inspection of its condition with its load upon it, have a common origin. Both spring from the duty of protection which the master owes to the servant. There is no ground for saying that one of these duties may be delegated so as to relieve the master from all liability, and that the other may not; nor is there reason in saying that the person who inspects the car itself, its appliances and instrumentalities, with reference to the safety of those engaged in its transportation, is not a fellow servant, while he who inspects the loaded car for a like purpose, and to see whether it affords proper facilities for the performance of the duties which must necessarily be performed in its transportation, is a fellow servant. In the present case both duties were delegated to the same person, both are performed with reference to the same end, and the person to whom delegated must be held in the performance of each to occupy the same relation to plaintiff and defendant. It certainly cannot be said that with reference to stationed machinery, belting, shafting, and gearing the master must, at his peril, provide the necessary guards and coverings, and arrange the surroundings so as to render the place reasonably safe, yet, as to a train of cars between which a brakeman is required in the ordinary discharge of his duties to go, while one section is being driven against a standing section or car, so loaded as to render the position of the brakeman one of greatly increased hazard to life and limb, and, in case of injury, the master may escape liability. The employment is at best a dangerous one. It is as essential to the protection of the brakeman that these spaces be kept clear as that the spaces be provided. This danger can be guarded against. As is said by *Mr. Justice Long* in *Palmer v. Michigan Cent. R. Co.*, 87 Mich. 290: "In all cases where the danger can be readily guarded against, the employer is in duty bound to protect the employé at his peril." The judgment should be reversed, and a new trial granted.

ALABAMA SUPREME COURT.

B. H. LEWIS, Admr. etc., of Alfred Holley,
Deceased, *Appt.*,
v.
Ezekiel WATSON.

(.....Ala.....)

1. A purchaser of land at sheriff's sale cannot, while relying on the title so acquired, impeach the title of the judgment debtor, to prevent his recovering the land in ejectment.
2. A sheriff's deed, to which his name is affixed by another person in his presence and at his request and which the sheriff then duly acknowledged, is as efficacious as though signed by the sheriff himself.
3. There is a sufficient delivery of a deed, in the absence of evidence to weaken the force of the facts, if the judge of probate, before whom it is acknowledged, takes it for the purpose of recording it in his office.
4. Presumption of the delivery of a deed arises if it is found in the possession of the personal representative of the grantee.
5. A return of a levy may properly be indorsed on an execution by a third person at the direction and in the presence of the sheriff.
6. The return of a levy is not essential to the validity of a sheriff's deed to the purchaser at execution sale.

7. In ejectment for land which plaintiff claims by adverse possession evidence is admissible for the purpose of showing that the possession has not been continuous, that within the limitation period defendant recovered it in ejectment against plaintiff and was placed in possession.

8. Evidence of admissions or statements made during the limitation period by a plaintiff claiming land by adverse possession, that the land belonged to a third person is admissible in ejectment as tending to show that when they were made plaintiff did not claim ownership.

(June 12, 1898.)

A PPEAL by defendant from a judgment of the Circuit Court for Covington County in favor of plaintiff in an action brought to recover possession of real estate. *Reversed.*

Plaintiff claimed to have purchased the land from John B. Dickson in 1866, and to have occupied it under that purchase continuously until 1887 or 1888, when defendant's intestate took violent possession of it.

Defendant claimed under a sheriff's deed executed May 8, 1875, which purported to convey the land in question, and resulted from a judgment against Watson. Defendant claimed to have been in possession of the lot from the time of the sheriff's deed to June 9,

NOTE.—Signing by proxy.

1. *Signature written by another.*

a. *To a deed or mortgage.*

A deed will not be held invalid on account of the grantor's name having been signed to such instrument in his presence and at his request by another person, where such grantor acknowledges and delivers such deed. *Lovejoy v. Richardson*, 68 Me. 388; *Bird v. Decker*, 64 Me. 550; *Kerr v. Russell*, 60 Ill. 366, 18 Am. Rep. 634; *Nye v. Lowry*, 82 Ind. 816; *Frost v. Dering*, 21 Me. 158; *Pierce v. Hakes*, 23 Pa. 231; *McMurtry v. Brown*, 6 Neb. 368; *Cushman v. Wooster*, 45 N. H. 410; *Clough v. Clough*, 78 Me. 487, 40 Am. Rep. 386.

And a deed was sustained where the grantor's signature was written by his wife in his absence, and he adopted such signature and acknowledged the instrument. *Bartlett v. Drake*, 100 Mass. 174, 1 Am. Rep. 101, 97 Am. Dec. 62.

So where one of the subscribing witnesses who could not write directed one of the grantees to subscribe his name. *Taton v. White*, 95 N. C. 460.

But a deed was not sustained where the grantor had been a lunatic with lucid intervals during one of which his name was signed by his request or his assent, and one of the witnesses did not see the execution of the deed, nor sign at the request of the grantor. *Hays v. Hays*, 6 Pa. 368.

In *Wallace v. McCollough*, 1 Rich. Eq. 426, the court was divided on the question whether or not a deed would be invalid which was executed by another writing the grantor's name at her request in her presence.

So a mortgage was held not to be invalid because the name of a grantor was written by another in her presence and at her request. *Jansen v. McCahill*, 22 Cal. 563, 58 Am. Dec. 84; *Gardner v. Gardner*, 5 Cush. 438, 52 Am. Dec. 740.

The same rule was said to apply where it was claimed that a mortgage was executed under a forged power of attorney. *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 198, 22 L. R. A.

But it was said that if a writing giving a right of way was signed by another for the grantor, but not in his presence, it would be void, as the authority to execute should be in writing. *Rockford, R. L. & St. L. R. Co. v. Shunick*, 65 Ill. 223.

As to other signature to deed, see *Harris v. Harris*, *infra*.

b. *To notes, contracts, and bonds.*

A note is not invalid on account of the obligor's name having been written for him at his instance and request by another person. *Haven v. Hobbs*, 1 Vt. 238, 18 Am. Dec. 678; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Morse v. Green*, 18 N. H. 32, 38 Am. Dec. 471; *Handyside v. Cameron*, 21 Ill. 538, 74 Am. Dec. 119.

And a note was held binding where the party authorized to sign the obligor's name directed a third person to sign for the obligor. *Weaver v. Carnall*, 35 Ark. 198, 87 Am. Rep. 22; *Commercial Bank of Lake Erie v. Norton*, 1 Hill, 501.

And in a similar case the validity of the note was held to be a question for the jury. *Lord v. Hall*, 8 C. B. 681.

But a defendant who could not read or write, who was on trial for perjury in denying the execution of a note, which was charged to have been written for him at his request, should have been permitted to show that the writing was understood by the parties to be only a contract to arbitrate. *Flemister v. State*, 48 Ga. 170.

A signature to a contract written by another at the request and in the presence of the obligor is binding on such obligor. *Harris v. Story*, 2 E. D. Smith, 363; *Mallon v. Story*, Id. 331; *Crow v. Carter*, 5 Ind. App. 169.

And the same applies to a letter of attorney directing a sale of land. *Irvine v. Thompson*, 4 Bibb, 295.

And the same was held where the obligor held the top of the pen while his name was being written. *Helshaw v. Langley*, 11 L. J. Ch. N. S. 17.

A contract was sustained where a party finding-

1890, with the exception of a short time when Watson entered the land clandestinely, because of which defendant claimed that he had recovered the land in ejectment against Watson.

Further facts appear in the opinion.
Mr. John Gamble for appellant.
Mr. J. W. Posey for appellee.

McClellan, J., delivered the opinion of the court:

This is a statutory action for the recovery of a certain lot of land in the town of Andalusia. Watson is plaintiff, and Lewis, as administrator of one Holley, deceased, is defendant. Plaintiff derives title from one Dixon by deed appearing to have been executed in 1866. Defendant claims title through Watson, under a sale and conveyance by the sheriff to his intestate in 1875, made in satisfaction of certain judgments against Watson, and also by virtue of an adverse possession on the part of the intestate and himself subsequent to said sale and conveyance.

1. Some rulings were made on the trial in respect of Watson's title to the land prior to the sheriff's sale and conveyance of it, as his property, to Holley, and upon testimony in relation thereto. These are of no importance

in the case, and, whether erroneous or not, in the abstract, need not be considered, since the defendant—claiming, as he does, under that title, and having recognized its validity by purchasing at the sheriff's sale, and now further recognizing it by a reliance upon the acquisition of it through that sale, and upon adverse possession since that time under the color of title, with which, at least, he was invested by the conveyance then made by the sheriff—is not in a position to impeach Watson's original title. *Ware v. Deuberry*, 84 Ala. 568; *Houston v. Farris*, 71 Ala. 570; *Tennessee & C. R. Co. v. East Alabama R. Co.* 75 Ala. 516, 525, 51 Am. Rep. 475.

2. The evidence as to the execution of the deed by the sheriff to Holley was that of the probate judge of the county, and is as follows: "That J. A. Thompson, the sheriff, could not write his name and that he [the witness] frequently wrote in the sheriff's office for said Thompson; that he indorsed the levies on the execution here in evidence, and wrote the deed of Thompson, as sheriff, to Alfred Holley, dated May 8, 1875; that said deed and indorsements on said levies are in his handwriting; that said J. A. Thompson was present when said deed was written; that it was written in the sheriff's office, at

her name signed thereto by her brother, delivered the same, saying she knew his handwriting. *Speckels v. Sax*, 1 E. D. Smith, 253.

So an indorsement of consent by an assignee for creditors under Wis. Rev. Stat., 1898, requiring an indorsement in writing, is not invalid when written by another in the presence and under the direction of the assignee. *Scott v. Seaver*, 52 Wis. 175.

An assignment of a benefit certificate signed by another for a member not in his presence but made under verbal instructions received through a third party was sustained. *Schmidt v. Iowa K. of P. Ins. Assn.* 11 L. R. A. 205, 82 Iowa, 304.

And an apprentice indenture was sustained where the names of father and apprentice were written in their presence at their request and the paper was delivered and acted upon. *Rex v. Longnor*, 4 Barn. & Ad. 647, 1 Nev. & M. 576.

In an action on an order of certificates against the drawer's estate where such order had been written for him by another the plaintiff was non-suited, as the right to receive the certificate abated on the death of the drawer. *McKee v. Myers*, Add. Rep. 81.

Cutting off the names of signers from a duplicate petition for county seat location and attaching them to one of the same petitions, which signatures are accepted by the county board, is an irregularity but will not invalidate the petition. *Douglass v. Baker County Comrs.* 23 Fla. 419.

Under the Statute of Frauds, § 17, requiring contracts to be signed by the parties or their agents thereunto lawfully authorized it was held that one party to a contract could not sign the name of the other although so directed. *Wright v. Dannah*, 2 Campb. 208.

A marriage contract signed in the name of one of the parties at her request by her brother, although not in her immediate presence, was sustained. *Reinhart v. Miller*, 22 Ga. 402, 65 Am. Dec. 508.

But where an obligor by reason of age and infirmity could not write but directed his daughter to sign the bond for him, and for that purpose laid the paper down on a table in the house and turned away and went out into the yard, and she then

signed his name, and at the time could hear her father conversing in the yard but could not see him, the bond was held invalid. *Kime v. Brooks*, 31 N. C. 218.

This was on the ground that the principal must be in a situation to control the action of the agent and seems to conflict with the decision of *Reinhart v. Miller*, *supra*, in which case, however, the court said there was no occasion for ratification but, as she married the party contracting, it might also be sustained on that ground.

A bond under seal to which the name and seal of the obligor is attached by another is not invalid, where such obligor acknowledges it to be his act and deed. *Rhode v. Louthain*, 8 Blackf. 412.

And a surety on a recognizance is not released by the fact that the name of the principal was not signed by the latter's own hand. *Com. v. Basendorf*, 26 Atl. Rep. 779, 153 Pa. 459.

And a surety was not released by the fact that his name was written by another in his presence and by his direction. *Croy v. Busenbark*, 72 Ind. 48; *Goodell v. Bates*, 14 R. I. 65.

The question as to the release of the sureties on the ground of the decision in the cases *infra* arising in the Kentucky statute does not seem to be discussed; and in the case of *Goodell v. Bates*, *supra*, the court also held it valid on the ground of ratification.

But in Kentucky the surety is released in such a case under Gen. Stat., chap. 22, § 1, requiring the promise to pay the debt of another to be in writing signed by himself or his authorized agent, and chap. 22, § 20, providing that a surety shall not be bound by the act of an agent unless his authority is in writing signed by the principal. *Simpson v. Com.* 89 Ky. 412; *Dickson v. Luman*, 14 Ky. L. Rep. 884; *Ragan v. Chenault*, 78 Ky. 545; *Billington v. Com.* 79 Ky. 400.

c. To writs and notices.

A writ is not invalid where the name of the magistrate is signed to the same in his presence and by his direction by another. *Hanson v. Rowe*, 26 N. H. 327; *Cushman v. Wooster*, 45 N. H. 410.

And a magistrate may refuse to quash a writ to

Thompson's instance, and under his direction; that, after the deed was written, Thompson told him to sign his name, as sheriff, to the deed, which he did, and then, as judge of probate, took Thompson's acknowledgment to the deed, and carried it into the probate office, and afterwards recorded it; . . . and that some one came and got the deed from the probate office after it was recorded, but don't now remember who it was." It is not entirely clear, on this testimony, that Thompson was actually and immediately present when his name was subscribed to the deed by Fletcher, by his direction; but, manifestly, there was room for an inference to be drawn to that effect by the jury. If he was so present, as the jury might have found, the subscription to the instrument was as efficacious as if he had been able to write his name, and with his own hand had written it, or, he being unable to write his name, as if he had made his mark, and the words, "his mark," had been written against it, and had the signature thus made attested by two witnesses. This on the principle that where the grantor is present, and authorizes another, either expressly or impliedly, to sign his name to the deed, it then becomes his deed, and is as binding upon him, to all intents

and purposes, as if he had personally affixed his signature. The reason for the doctrine is thus stated by Shaw, *Ch. J.*: "The name being written by another hand, in the presence of the grantor, and at her request, is her act. The disposing capacity, the act of mind, which are the essential and efficient ingredients of the deed, are hers; and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. To hold otherwise would be to decide that a person having a full mind, and clear capacity, but, through physical inability incapable of making a mark, could never make a conveyance or execute a deed." *Gardner v. Gardner*, 5 Cush. 483, 52 Am. Dec. 740; 1 Devlin, Deeds, §§ 232, 233; *Kims v. Brooks*, 81 N. C. 218; *Frost v. Deering*, 21 Me. 158; *Videau v. Griffin*, 21 Cal. 890; Me. Rev. Stat. 1857, p. 56; *Lovejoy v. Richardson*, 68 Me. 886; *Bird v. Decker*, 64 Me. 551.

3. And it would seem that if the signing by Fletcher, under the direction, and in the immediate presence, of Thompson, was not in itself efficacious, the subsequent acknowledgment of the latter, as shown on the deed, would be a sufficient recognition and adoption of the signature as his own. *Bartlett v.*

which his name has been signed under his direction and in his presence by another. *Achorn v. Matthews*, 88 Me. 173.

And where an attorney attached a genuine signature of a magistrate to a writ, which was authorized by the magistrate, the writ was sustained. *Richardson v. Bachelder*, 19 Me. 82.

But a return upon a warrant calling a town meeting cannot be written and signed by another, for the constable who executed the same. *Chapman v. Limerick*, 56 Me. 300.

This last decision is on the ground that official signatures must be signed by the officer in person and reconciles the preceding cases in Maine by claiming that in *Achorn v. Matthews*, *supra*, the adoption of a signature was an exercise of discretion from which no appeal lies; and in *Richardson v. Bachelder*, *supra*, the signature was a genuine signature of the magistrate which had been once written by him.

The case of *Chapman v. Limerick*, is not supported by other authority, and is believed to be an exceptional case. The Statute of Construction, section 4, rule 18, also provides,—when a signature of a person is required he must write it or make a mark.

A writ signed in the name of a justice of the peace by his direction where such justice was not present is invalid. *Kidder v. Prescott*, 24 N. H. 267.

But a signature to a summons made for the plaintiff in his presence and by his direction by another was sustained. *Hotchkiss v. Cutting*, 14 Minn. 537.

And so with a return of *nulla bona* on a *f. fa.* made for a constable. *Ellis v. Francis*, 9 Ga. 327.

And a scale of costs may be signed for a solicitor in his name by his clerk under County Court Rules 1889, App. *France v. Dutton*, *infra*.

And the same was held in regard to a notice calling a meeting of bankrupt's creditors signed for the debtor's attorney by his clerk. *Re Hirst*, L. R. 18 Eq. 704.

And a notice of appeal signed in the name of appellant by his attorney's clerk was not invalid. *Reg. v. Justices of Kent*, L. R. 8 Q. B. 305.

But a notice of objection to a voter's registration signed by another for such objector was invalid under a statute requiring such notice to be signed 22 L. R. A.

by the person objecting. *Toms v. Cuming*, 7 Mann. & G. 88.

In this case the notice was properly signed but the duplicate was not and the duplicate was served instead of the original.

And a notice of a call for subscription required to be signed by the trustees or by the clerks employed by them could not be signed for such clerks by one employed by them, as this would be an attempt to substitute a deputy for a deputy. *Miles v. Bough*, 5 Q. B. 845.

d. To wills.

A will may be signed by another for the testator at the request of the testator and in his presence and will not be invalid where such signature or will is acknowledged by the testator. *Green v. Crain*, 12 Gratt. 232; *Catlett v. Catlett*, 55 Mo. 841; *Herbert v. Berrier*, 81 Ind. 1; *Re Elcock*, 30 L. T. N. S. 757; *Re Marshall*, 13 L. T. N. S. 643; *Merchant's Will*, Tucker, 151; *Haynes v. Haynes*, 33 Ohio St. 596, 31 Am. Rep. 579; *Hall v. Hall*, 17 Pick. 373; *Cochran's Will*, 3 Bibb. 491; *Shanks v. Christopher*, 3 A. K. Marsh. 144.

And when so signed the subsequent addition of a mark is superfluous. *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97; *Sechrest v. Edwards*, 4 Met. (Ky.) 163.

And is not invalid where the name of the testator was written by an attesting witness of the will. *Re Bailey*, 1 Curt. Ecol. Rep. 914; *Robins v. Coryell*, 27 Barb. 556; *Re Stevens*, 17 N. Y. S. R. 785.

And the same doctrine was announced in other cases although the question was not directly involved. *Butler v. Benson*, 1 Barb. 323; *Dewis v. Lewis*, 13 Barb. 17; *Rigg v. Wilton*, 13 Ill. 15, 44 Am. Dec. 419; *Miles' Will*, 4 Dana, 1.

But a will signed for the testator by another was invalid where the will was presented to the attesting witnesses at different times. *Burwell v. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

This, however, was in effect overruled in *Dudleys v. Dudleys*, 3 Leigh, 423, which sustained a similar will and claimed that *Burwell v. Corbin* was a case in a court of chancery acting on a special verdict and the other was a case of court of probate acting on the evidence. The Statute of 1841, since then,

Drake, 100 Mass. 174, 1 Am. Rep. 101, 97 Am. Dec. 92.

4. Certain it is that this acknowledgment relieves the deed from any infirmity which might otherwise have affected it on account of the signature not being attested by witnesses. 1 Brickell, Dig. p. 580, § 18 *et seq.*; 8 Brickell, Dig. p. 298, § 18.

5. As we have seen, Fletcher, the probate judge, took the deed, after it was signed and acknowledged, for the purpose of recording it in his office. This, nothing appearing to the contrary, may well be considered as a delivery to him by the grantor for that pur-

pose; and, so considered, "there being no evidence to weaken the force of these facts," this constituted sufficient proof of delivery to the grantee. *Elisberry v. Boykin*, 65 Ala. 336; *Alexander v. Alexander*, 71 Ala. 295; *Sheffield Land, Iron & Coal Co. v. Neill*, 87 Ala. 158.

6. And, moreover, at the time of the trial below, this deed was in the possession of the personal representative of the grantee, who in that capacity had also the possession of the land in controversy, and was defendant to this action for its recovery. The presumption from this fact alone, unexplained, is that the

provides that the witnesses shall both attest at the same time.

It was said that an acknowledgment would not validate a will if signed for the testator by another, if such signature was purposely concealed from the view of the testator and of the witnesses. *Baskin v. Baskin*, 36 N. Y. 416.

But it may be signed for the testator even if the wrong name is written for the testator's name, as the name of the witness. *Re Clark*, 2 Curt. Ecol. Rep. 329.

The same was held in *Baldwin's Estate*, 16 W. N. O. 300, going to the extent, however, of putting the decision on the ground that the act authorizing signature by another does not prescribe the manner of signing, and the further ground that the name of the testator at the beginning was a signature.

Where a person subscribes the testator's name to a will, such person must also write his own name. *Meehan v. Bourke*, 2 Bradf. 385; *Guthrie v. Price*, 23 Ark. 396.

And a will is sufficiently signed in the presence of the testatrix where at her request her name had been previously written thereto by another person, and the latter in her presence and by her request adds to her name words showing that it was written by him at her request. *Ex parte Leonard* (S. C.), post, 302.

And where a statute requires the party writing the testator's name to write his own name as a witness to such will and state that he signed the testator's name at his request, a signature, "A. B. by C. D. in his presence and at his request," was a substantial compliance with the statute. *Abraham v. Wilkins*, 17 Ark. 232.

And "E. N. for R. D. at her request," was a valid signature. *Vernon v. Kirk*, 30 Pa. 218.

A party writing the testator's name must state that he subscribed such name at the testator's request and sign his own name. *McGee v. Porter*, 14 Mo. 61, 55 Am. Dec. 129.

Under the provision of the statute requiring this the courts in Missouri hold that the name written near a mark is the name written by such other person, and that this is the signature and not the mark. *Northcutt v. Northcutt*, 20 Mo. 266; *Simpson v. Simpson*, 27 Mo. 238; *St. Louis Hospital Asso. v. Williams*, 19 Mo. 609; *St. Louis Hospital Asso. v. Wegman*, 21 Mo. 17.

The effect of these decisions will be that in Missouri if a will is signed by mark, the name of the testator should not be annexed to the same or else it will control and be the signature, and then such signature must be attested as if there was no mark.

But other courts hold that the name at the mark though written by another does not constitute the signature, unless so indicated by attesting words, but the mark is the signature. *Pool v. Buffum*, 3 Or. 438; *Jackson v. Jackson*, 39 N. Y. 153; *Main v. Ryder*, 84 Pa. 217.

Under N. J. Stat. 1861, providing that all wills

shall be signed by the testator and such signature or the making thereof be acknowledged by him, a signature by another for the testatrix at her request in her presence and in the presence of the witnesses cannot be made sufficient by her acknowledgment that it is her name and seal because the witnesses know, notwithstanding her acknowledgment, that she has not signed the will as the statute required. *Re McElwaine's Will*, 18 N. J. Eq. 499.

And under 2 N. Y. Rev. Stat., § 40, subsec. 2, providing that the subscription must be made by the testator in the presence of the witnesses or acknowledged to have been so made to each of the witnesses, a will is invalid where the testator does not acknowledge that he signed or authorized some one to sign for him, although he puts his finger on his name to a signed will and says it is his will. *Chaffee v. Baptist Missionary Convention*, 10 Paig. 85, 4 L. ed. 396, 40 Am. Dec. 225.

And under Minn. Gen. Stat. 1873, chap. 47, § 5, allowing a will to be signed by another for the testator by his express direction, such direction must precede the signing and is not to be implied from looks or gestures, or assent. *Waite v. Frisbie*, 45 Minn. 361.

And a request for another to sign for the testator, which was refused, will not validate an unsigned will. *Stricker v. Groves*, 5 Whart. 388.

The name of an attesting witness to a will may be written for such witness by another. *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 566; *Upchurch v. Upchurch*, 16 B. Mon. 102; *Re Strong*, 39 N. Y. S. R. 352, 2 Connoly, 574; *Jesse v. Parker*, 6 Gratt. 57, 53 Am. Dec. 102.

So a will was not invalid where the witnesses who were not able to write held the top of the pen while their names were written. *Lewis v. Lewis*, 2 Swab. & T. 153.

But where they could write and held the top of the pen while another wrote their names the attestation was invalid. *Re Killeher*, 6 Notes of Cases, 15.

There is some conflict on this question, some of the English cases adopting the view that the witness must assist in some way—by touching the pen or making a mark.

This has been followed by some American cases, which, as expressed in *Lord v. Lord*, *supra*, do not appear to have been very thoroughly considered. *Horton v. Johnson*, *infra*, says that as the statute authorizes some one to sign for the testator, and does not provide for witnesses, that the mention of one thing excludes the other. In *Simmons v. Leonard*, *infra*, the witness did not know whether the testatrix signed or not.

And so it has been decided that one of the witnesses cannot sign for the other. *Riley v. Riley*, 36 Ala. 496; *Horton v. Johnson*, 18 Ga. 396; *Re Duggin*, 39 L. J. P. 24; *Re Cope*, 2 Rob. Eccl. Rep. 835; *Re Mead*, 1 Notes of Cases, 456; *Simmons v. Leonard*, 91 Tenn. 153; *Re White*, 2 Notes of Cases, 461, 7 Jur. 1045.

execution of the instrument had been duly perfected by a delivery of it to the grantee. *Cherry v. Herring*, 88 Ala. 458; *Simmons v. Simmons*, 78 Ala. 365. And our conclusion, therefore, is that it is shown by the evidence in this record that there was an efficacious delivery of the deed by the grantor, the sheriff, to the grantee, Alfred Holley.

7. It is stated in the bill of exceptions, immediately following the copy of the deed, that "the Jordan lot, No. 1, in the above deed, was interlined in different handwriting from the body of the deed." This "Jordan lot, No. 1" is the lot involved in this suit. We need only say, in this connection, that this statement is not borne out by a reference to the original deed, which is before us by

order of the trial judge. The lot in controversy, leaving out of view the interlineation, is therein described and conveyed as "lot No. 1, east of the public square," and it clearly appears that this lot No. 1, on the east side of the public square, is the Jordan lot. This would have been a sufficient description, in the particular under consideration, had nothing more been said; but it seems that the grantor did not think so, and, for the purpose of curing what might be supposed to be an insufficient description, he interlined—the interlineation and the body of the deed being clearly in the same handwriting—the words, "the lot known as the 'Jordan lot.'" Manifestly, the interlineation accorded "with all the purposes and objects of the deed." The

And is invalid where the witness whose name was signed was not present. *Re Leverington*, 11 Prob. Div. 80, 55 L. J. P. 62; *Pryor v. Pryor*, 29 L. J. P. 114. And is invalid where the name was written for the witness and he then signed his own name, being in fact attested by only one witness. *Re Leroy*, 8 Bradf. 227.

See also sub-heads, "Guiding the hand of subscriber;" "Printed signature," etc.

2. "Guiding the hand of subscriber."

Where the testator signing a will is in full possession of his faculties, his signature will not be invalid although he was assisted or his hand guided in making the same. *Vines v. Clingfost*, 21 Ark. 309; *Watson v. Pipes*, 32 Miss. 468; *Fritz v. Turner*, 46 N. J. Eq. 516; *Vandruff v. Rinehart*, 29 Pa. 232; *Den v. Vancleve*, 4 Wash. C. C. 282.

And the same rule was applied to a deed where the grantor was assisted in signing. *Harris v. Harris*, 59 Cal. 620.

So a will is not invalid where the testator affixes, in the proper place, with his own hand, characters which he declared to be his signature although he was aided in directing the movements of his hand and pen by another. *Van Hanswyck v. Wiese*, 44 Barb. 494.

So a will was not invalid where the testator was assisted in making his mark to his signature. *Cozens' Will*, 61 Pa. 196; *Wilson v. Beddard*, 12 Sim. 23; *Re Shotwell's Estate*, 11 Pa. Co. Ct. Rep. 444, 30 W. N. C. 232, 1 Pa. Dist. Rep. 267, 9 Lanc. L. Rev. 203.

Where two witnesses to a will swore that the testator did not publish it as his will, but that his hand was guided by another, and the testator made his mark but said nothing nor was he capable, but it was proven that three days after he was sensible and able to converse, the will was sustained and the court directed the witnesses to be committed for perjury. *Hudson's Case*, Skin. 79.

So a witness to a will may be assisted in making his signature. *Campbell v. Logan*, 2 Bradf. 90; *Harrison v. Elvin*, 3 Q. B. 117; *Re Frith*, 27 L. J. P. 6.

But probate was refused where the hand of the testator was guided in signing the will and he was not able to comprehend fully what was being done, and the signature was not his free act. *Tucker v. Sandidge*, 85 Va. 546; *Rollwagen v. Rollwagen*, 68 N. Y. 518.

Printed signature or by stamp.

In regard to using a printed signature for bank notes section 5172 of National Bank Act authorizes the issue of circulating notes signed by the written or engraved signature of the treasurer and register expressing also the promise of the association receiving the same to pay on demand attested by the signatures of the president or vice-president and cashier.

There seems to be a scarcity of decisions on the question of using engraved signatures on bank bills, and it is believed that *Pennington v. Baehr*, 23 L. R. A.

infra, as to signature to coupons, is the only one of the kind on that subject. N. Y. Laws 1883, chap. 260, § 21, required bank notes to be signed by the president or vice-president and cashier.

11 Geo. IV. and 1 Wm. IV., chap. 23, was passed to enable his majesty, who was laboring under severe indisposition which rendered it painful and inconvenient for him to sign with his own hand instruments which required the royal sign manual, to appoint certain persons to affix it, by means of a stamp. A special provision was also made for bank notes.

Coupons of bonds issued by the fund commissioners having the signatures printed thereon were held valid and binding. *Pennington v. Baehr*, 48 Cal. 565.

A printed signature adopted or used by the signer is as binding and valid as though written, and this applies to the signature of a clerk to the resolution of intention to make a tax assessment. *Williams v. McDonald*, 58 Cal. 529.

Or to a signature required to a summons. *Ligare v. California S. R. Co.* 78 Cal. 610; *Herrick v. Morrill*, 37 Minn. 250 (overruling *Ames v. Schurmeier*, 9 Minn. 221); *Mutual L. Ins. Co. v. Ross*, 10 Abb. Pr. 280, note (overruling *Farmers' Loan & T. Co. v. Dickson*, 9 Abb. Pr. 61); *Mezohen v. Mora*, 54 Wis. 214.

And *Mutual L. Ins. Co. v. Ross*, *supra*, is sustained by *Barnard v. Heydrick*, 49 Barb. 62, 32 How. Pr. 101, on the ground that 2 N. Y. Rev. Stat., 278, § 70, providing a penalty for any attorney permitting any person not his partner or clerk to use his name implies that his name may be used by a clerk.

And the same is held in regard to the name of the prosecuting attorney signed to an indictment. *Hamilton v. State*, 103 Ind. 96, 58 Am. Rep. 491.

Or to the name of an attorney printed to a complaint. *Hancock v. Bowman*, 49 Cal. 413.

And applies to a printed signature to a contract of warranty on the back of a machine note. *Grieb v. Cole*, 60 Mich. 397.

And is held to apply to sutler's checks. *Weston v. Myers*, 93 Ill. 424.

And a stamp may be used instead of a written signature by an objector, to a name of a voter. *Bennett v. Brumfitt*, L. R. 3 C. P. 23.

And may be used to sign testator's name to a will. *Re Emerson*, L. R. 9 Ir. 443; *Jenkyns v. Galsford*, 3 Swab. & T. 98, 32 L. J. P. 71, 122, 9 Jur. N. S. 311, 630, 3 L. T. N. S. 517, 11 Week. Rep. 601, 854.

And may be used for signature of liquidators of a bank. *Ex parte Birmingham Bk., Co.* L. R. 3 Ch. App. 651.

But a lithograph signature of solicitor is not sufficient under County Court Rules 1889, requiring the solicitor to indorse on the particulars his name, and appendix requiring signing the same. *Reg. v. Cowper*, L. R. 24 Q. B. Div. 533; *France v. Dutton* [1891], 2 Q. B. 208.

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fair presumption is that it was made before the acknowledgment of execution, and the burden of repelling the presumption rested on the plaintiff. *Sharpe v. Orme*, 61 Ala. 263.

8. The fact that Fletcher indorsed the levies under which the sale was made on the executions for the sheriff is of no consequence. Even were it essential to the validity of defendant's deed that the return should have been made by the sheriff, the facts here show an adoption and ratification by the latter of the indorsement made by Fletcher so as to make it his own; and it was his own in the first instance, if entered by Fletcher by his direction, and in his presence. But the return of the levy is not essential to the validity of the sheriff's deed to the purchaser at execution sale. 2 Freeman, Executions, § 841; *Forrest v. Camp*, 16 Ala. 642; *Love v. Powell*, 5 Ala. 58; *Driver v. Spence*, 1 Ala. 540.

9. It follows from what we have said that if the jury believe that Fletcher signed the sheriff's name to the deed we have been discussing at the instance and in the presence of the latter, as is inferable from the evidence, Holley acquired a perfect title to the land in question on May 8, 1875, when that deed was executed. It is not pretended that there has been any conveyance of this title by Holley, or his privies in estate, since that time, nor is it pretended that Watson has received a conveyance of this land from any source since that time. The legal title to the lot, therefore, was at the time, and for all the purposes of the trial, in the estate of Holley, and represented in this action by the

defendant Lewis, as his administrator, unless Watson, for some period of ten years after May 8, 1875, and prior to the institution of this suit, had been in the open, adverse, uninterrupted possession, under a claim of right; and that is really, we take it, the main question at issue in the case. On that issue it would, we think, be competent for the defendant to show by the records of the circuit court, in a former action of ejectment between these parties, that Holley recovered therein against Watson, and was put into possession of the land, under a writ of assistance in May, 1880, as going, not in bar of this action for a former recovery, but to show that, at the time referred to, Holley, and not Watson, was in possession. It would, in our opinion, also be competent for the defendant to show any admissions or statements, made under oath or otherwise, by the plaintiff, subsequent to 1875, to the effect that the land was another's, and not his, as going to show that at the time they were made he was not in possession of the lot under a claim of ownership, and as also tending to impeach his evidence in that regard on another trial of this cause, should it then be the same or like that on the trial which we are now reviewing.

Many rulings of the trial court on the admission of evidence, and in respect of charges given and refused, are out of harmony with the foregoing opinion. What we have said will suffice for the circuit court's guidance on another trial, without a specification here of the particulars in which error appears by this record.

Reversed and remanded.

SOUTH CAROLINA SUPREME COURT.

Ex parte B. E. LEONARD, Executor, etc.,
of Emeline Bowen, Deceased.

Mary DIAL *et al.*, Appts.

(.....S. C.....)

1. One who signs the name of a testatrix at her request may be also one of the subscribing witnesses to the will.
2. Express directions by a testatrix to sign her name to the will are sufficiently given by her answering, "Yes," to one who inquires if he shall sign the will for her.
3. A will is sufficiently signed in the presence of the testatrix, although her name had been previously written thereto by another person, where the latter, in her presence, and by her request, adds to her name words showing that it was written by him at her request.

(November 3, 1893.)

APPEAL by Mary Dial *et al.* from a judgment of the Common Pleas Circuit Court for Laurens County dismissing an appeal from an order of the Probate Court admitting to probate an alleged will of Emeline Bowen, deceased. *Affirmed.*

The facts sufficiently appear in the opinion.

NOTE.—On the question as to signing an instrument by proxy or by the hand of another, see the note to the case preceding.

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Mr. W. H. Martin, for appellants:

It was clearly error to instruct the jury that the party requested to sign the will of another could adopt the signature of testatrix previously written by him by signing his name as agent. Such a proposition is in conflict with all the rules and precedents of the common law and in conflict and violative of the spirit and intent of the statute.

Our court has held in *State v. Whitesides*, 8 L. R. A. 777, 80 S. C. 586, that the general assembly could not ratify a void act done by it.

It was error to instruct the jury that S. S. Knight was a competent witness to the execution of testatrix's will.

Sugden, Essay on Wills, p. 88, referred to in Williams on Executors, p. 72.

A party acting as agent or under power of attorney certainly cannot witness his own acts, and the rule ought to apply more rigidly in case one acts under mere verbal instruction.

The language of the statute is imperative in the presence of the testatrix, and the witnesses too. The express direction to sign for testatrix is a substantive part of the execution of the will (*Greenough v. Greenough*, 11 Pa. 439, cited in footnote to Wms. Exrs. p. 56). This being the case no one can sign for testatrix until expressly directed, and if they attempt to do so before this express direction is given the act is a nullity.

Messrs. Haskell & Dial also for appellants.

M.R. H. J. Haynsworth, for respondent: Express means "directly stated, not implied or left to inference."

7 Am. & Eng. Encyclop. Law, 538.

An express direction is one stated, not implied from silence or the conduct of a party. It is not necessary that all the words should be spoken by him who gives the direction.

An express contract is one expressed in words.

3 Am. & Eng. Encyclop. Law, 842.

This may consist of proposal and acceptance. Id. 841.

In *Coffin v. Coffin*, 23 N. Y. 15, the court said: "The statute requires that the testator, when he subscribes a will, or acknowledges its execution to the witnesses, shall declare the instrument to be his last will and testament. But this declaration need not be in any particular form. . . . There can be no doubt that such a declaration can be made in answer to a question, or even by a sign."

See also *Peck v. Cary*, 27 N. Y. 84, 84 Am. Dec. 220; *Stevens v. Van Cleeve*, 4 Wash. C. C. 262; *Johnson v. Clarkson*, 3 Rich. Eq. 314.

The law requires that all wills shall be signed by the testator or by some other person in his presence and by his express directions.

Gen. Stat. § 1854.

"Sign" (2 Rapalje & Lawrence, Law Dict., p. 1192): "In the primary sense of the word, a person signs a document when he writes or marks something on it in token of his intention to be bound by its contents. . . . Any mark is sufficient if it shows an intention to be bound by the document."

A signing, then, is the writing or marking something on a document with the intention to be bound by it. Any mark made with this purpose will be a sufficient signing.

Adams v. Chaplin, 1 Hill, Eq. 265; *Ray v. Hill*, 3 Strobb. L. 303, 304, 49 Am. Dec. 647; *Brown v. Butchers & D. Bank*, 6 Hill, 443.

The name itself is valuable as a signature only so far as it more certainly evidences the intention to be bound.

1 Jarman, Wills, 78; 1 Wms. Exrs. 77; Schouler, Wills, §§ 803, 804, 310; *Adams v. Chaplin*, and *Ray v. Hill*, *supra*; *Brown*, Stat. Fr. § 357.

The signature must have been placed there with the design of finally authenticating the instrument, no further signature on the marker's part being contemplated.

Schouler, Wills, § 818; 1 Jarman, Wills, 80.

The testator or an attesting witness may sign his initials or a mark, etc. Yet if the intended signature is incomplete, as if after writing his Christian name he finds himself unable to finish, this will not be a good signature.

Schouler, Wills, § 835.

Schouler on Wills, § 318: "A name originally written without such final design (i. e., that it shall stand as a signature) may . . . have that final effect afterwards, by the testator's subsequent adoption of the signature as his final one."

1 Jarman, Wills, 80; *Oleeland v. Spilman*, 25 Ind. 97.

Tucker v. Ozner, 12 Rich. L. 148, says: "Witnesses are required to attest the signing,

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and the words of the act plainly imply that they shall attest the factum of signing. But a more liberal construction has been adopted, and it is now well settled that the acknowledgment of the testator that it is his handwriting, his will, etc., is a sufficient attestation of the act of signing."

See also *Little v. White*, 29 S. C. 173; 1 Jarman, Wills, 204; Schouler, Wills, § 307; *Re Goods of Clark*, 2 Curt. Eccl. Rep. 329; *Jenkins v. Gaisford*, 3 Swab. & T. 93.

The party who signs for the testator may sign his own name first and that of the testator after.

1 Jarman, Wills, 78, note 2, 79; 1 Wms. Exrs. 83, note p.

The one who signs the will for testator may be a subscribing witness. The affirmative is the universal holding.

1 Jarman, Wills, 204; *Re Stevens' Will*, 17 N. Y. S. R. 785; Am. Dig. 1889 (Wills) § 143.

McGowan, J., delivered the opinion of the court:

On August 16, 1890, Emeline Bowen, widow, departed this life. On September 6th thereafter a paper writing, purporting to be her last will and testament, was filed in the office of the probate judge of Laurens county, who admitted the same to probate in common form, and on October 20, 1891, Albert Dial and others, the heirs and distributees of deceased, if she died intestate, filed their petition that Benjamin E. Leonard, the party producing said paper, be required to prove the same in due form of law on or before November 15th thereafter. On November 11, 1891, said Leonard filed his petition accordingly, and on June 23, 1892, the matter came on for a hearing in the probate court, and, after hearing the testimony of the subscribing witnesses and others, both for and against the said will, the probate judge filed his decree admitting the same to probate in due form of law, whereupon Albert Dial, Elizabeth Teague, and others appealed to the court of common pleas of the said county. At the February term of the court thereafter the proceedings on appeal came on for a hearing before his honor Judge Norton, who submitted two questions to the jury: (1) Was the paper duly executed as a will? (2) Was Mrs. Emeline Bowen, at the time of executing the will, competent to make a will? On these issues of will or no will there was much testimony, covering nearly 100 pages of printed matter, reported by the stenographer, as it fell from the witnesses, and of course it cannot be restated here; but, in order to make the points intelligible, it will be necessary to make a short and condensed statement of facts as developed. It appeared that Mrs. Bowen, the testatrix, was very sick with what was called "typhoid fever," and that about noon of August 16, 1890, she asked her attending physician, Dr. S. S. Knight, to prepare her will for her, and gave him minute instructions as to how she wished it drawn, of which the doctor took rough notes. Among other things, she asked him if it would not do for him to sign her will for her, as she was so nervous, to which he replied that he thought so. Later the doctor

drafted the will, and, as he testifies, he first prepared it to be signed by "a mark," by leaving a blank space, and writing "her mark" above and below respectively. It is not very clear whether he then wrote the name of "Emeline Bowen" in preparing for the mark, but we think it probable that he did. After having done this, the doctor says he concluded that it would be best not to sign with "a mark," and so erased the words "her mark." About twilight he procured two other witnesses, and, went to Mrs. Bowen's room, which was lighted by a lamp. He then produced the paper, and told Mrs. Bowen that it was her will, and was ready to be executed. He recalled to her attention what she had said about signing the will, by asking her, "Shall I sign the will for you?" to which she answered "Yes," and he signed the will for her. It is not quite clear whether he did this by writing then all the words "Emeline Bowen. By S. S. Knight, by request," or whether, the name "Emeline Bowen" having been previously written in preparing the will for "a mark," and not having been erased, the signing was merely by writing under the name "Emeline Bowen" the other words, "By S. S. Knight, by request." Then each of the witnesses in turn signed the paper, including Dr. Knight, who signed the paper for the deceased. All this was done in the presence of the testatrix, who was lying in bed, with her face towards the little table in the room, on which the paper rested, in full view of all who chose to use their senses. Mrs. Bowen died on the next day night, within thirty hours after the signing of the paper. After a full and careful charge, the jury found both issues of fact referred to them in the affirmative,—that Mrs. Bowen was competent to make a will, and that the will was executed according to law. The contestants did not except to the finding on the second issue, that Mrs. Bowen was competent to make a will, and therefore that issue goes out of the contest; but they did except to the finding on the first issue, as to the manner of the alleged execution of the paper propounded as a will, and moved for a new trial, which was refused; and then the whole issues involved came on to be heard by the presiding judge, who, after argument, held and decreed as follows: "The parties seeking to set aside the probate of the will raise and urge the following propositions before me now: 'First. That the witness S. S. Knight is not a competent witness, as he signed the name of the testatrix to the paper propounded as a will. Second. That the will was not signed by S. S. Knight in the presence of testatrix. Third. That the will was not signed by her express direction. Fourth. The signature of testatrix not having been made in her presence, was the signing of S. S. Knight's signature under hers a sufficient ratification of any previous instructions to sign for her?' I am of opinion that the three first propositions are not well taken, and are overruled. As to the fourth and last proposition I am in doubt, rather inclining to sustain the position; but, as the effect would be to grant a new trial, I prefer that the supreme court pass upon this ques-

tion, as in that event the case would be ended one way or the other, and therefore the motion to set aside the probate of the will is refused, and the appeal dismissed."

From this judgment the contestants appeal to this court upon numerous exceptions, fourteen in number, which are all printed in the brief; but, following the good example of the appellants' attorney, we think that they all may be considered under four general propositions, urged in the argument below to set aside the verdict of the jury and refuse probate of the will, which have already been stated in the judgment of the court. The power to direct during life how one's property shall go after death is certainly a great privilege. As was said by the court in *Means v. Means*, 5 Strobb. L. 190: "The right to make a will is especially valuable to the old and infirm. Their thoughts dwell most upon posthumous arrangements, and in this right they have the means, not only of gratifying their feelings, but of securing substantial advantages while they live," etc. In order to protect this valued right against fraud and imposition, the law has prescribed for the execution of wills peculiar formalities, which must be observed. Section 1854 of the General Statutes declares that "all wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed, in the presence of the said deviser, and of each other, by three or more credible witnesses, or else they shall be utterly void and of no effect." The words of this law which are in point here are identical with those in the old English statute of frauds, and have often received construction which may throw light on the inquiry here. Mrs. Bowen, the testatrix, did not sign the paper propounded as her will, but the law allowed her to execute a will, "signed by another person in her presence, and by her express directions, attested and signed by three or more subscribing witnesses in the presence of the deviser and of each other," etc.

1. The first objection to the execution is that, "as Knight signed the name of the testatrix to the paper propounded as her will, he was not a competent witness to attest her will as one of the subscribing witnesses required by law." At first some of us thought it rather an anomalous proceeding for a witness to attest a signing by himself, but Mr. Jarman explains that such a witness does not attest the signing merely, but also the directions given to sign; but, at all events, the authorities concur that, under the circumstances stated, the signer of the will is competent as one of the three subscribing witnesses required by law. See 1 Jarman, Wills, 204; Schouler, Wills, 388; Redf. Wills, 209. Mr. Redfield says: "Both the earlier and present English statute, and most of those in force in this country, allow the testator's signature to be made by some other person, if made in the presence of the testator, and by his express direction. Under this clause of the statute, it has been held

that this act may be done by one of the witnesses. Indeed, it is the law in some of the states that one who has signed for the testator, at his request, must write his name as witness to the will." We think there was no error here.

2. The second proposition is that Mrs. Bowen did not give Doctor Knight "express directions" to sign her will for her. The judge charged that it was a question of fact, to be decided by the jury; saying that the "plaintiffs' attorney contended that Mrs. Bowen need not have said in articulate words, 'Doctor Knight, you must sign that paper for me;' and that is the right contention. It is sufficient if the whole conversations that occurred between the testatrix and Dr. Knight amounted to an express declaration, it should be construed into 'an express direction' to sign the paper." As we understand it, a simple question and answer may amount to a declaration. We cannot suppose that the word "express" was intended to be limited necessarily to an expression in words. We take it that one perfectly dumb, and unable to speak a word, may in some way indicate his desire, so as to come within the provision of the law, as to giving direction; as some one has tersely put it, "a direction in fact, but not in words." But, taking both conversations of the parties together,—that of the afternoon, when Dr. Knight was requested to write the will, and that at night, when they were about to execute it,—we think that the judge committed no error on this point. There is no evidence that Dr. Knight was a volunteer in the matter.

3. The next proposition is that "the will was not signed in the presence of Mrs. Bowen, the testatrix, and the signing of S. S. Knight's name under hers was not a sufficient ratification of any previous instructions to sign for her." The judge charged: "If you find that S. S. Knight did not write or sign Mrs. Bowen's name to the paper propounded as her will in her presence, then it was not duly executed, under the law, unless he then and there adopted it by signing his name as agent in the presence of the other witnesses." Under the charge the jury must have found that Knight wrote the words "By S. S. Knight, by request," under the name of "Emeline Bowen," already in the will, thereby adopting the name previously written by himself, and that this was done at the time the will was executed, in the presence of the testatrix and the witnesses. Assuming, then, that the name of the testatrix was written on the will in the afternoon, and not rewritten at the time of execution, it is very clear that her written name, no matter when or where made, was not an accomplished act, but only preparatory to something else, to give it vitality. At first the appending of "her mark" by Mrs. Bowen was intended, which would certainly have adopted it, no matter when written, but afterwards changed to "another person signing for her by request." Standing

alone, it was a perfect nullity, and might have been stricken out, as a word incorrectly used. As it seems to us, it is not a question of ratification by Mrs. Bowen, for she did not know that in preparing her will her name had been written in it, but rather a question of adoption by Knight, as a part of his signing by request. Neither the law nor the testatrix directed Knight how he was to sign, and we cannot see why he might not adopt her name, previously written by himself, as he could then have run his pen through the name, and have rewritten it then and there. But if in this we are in error, if, from the nature of the subject, Knight could not adopt the name of Mrs. Bowen, standing on the draft of the will, so as to be a compliance with the law, which requires that the signing by "another person" must be in the presence of the testator, etc., was it indispensable to the execution that the "other person" deputed to sign for Mrs. Bowen should, in doing so, set out her name? It will be observed that the law does not so require, and, as it seems, the signing by "another person" is not confined only to the name of the testatrix. All the authorities agree that a will may be executed without the name of the deviser appearing on its face. It has often been decided that a mark, without the name itself, is sufficient, and, of course, the initials of testator's name would also suffice (see *Ray v. Hill*, 8 Strobb. L. 803, 49 Am. Dec. 647, and *Adams v. Chaplin*, 1 Hill, Eq. 265); and the will may be signed by another person for the testator. "That 'other person,' as it seems, may be one of the witnesses, and it is immaterial that he signed his own name, instead of the name of the testator; and, when the testator directed a person to sign the will for him, which that person did by writing at the foot 'This will was read and approved by C. F. B., by C. C., in the presence of' etc., and then followed the signature of the witnesses, the will was held good," etc. The following form of subscription is sufficient: "E. N., for R. D., at her request." "So, also, where the testator's name was subscribed, at his request, by one of the subscribing witnesses." See 1 Jarman, Wills, p. 79, and Redf. Wills, 205, and numerous cases in the notes; and also 1 Wms. Exrs., p. 83. But, be this as it may, we cannot say it was error to hold that, under the authority given him by the testatrix to sign for her, S. S. Knight sufficiently signed for her on Sunday night, at the time the will was executed, in the presence of the testatrix and of the subscribing witnesses.

The judgment of this court is that the judgment of the Circuit Court be affirmed, and the case be remanded to the probate court of Laurens county, for such further proceedings as may be deemed proper and necessary to carry out the conclusions herein announced.

McIver, Ch. J., and Pope, J., concur.

PENNSYLVANIA SUPREME COURT.

Joseph A. FREDERICKS, *Appt.*;
v.
NORTHERN CENTRAL R. CO.

(157 Pa. 108.)

1. A passenger injured in a collision of cars on the railroad is entitled to the benefit of a presumption of negligence on the part of the carrier.
2. A railroad company is not liable for an injury to a passenger caused by the grossly criminal act of a stranger in letting off the brakes on loaded cars standing on a switch and closing the switch, which had been left open to derail the cars if they got loose, on account of which the cars run down grade and out on the main track causing a collision, where there was no negligence in failing to discover the mischief or prevent its effect.
3. It is not error for the judge to express an opinion on the question whether a railroad company had been guilty of negligence in respect to loaded cars left on a switch, which was left open so as to derail them if they got loose, where the circumstances call for words of caution from him, because of a collision due to the criminal act of a stranger, and the jury are told that it is for them to decide the whole matter.

(*Storrett, Ch. J., dissents.*)

(October 2, 1898.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas No. 4, for Philadelphia County in favor of defendant in an action brought to recover damages for personal injuries received by plaintiff while a passenger on defendant's road, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. John R. Adams and Samuel B. Huey*, for appellant:

As to railway companies, they contract to carry passengers safely, and the slightest degree of neglect against which human foresight and prudence may guard, and by which hurt or loss is occasioned, will render them liable to answer in damages.

Laing v. Colder, 8 Pa. 482, 49 Am. Dec. 533; *Sullivan v. Philadelphia & R. R. Co.* 80 Pa. 234, 72 Am. Dec. 698; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 358, 39 Am. Rep. 787; *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A. 820, 124 Pa. 471; *New York, L. E. & W. R. Co. v. Daugherty*, 11 W. N. C. 437; *Smith v. New York, S. & W. R. Co.* 46 N. J. L. 7, 18 Am. & Eng. R. R. Cas. 899; *Nicholson v. Erie R. Co.* 41 N. Y. 525.

The defendants had notice that this locality was infested by boys, because it was in the neighborhood of miners' houses.

Extraordinary care with reference to the

NOTE.—*Liability of railroad for accidents caused by wrongful act of stranger.*

A railroad company is not liable to passengers for accidents caused by torts of third persons tampering with the rails or switches, where the company has exercised due care in operating the road. *Keeley v. Erie R. Co.* 47 How. Pr. 256; *Worth v. Chicago, M. & St. P. R. Co.* 51 Fed. Rep. 171; *Latch v. Rumner R. Co.* 3 Hurst. & N. 930, 27 L. J. Exch. 155; *Deyo v. New York Cent. R. Co.* 34 N. Y. 2.

The same doctrine is announced in *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 584, 75 Am. Dec. 253, but in that case the plaintiff's verdict was sustained because the evidence tended to show that the cause of the injury was negligence in condition of the track.

Nor is it liable to injured employés for accidents from the same cause. *Miller v. Southern Pac. R. Co.* 20 Or. 235; *East Tennessee, V. & G. R. Co. v. Kane*, *post*, 515.

In *Deyo v. New York Cent. R. Co.*, *supra*, evidence of threats against the company was admitted to show warning and necessity of care to be taken by the company. In *Worth v. Chicago, M. & St. P. R. Co.*, *supra*, evidence of other obstructions and threats against the company was allowed on behalf of the defendant to show a motive of wrongdoing; but in *Miller v. Southern Pac. R. Co.*, *supra*, the court refused to admit the confession of a criminal convicted of derailing the train, as evidence to relieve the company of responsibility as he was not a party; and in *East Tennessee, V. & G. R. Co. v. Kane*, *supra*, the fact that the company had not recovered its switch key from a discharged employé was not negligence *per se*.

And the company is not liable to a passenger injured by the explosion of a fog signal placed on the track by some party unknown. *Jones v. Grand Trunk R. Co.* 45 U. C. Q. B. 193.

So where a passenger is injured by a missile, which is not thrown by some one connected with 22 L. R. A.

the operation of the road, the company is not liable. *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A. 820, 124 Pa. 463; *Thomas v. Philadelphia & R. R. Co.* 15 L. R. A. 410, 148 Pa. 180.

And a railroad company is not required to have its car windows covered with wire screens to keep out missiles thrown by trespassers. *Missimer v. Philadelphia & R. R. Co.* 17 Phila. 172, 42 Phila. Leg. Int. 405.

And is not liable if an engine placed on a side-track with its fires banked was started by some unknown wrongdoer, causing a collision, but would be liable if it started itself. *Mars v. Delaware & H. Canal Co.* 54 Hun. 625.

And is not liable where a female passenger entered a car standing on a gravity track, knowing the proper time had not yet arrived when a brakeman would take charge of the car, and a small boy unlocked the brakes and she was injured jumping from the car. *Western Maryland R. Co. v. Herold*, 14 L. R. A. 75, 74 Md. 510.

A mining company is not liable where such company ran its cars down a siding on to a track against cars from which the brakes had been removed by a wrongdoer, causing them to run against a car in which plaintiff was working injuring him, although the brakes had been removed on prior occasions. *EBright v. Mineral R. & Min. Co.* (Pa.) Oct. 1, 1898.

So a railroad company is not responsible to an injured passenger for leaving an unlocked hand-car near the track which some one placed on the track causing a collision, unless the company was bound to apprehend that it would be placed on the track and would cause injury. *Harris v. Union Pac. R. Co.* 18 Fed. Rep. 501, 4 McCrary, 454.

In this note injuries to trespassers as in the turntable cases, have been omitted. As to liability for injuries to children trespassing on turntable, see note to *Fort Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781, 1 L. T.

switch certainly included more than merely leaving it open. Had the track been perfectly level the switch ought to have been opened, to protect the main line from the danger of cars left there being pushed or bumped upon it by engines or moving cars in the rear. Extraordinary care with reference to the switch could not stop short of a lock.

There can be no cause connected with the management of defendant's cars, rails, brakes, or switches so remote that the law requiring extraordinary care does not apply.

The charge was partial and controlling on the minds of the jury.

Reichenbach v. Ruddach, 127 Pa. 565; *Pennsylvania Canal Co. v. Harris*, 101 Pa. 80; *Burke v. Maxwell*, 81 Pa. 139; *Herstine v. Lehigh Valley R. Co.* 151 Pa. 244.

Mr. George Tucker Bispham, for appellee:

The mere happening of an injurious accident, if it arises from something connected with the means of transportation, or from something over which the railroad company has control, makes out a prima facie case, but not otherwise.

Thomas v. Philadelphia & R. R. Co. 30 W. N. C. 9; *Pennsylvania R. Co. v. MacKinney*, 2 L. R. A. 820, 124 Pa. 463.

A railroad company is not bound to anticipate and take precautions against trespasses by third parties.

Ibid.

The presumption of law is that crime will not be committed, and that persons will act with ordinary prudence.

Daniel v. Metropolitan R. Co. L. R. 5 Eng. & Ir. App. 61.

In *Litch v. Rumner R. Co.*, 3 Hurlst. & N. 980, it was held that although the derailment of a train was prima facie evidence of negligence, yet it was entirely rebutted by proof that the derailment was caused by the act of a stranger.

In *Ebright v. Mineral R. & Min. Co.*, 3 Pa. Supreme Court Digest, 281, the defendant, a railroad company, was held not liable for a collision which took place in consequence of the brakes of the cars having been removed by a trespasser.

See also *Worth v. Chicago, M. & St. P. R. Co.* 51 Fed. Rep. 171.

There was an efficient intervening agency between the acts alleged as negligence upon the part of the defendant and the happening of the accident, and under the decisions of this court it is submitted that this reduces any alleged negligence on the part of the defendant from a proximate to a remote cause, and relieves it from liability therefor.

Schaeffer v. Jackson Twp. 18 L. R. A. 100, 160 Pa. 151; *Herr v. Lebanon*, 80 W. N. C. 248.

The court was asked to pass upon the question of proximate or remote cause as a question of law. It is believed that to do so was right.

South Side Pass. R. Co. v. Trich, 117 Pa. 390.

Green, J., delivered the opinion of the court:

There is not the least question as to how the collision occurred which resulted in the plaintiff's injury. Two loaded coal cars, which had been standing on a side track, at 23 L. R. A.

a distance of almost two miles from the place of collision, were detached from a number of other cars to which they were coupled. A throw-off switch which would have derailed the cars if left undisturbed was closed so as to lead the cars on the side track, down a moderate grade, until it joined the main track. There the cars collided with a miners' train on which the plaintiff was riding as a passenger, and killed two persons and injured others, among whom was the plaintiff. The coal cars, which had attained a very high speed, ran into the miners' train from behind, and drove the forward car, on which the plaintiff was riding, into the tender and engine. The plaintiff was a passenger, and was injured without any fault of his own. As the injury was inflicted by a collision of other cars and on the track of the defendant company, he was entitled to, and received, the benefit of the legal presumption that the injury was the consequence of the defendant's negligence, which presumption it was the defendant's duty to rebut, or suffer a recovery of damages by the plaintiff. The only substantial question in the case was whether the presumption of negligence was rebutted by the evidence. That question was left to the jury by the learned court below, and the jury found that it was, by returning a verdict in favor of the defendant. It is difficult to see how any other verdict could have been returned consistently with the testimony. The evidence, which was entirely uncontradicted, showed that a small train consisting of four loaded and six or seven empty coal cars was taken up the Northern Central track over on the side track, which belonged to the Philadelphia & Reading Railroad Company, but was used by the defendant, at about half past 10 o'clock in the morning. The engine was detached from the train, and the cars were left standing on the side track, and remained there during the day. The loaded cars were in front. There was a throw-off switch on the track upon which the cars were left standing, a short distance below the cars. The conductor, Linderman, was asked: "Question. Tell the jury what you did with the draught of cars when you got up there; whether any of the brakes were put on, and whether anything was done to the shut-off switch. Tell us first about the brakes. Answer. The brakes were put on by the men, and I threw the throw-off switch back personally myself when the engine run back over it. Q. You left the cars standing there, did you? A. Yes, sir. Q. You went back with the engine? A. Yes, sir. Q. Of course the throw-off switch was closed when the engine went over it? A. Yes, sir. Q. After the engine passed over it, who threw the throw-off switch? A. I did."

The fireman of the train, Joseph A. Eadie, having testified that he was on the train, and that they took the cars to the point stated by Linderman, above the throw-off switch, was asked: "Question. After you got the draught of cars up there, did you do anything to the brakes? Answer. I set three brakes. Q. On what cars? A. On the first and second; two on the first and one on the second car. Q.

Were those the cars that were nearest to the locomotive? A. Yes, sir. Q. Those were the two loaded cars, were they? A. They were. Q. Were the cars coupled together? A. Yes sir. Q. Were they left coupled? A. They were. Q. The entire draught was left coupled? A. They were all left coupled that we took up there. . . . Q. Did you leave on the locomotive with the engineer and conductor? A. I did. Q. And the rest of the crew? A. Yes, sir. Q. You left the cars standing there. A. Yes, sir. Q. What was done to the throw-off switch? A. The conductor threw the throw-off switch back. Q. Was that before or after the locomotive had passed over it? A. After it passed over it. Q. After it was thrown, the switch was open? A. It was. Q. If the cars had started to run down in that position they would have been thrown into the meadow by the miners' houses, would they not? A. Yes, sir."

W. L. Eadie, a brakeman, having testified that he was on the cars as brakeman, that the cars were left standing on the track above the throw-off switch, and that he went back on the engine with the others, was asked: "Question. After the engine had passed this throw-off switch, did you notice the conductor do anything? Answer. Yes, sir; he threw the throw-off switch open. Q. You were with him when he did that, were you? A. Yes, sir; him and I were on the point together after he did it. Q. The switch was open when you left? A. Yes, sir."

The testimony of the foregoing witnesses proves that the two cars that escaped were duly braked, by setting both brakes on the front one and one brake on the rear one, and also that the throw-off switch below the cars was thrown open, and that, if left in that condition, the cars, if started, could not run on the track, but would be thrown off in the meadow. Other brakes were set on the other cars, but it is not necessary to recur to that testimony, because their sufficiency to hold the cars was conclusively established by the fact that they did hold them. They did not leave, but remained standing where they were placed after the two loaded cars had been detached and left.

The question whether the precautions taken by the defendant's men were sufficient to hold the cars in place was fully illustrated by the testimony of F. W. Monier, who was shipping clerk of the Excelsior colliery, which was further up the track, and above the cars. He testified that he saw the cars in the morning, and again in the afternoon. He was asked: "Question. When did you examine the throw-off switch? Answer. In the afternoon, about half past four or five o'clock. Q. That was before the cars ran away? A. Yes, sir. Q. What was the condition of the throw-off switch then,—was it open or closed? A. It was open. Q. So that, if the cars had been started, and the switch in that condition, they would have been ditched? A. Yes, sir. Q. Did you take notice of the condition of the brakes on this draught of coal cars? A. I did. Q. Did you notice the condition of the brakes in the afternoon? A. I only noticed the condition of the brake about half past four or five o'clock. Q. Please tell

the jury what condition you found the brakes in; whether you examined the brakes, and why you did it, and what condition you found the brakes in at half past four o'clock in the afternoon. A. I examined the first three brakes on the train nearest to the throw-off switch. I found the brakes set. Q. Were they set hard or tight? A. Yes, sir; the brakes were set very tight. I could not make them any tighter. I tried to tighten the brakes up tighter. The brakes were set tight enough to hold the cars. The switch was set to throw the cars off in case anything would happen to them. Q. The brakes that were set, were they on the car nearest to the switch? A. The first three brakes; yes, sir. The two brakes in the first car and the first brake on the second car were set. Q. Did you look at the brakes yourself? A. Yes, sir; I examined the brakes. The brakes were all right."

The testimony of the last witness shows the condition of the cars, the brakes, and the switch at nearly, or quite, 5 o'clock in the afternoon. The cars were in the same position as when they were left by the crew in the morning at 11 o'clock. The brakes on the two cars in question were in the same condition as then,—they were set tight, and held the cars. The throw-off switch was open, as it was left in the morning, so that, if the cars had started, they would not have run down the track, but would have been derailed on the meadow. The absolute sufficiency of the precautions taken was conclusively proved by the fact that they did prevent the cars from starting, and made it impossible for them to run down the track if they had started. It cannot, therefore, be argued that they were insufficient. The jury has found that the defendant did its whole duty in the way of precautions, and was not guilty of any negligence which led to the collision.

The manner in which the collision was produced was fully shown by the evidence, which was entirely uncontradicted. Between 5 and 6 o'clock on the same afternoon a boy named John McCoskey got on the cars between the second and third cars, and was seen hammering at the ratchet wheel of the brake with a coupling pin which he had in his hands. A very few minutes before he got on the cars he turned the throw-off switch in front of the cars so as to close it, and let the cars run down on the track. He hammered at the cog which holds the brake for a minute or so, until he got it loose, when the cars started on the track. Three boys testified to seeing this, and one of them—Alexander Smoogen—jumped on the cars and tried to stop them with the brakes, but did not succeed, and he then jumped off to save himself. The cars ran on down the side track, and on to the main track, where they collided with the miners' train, and did their dreadful work. There is not the least dispute as to this state of facts, and the jury confirmed it by their verdict. It will thus be seen that the collision was produced by the criminal trespass of a stranger to the defendant company, for whose acts they were not in the least degree responsible, and over whom they

had no control. The offense of which the boy McCoskey was guilty in misplacing the switch was a most atrocious and abominable crime, for which, under the Crimes Act of 1860, he was liable to a fine of \$10,000, and an imprisonment at labor for ten years. By the Law of May 26, 1891 (Pub. Laws, 121), the penalty for the same offense, when it results in death, is a conviction of murder.

The question in this case is whether the defendant company was bound, in the exercise of its duty of extraordinary care, to take extraordinary precautions against the grossly criminal acts of strangers. That it did take amply sufficient precautions against everything short of the grievous crime of misplacing a switch is conclusively established by the uncontradicted evidence in the case and by the verdict of the jury. The learned court below did, with some well-founded hesitancy, commit to the jury the question of the defendant's negligence in the precautions it took. It was argued in the lower court, as here, that the defendant might have opened the lower switch, or put locks on the switches, and therefore they did not exercise the very highest degree of care which was possible to human skill, prudence, and foresight. But this argument overlooks the fact that the upper switch was left open, which made it impossible for the cars to get to the lower switch, and the further fact that any person who would misplace a switch would break a lock, if it were there. But the argument is fatally defective in that it is founded upon the theory that transporting companies are legally bound to take precautions against the criminal acts of strangers, and are responsible for such acts if they do not. We have not been referred to any case, and we know of none, in which such doctrine has ever been held. In the case of *Philadelphia & R. R. Co. v. Hummel*, 44 Pa. 875, 84 Am. Dec. 457, this court said: "If the law declares—as it does—that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precautions against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty, and negligence. . . . Were it worth while, abundant authority might be cited to show that the law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrongdoer. . . . It is too well founded in reason, however, to need authority. We act upon it constantly, and without it there could be no freedom of action." The rule that the carrier is bound to exercise the highest degree of care that is possible to human foresight and prudence does not require a construction that will make the carrier an insurer against accidents; nor the prevention of accidents by the employment of means which, if the accident could have been foretold, might have been used to prevent it; nor for the wrongful acts of strangers, unless the carrier was remiss in not discovering them in time to avert the injury; nor for an impracticable character or extent of precaution which could not be observed without so ruinous a cost as to destroy the

business; and in all cases the liability is only such as results from negligence.

Our own cases illustrate all these qualifications of the rule of highest possible care. Thus in *Meier v. Pennsylvania R. Co.*, 64 Pa. 225, 3 Am. Rep. 581, the plaintiff's injury was sustained while he was a passenger on a sleeping car in consequence of the breaking of the axle of the forward truck in two places. The end of the car then dropped down and slid along the rails. The plaintiff was thrown forward, the ligaments of the right knee were torn, and the bones of his leg were severely bruised. The plaintiff was entirely without fault, and the accident was the result of a defect in the axle. Of course, the presumption of negligence arose, and the defendant undertook to rebut it by proving that new wheels and axles had been put on a few months before, and that they were of good quality; that they were constantly inspected; that the road was in good order, and the train running at proper speed; and that they had employed such appliances as were approved by the most experienced railroad operators and mechanics. The case was tried in the district court of Philadelphia by the very able and distinguished Judge Thayer, then of that court, who submitted the question of negligence to the jury in a lucid and exhaustive charge, which received the full approbation of this court. The verdict was for the defendant. The plaintiff sued out a writ of error, and assigned portions of the charge, which qualified, or rather carefully stated, the rule of highest possible care; but this court approved his rulings, and sustained the judgment. The following language of the charge was assigned for error: "That common carriers of passengers are liable only for negligence. They are not insurers of the safety of their passengers, like common carriers of goods. . . . But common carriers of passengers are not liable for injuries happening to passengers from unforeseen accidents, where there has been no negligence. They do not undertake absolutely to be responsible for unavoidable accidents,—for accidents, in a word, which are not the result of their own negligence." Concerning this part of the charge, *Mr. Justice Agnew*, delivering the opinion of this court, said: "It is agreed on all hands, says Judge Redfield, in his work on Railways (ed. 1867, p. 174), that carriers of passengers are liable only for negligence, either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as carriers of goods and baggage of passengers. The numerous cases cited from which this result is drawn justifies this statement. . . . In all the Pennsylvania cases it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects, which is impossible." Judge Thayer also charged: "(2) That the rule in regard to carriers of passengers is this: The utmost care and vigilance is required on the part of the carrier. The rule does not require the utmost degree of care which the human mind is capable of imagin-

ing, but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers, and these precautions are to be measured by those in known use in the same business which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use. That is the rule; the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest." In regard to this part of the charge we said: "The rule laid down by the learned judge in the language quoted in the second assignment is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence casting upon the carrier the *onus* of disproving it [citing several cases]. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty to carry the passengers safely. But this rule of evidence is not conclusive. The carrier may rebut the presumption, and relieve himself from responsibility, by showing that the injury arose from an accident which the utmost skill, foresight, and diligence could not prevent. . . . To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business,—that of insurance."

It will be observed that the rulings of the court below were approved in a case in which the passenger was injured while traveling on the defendant's car, without any fault of his own, and where the cause of his injury was a defect in one of the axles of the car, in consequence of which it broke. An appliance was defective and the defendant was relieved from liability, although the defect was not discovered, and the rule of highest skill, foresight, and diligence was held not to be infringed by the nondiscovery of the defect.

How much stronger is the present case. Here the injury was not the result of any defect in any of the appliances used by the defendant, nor by any want of skill, foresight, and diligence which was humanly possible. The injury was not the result of any act of carelessness or negligence on the part of anybody. It was the result, exclusively, of a deliberate, intended, willful, affirmative, positive act of criminal trespass. No mere act of carelessness or negligence could have turned over the switch, which was set to derail the cars, so that it would throw the cars on the track instead of off. No mere act of carelessness or negligence could or would have taken out the coupling pin which held the cars together. No mere act of carelessness or negligence could or would have driven back the ratchet which

held the brakes in place,—four of them in all,—so as to set the cars in motion. All and every one of these acts required special physical effort, exerted for the very purpose of releasing the cars from the entirely sufficient restraints which had been imposed upon them by the company's agents, and these efforts were made each one after the other, in a wicked and deadly succession, until the horrible purpose was accomplished, and the work of death and destruction resulted. How can it be said that any human skill, foresight, or diligence could have divined or believed or imagined that such acts would have been perpetrated? It would require a gift of omniscience to foresee them, a gift of prophecy to foretell them, and neither of these qualities is human. It is useless to say that additional precautions might have been taken. So they might, if the possibility of such acts could have been known in advance. A force of men might have been stationed at the cars to prevent the possibility of another force of men invading them and setting them loose, but such transactions are outside the pale of human experience, and it is simply preposterous to say that the omission to take that kind of precaution is negligence in any conceivable aspect of the case. Placing blocks under the wheels and locks on the switches avails nothing against the deliberate, willful, and intended purpose to set free loaded cars in such circumstances as these. The same purpose which would turn over the switch, take out the coupling pin, and then hammer at the brakes until they were opened, would remove the blocks from the wheels and shatter the lock on the switch. But it is not one or another particular act of precaution the want of which is to be set up as a test of the legal duty of precaution, but the whole criminal purposes ought to be accomplished. If that purpose and corresponding action were such as not to subject the defendant to a duty of precaution against it, the presence of some precautions, and the absence of another, which might or might not have been effective, or might have been more effective than those that were observed, is of no moment in the consideration of the general question as to the existence of the legal duty. If the purpose and the act were criminal, and were those of a stranger, and could not have been foreseen by any human skill or knowledge, the duty of precaution against such acts does not arise, and negligence does not result from the want of such precautions. The rule of highest skill, care, and prudence does not require the impossible, or the very extreme of care and precaution that can be imagined. In *Shearman & Redfield on Negligence* (sec. 266) it is thus expressed: "This doctrine is not to be construed as meaning that the carrier must adopt all the precautions that an ingenious mind could suggest, or have all the skill that science could give, nor that he must use all the precaution which, after an accident has happened, it can be seen would have sufficed to avoid it, nor even that he must use such precautions as one would use who knew beforehand that the accident would otherwise certainly occur." Again, at section

370, the writer says: "A railroad company is certainly not liable for an injury arising from a break in its tracks, caused by a sudden and extraordinary flood, or by the willful act of a stranger, unless the injury happens to a train which the servants of the company run upon the broken road after they, or those who ought to advise them, have had notice of its condition, or have had sufficient opportunity to learn it." In 2 Wood's Railway Law, at section 302, the writer, presenting the subject in words nearly identical with the foregoing, continues: "The law does not require such particular precaution as, it is apparent after the accident, might have prevented the injury, but such as would be dictated by the utmost care and prudence of a very cautious person before the accident, and without knowledge that it was about to occur. The defendant must use the highest degree of practicable care and diligence that is consistent with the mode of transportation adopted." This was the precise language of the court in the case of *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408, 72 Am. Dec. 529. The rule is stated in the same way in *Redfield on Carriers* (sec. 347 and note 19). The rule is stated in substantially the same way in 2 Rorer on Railroads (p. 955), thus: "But this rule of greatest possible care is not to be understood as requiring the utmost degree of care which the human mind can attain to or is capable of inventing. Such applications of it would involve such an expenditure as would tend to prevent all persons of ordinary prudence from engaging in the business. It simply means greatest degree of care that is consistent with that mode of transportation. It does not contemplate such a measure of care as will render it practically impossible to continue the railroad transportation of passengers. They are by no means insurers of human life, and are not accountable for the results of latent defects which the usual and well-recognized tests of science and art fail to detect; nor are they liable for accidents which skill and experience are unable to foresee and avoid."

The very question which arises in this case was decided in *Deyo v. New York Cent. R. Co.*, 34 N. Y. 9. The plaintiff was a passenger on the railroad of the defendant at night. "The train was thrown from the track through the culpable act of some unknown person, who maliciously or mischievously drew the spikes which fastened the chairs and the rails. Marks were visible on the ties of a claw bar having been used in removing these spikes. Two trains had passed over this section of the road at the point where the injury happened. . . . The road was in good condition when these trains passed over it in safety and without any obstruction." *Davies, J.*, in delivering the opinion, said: "The only question upon this appeal is whether there was any evidence of negligence on the part of the defendants or their servants sufficient to warrant the learned justice who tried the action in submitting that question to the jury. It is a familiar principle that carriers of passengers are not insurers of the safety of their passengers. Their duty is measured by the dangers which

attend railroad carriage; and the utmost foresight as to possible dangers, and the utmost prudence in guarding against them are required to exempt them from liability in case of injury to a passenger. . . .

There was no evidence in this action of any negligence on the part of the defendants, their servants or agents. This portion of the track was laid with the best and most improved rail. It was in perfect order. It had been passed over by their track-master a few hours before the accident. Within two hours before it occurred three trains of cars had passed over it in safety, and it must then have been in complete order. The proximate cause of the accident was the removal of the spikes which fastened the chairs and rails to the ties and sleepers. It is apparent that, as soon as these fastenings were removed, a superincumbent pressure would displace the rails, and thus inevitably throw the cars off the track. No human care or foresight could guard against such a diabolical act, committed under the circumstances developed in this case. It is clear that these fastenings must have been removed after the last train going east had passed the point where the road was disturbed." The court below had on the trial granted a compulsory nonsuit, and the court of appeals affirmed the judgment, saying: "If, therefore, the jury on this testimony had found that the defendant had been guilty of negligence, it would have been the duty of the court to have set aside the verdict."

It will be observed that in the case just cited there was no affirmative proof as to who removed the spikes, and thus caused the rails to become displaced. There was, therefore, a possibility that they might have been removed by some vindictive employé who had been discharged. In fact, there was evidence to prove just such a state of facts, but nevertheless the court held that the company was not liable. But in the case at bar there was full proof that the cars were uncoupled and the brakes loosened, and the switch turned back, by a person who was a total stranger, and having nothing to do with the defendant company, and for whose acts, therefore, the company was not responsible in any conceivable manner.

The case of *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534, 75 Am. Dec. 258, is another instance in which the same doctrine of non-liability was held, although there the evidence was sufficient to warrant a verdict of negligence. The plaintiff was a passenger, and was injured by the car running off the track at a switch at a station, which was misplaced, on the main track. There was no evidence to show how it became misplaced, and as it was at a station there was sufficient evidence of want of care to carry the case to the jury. But the court of appeals, in their comments upon the rule of duty applicable in such cases, said: "Carriers of passengers are not insurers, and many injuries may occur to those they transport for which they are not responsible. They are, for obvious reasons, held bound to exert the utmost care and vigilance to secure the safety of passengers, and are responsible for the slightest negli-

gence. But injuries may often happen through the fault or misconduct of those whose acts are in no way chargeable to them.

Still accidents may occur from a multitude of causes, even upon a railroad, for which the company is not responsible. If obstructions are placed by strangers upon the road, either through accident or design, the company is not responsible for the consequences, unless its agents have been remiss in not discovering them."

That is precisely this case. These cars were in a place of safety, and amply secured against either leaving their position or running on the main track, by a switch, so as to derail them if they did get loose. But they were detached from the other cars, their brakes were opened, and the derailing switch turned back by one who was a stranger; and within a very few minutes after this was done the collision occurred. There was no time for the defendant's agents to discover the mischief, and they cannot be charged with negligence in that respect. So far as this defendant is concerned, it is of no consequence who it was that committed this crime, nor what his motives were. He was a stranger, over whom they had no control, and they were not responsible for his acts.

In two of our recent cases the rule of the presumption of negligence from the mere fact that the plaintiff was a passenger, and was injured, has received qualifications which are strictly applicable to the case at bar. The first of them is *Pennsylvania R. Co. v. MacKinney*, 124 Pa. 462, 2 L. R. A. 820, in which the plaintiff was a passenger on the defendant's train, and, while reading a newspaper in his seat at an open window, was struck in the eye by a hard substance, and seriously injured. On the trial the court below instructed the jury that they should start with the presumption that the defendant was guilty of negligence from the mere happening of the accident, and that it thereupon devolved upon the defendant to rebut that presumption, and show that they were not negligent. We held that this was error, because the accident occurred from something extraneous to the railroad and the appliances of travel, and it would be necessary for the plaintiff to go further, and affirmatively prove that there was negligence. The present chief justice, in delivering the opinion, pointed out the difference between an accident resulting from the mere operation of the road and one which was the result of some extrinsic cause. In the former the presumption of negligence arose from the mere happening of the accident; in the latter no such presumption arose, and the fact of negligence for which the defendant was responsible must be proved by satisfactory testimony, just as in any ordinary case between strangers. Concluding, he said: "If the case had been submitted to the jury on the evidence, and they had found therefrom that the plaintiff's injury resulted from something connected with the operation of the railroad, and not from something entirely disconnected therewith, and with which neither the company nor its employés had anything whatever to do, that would have raised *prima facie* a presumption

of negligence on the part of the company, and thrown upon it the burden of proving that it did not exist."

In the present case, the injury having occurred as the result of a collision of cars on the railroad, the plaintiff was entitled to the benefit of a presumption of negligence, and the court below so charged the jury. But the defendant met and rebutted that presumption by showing conclusively, and without the least contradiction, that the collision was occasioned solely by the criminal act of a stranger, with whom neither the company nor its agents had anything to do. As this was an undisputed fact, it is almost impossible to understand why the learned court below would not have been justified in withdrawing the case from the jury, as was done in the case of *Deyo v. New York Cent. R. Co.*, *supra*, on the ground that upon the whole testimony no negligence was shown for which the defendant was responsible. But the learned court left that question to the jury, and the jury found that the defendant was not guilty of any negligence which produced the injury, and that verdict, of course, settles the question.

The appellant claims that the court below did not dwell with sufficient force and emphasis upon the rule of the highest degree of care, skill, and prudence which was humanly possible. It is sufficient to say in reply that, in view of the entirely uncontradicted testimony in this case, it was only necessary to inquire whether the defendant had rebutted the presumption of negligence which arose from the mere facts of the injury. There was nothing in the case but the mere presumption. All of the actual testimony as to the real facts of the occurrence tended in a most eminent degree to show that there was no negligence for which the company was responsible, and that the injury was the result of the willful criminal trespass of a stranger. In such circumstances the highest inquiry that could legitimately be conducted by the jury was whether there was any negligence on the part of the defendant in the precautions taken against such an accident. That question was fully submitted by the learned court to the jury, with instructions to find for the plaintiff if they found such negligence. The appellant's points on the subject of the highest possible degree of care were affirmed, and the remark of the court below, that the principle was very strongly expressed, was entirely correct in view of the manifest facts of the case. So, also, his expression of individual opinion that the precautions taken by the defendant were sufficient to relieve them of the charge of negligence was appropriate and just in view of the testimony. He distinctly told the jury it was for them to decide the question, and left them entirely free to act upon their own judgment. In the case of *Latch v. Rumner R. Co.*, 8 Hurlst. & N. 930, the plaintiff's trucks were derailed by the misplacement of the points of a siding. There the evidence showed that shortly before the accident a stone was found inserted under the lever of one of the points, and the defendant claimed that this had caused the ac-

cident, and, as it was the willful act of a stranger, they were not responsible. The judge who tried the case thought there was no evidence of actual negligence, and told the jury that if the defendant's account was correct they were entitled to a verdict, unless the jury thought there was negligence in not having a person to take care of the points, and he said he did not think there was. A verdict was rendered for the plaintiff, and on a rule for a new trial the case was heard in bank, and the rule made absolute. The court said: "There was evidence that there had been a willful act on the part of a stranger which would have caused the accident, and no evidence of negligence on the part of the defendants. None was suggested, except their not having a person always at the spot to look after the 'points,' which they were not bound to have. The siding had been in that state for months, and no accident had happened. The verdict was clearly contrary to the evidence, and there must be a new trial." In this case there was no proof as to who had placed the stone under the lever, and the verdict had found negligence as a fact, but the court set it aside as unwarranted by the testimony. Our own very recent case of *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. 180, 15 L. R. A. 416, affords a still more striking illustration of the inapplicability of the rule of the highest possible care, in the case of an injured passenger, and of the necessity of affirmative proof of actual negligence, before a recovery could be had. The facts and the conclusions of the court are well stated in the opinion of *Chief Justice Paxson*: "On June 5, 1890, the appellant was a passenger on the cars of the defendant company, and in the vicinity of Pottstown was struck on the arm by a missile with sufficient force to cause a fracture thereof. It was not shown what caused the injury. The appellant did not see the missile, nor was it found in the car. There was no evidence that any one was near the train on the outside who could have inflicted the injury. This suit was brought to recover damages for the injury referred to. The theory of the appellant was that it was caused by a loose nut, thrown from one of the switches of the defendant's roadbed, over which the train was passing at the time. This was a mere theory, however, without any evidence to sustain it. The appellant contended that under such circumstances the question of the defendant's negligence should have been submitted to the jury. The court took a contrary view of the case, and directed a verdict for the defendant. This was the error assigned. . . . There was nothing in the evidence to connect the accident with any defect in the cars or machinery, the movement of the train, or in any of the appliances of transportation. There was nothing, therefore, to submit to a jury. It would be as reasonable to hold that a bullet fired into the car from without, by means of which a passenger is killed, is evidence of negligence on the part of the company." It will be seen that in this last case the rule that a presumption of negligence arises in favor of a passenger traveling on a train from the mere fact of the accident was 23 L. R. A.

refused application, and the rule that the highest possible care must be applied was denied enforcement, because there must be evidence to justify it in the intrinsic facts of the case. Neither of these rules, therefore, is of universal application, and the particular circumstances must be considered in order to determine how far they control the decision. Here the legal presumption was applied because the injury resulted from a collision of cars. But, the presumption having been fully rebutted by proof that the collision was the result solely of the criminal act of a stranger, it suffices no further purpose. Had the learned judge directed a verdict for the defendant, it is scarcely possible that we would have interfered with it. But he left the question of actual negligence to the jury, who properly decided there was none, and that is the end of the plaintiff's case. It was eminently not a case in which the jury should be fired with urgent repetition of the doctrine of legal presumption of negligence, and the rule of the highest possible human skill, foresight, and diligence, but rather one in which the precise limitations of the defendant's liability should be presented calmly and dispassionately; and this is exactly what was done.

The complaint that the judge expressed an opinion on the facts as to whether the defendant had exercised sufficient precautions is without merit. In the case of *Leibig v. Steiner*, 94 Pa. 466, we said: "A judge may give his opinion freely on the weight and value of evidence, for he is the best and safest adviser of the jury; but he has no authority to decide any question of fact when the party affirming it has sustained his averment by any reasonable proof. Very strong expressions of opinion on the facts are tolerated; indeed, sometimes may be necessary. . . . Exceptional cases arise where it is the duty of the judge to express his opinion of the facts, and guide the minds of the jury to a correct view of the evidence; and therefore it has been settled that when he does so without misleading or controlling them in the disposition of the facts there is no ground for reversing." In the present case the learned judge who tried it was particularly careful to say to the jury that, while personally he thought the company was not careless in not opening the lower switch or putting on locks, and that he thought the company had done all that a prudent man would do, nevertheless he left it to them to say whether there was carelessness on the part of the defendant in leaving the cars as they did. He also said that he left it to the jury to say whether the defendant was responsible for the misconduct of bad boys; that, while it was his own opinion that they were not, he was bound to leave that question to them, and did so. There is certainly no error in this. No attempt was made to control the action of the jury; the decision was left exclusively to them. The circumstances were such as to call for words of caution from the court; and the expression of an individual opinion, in view of the remarkable facts of the case, was not at all inappropriate, especially as the jury were told that it was for

them to decide the whole matter. In the case of *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. 61, we said: "The learned judge who tried this case in the court below was persuaded that the evidence given on behalf of the defendants was sufficient to rebut the presumption of negligence, and he had a right to express an opinion on that subject, but the question was not one of law for his determination. It is the right, and in some cases it becomes the duty, of a judge to express his opinion upon the character and weight of the testimony which he must submit to the jury, and it should be done in such a manner as to leave them in possession of the question that belongs to them." To the same effect is *Pennsylvania Co. v. Allen*, 8 Pennyp. 170. *Kilpatrick v. Com.*, 81 Pa. 216: "A judge may rightfully express his opinion respecting the evidence, and it may sometimes be his duty to do it, yet not so as to withdraw it from the consideration and decision of the jury." *Bitner v. Bitner*, 65 Pa. 363: "Very strong expressions of opinion on the facts are tolerated; indeed sometimes may be necessary." In *Johnston v. Com.*, 85 Pa. 54, 27 Am. Rep. 623, on a trial for burglary, the court in the charge said: "The commonwealth claims that evidence can establish nothing if this evidence will not establish the facts alleged in the third count; and I, for my part, cannot see how the jury can hesitate a moment to convict the prisoner on the third count." Held not to be error under the facts of the case, although it was a strong expression of opinion. See also, *McClintock v. Pennsylvania R. Co.* 21 W. N. C. 138; *Doyle v. Union Pac. R. Co.* 147 U. S. 418, 430, 37 L. ed. 223, 230. The assignments of error are all dismissed.

Judgment affirmed.

Sterrett, Ch. J., dissenting:

If the right of trial by jury, "as heretofore," is to "remain inviolable," it behooves us, in my judgment, to disapprove of such constraining influence as was improperly brought to bear upon the jury in this case. While the learned judge who presided at the trial rightly conceded that the case hinged on questions of fact which he could not, in any event, withdraw from the jury, he submitted them with evident reluctance, and with such an emphatic expression of his own opinion that said questions should all be determined in favor of the company defendant that it was next to impossible for the jury to discharge their duty, as the constitutional triers of fact, with that sense of unconstrained freedom which should always characterize the deliberations of every jury in such cases as this. Referring to the duty which the company as a common carrier of passengers owed to the plaintiff, and whether that duty had been properly performed, etc., he said: "Under the law applicable to this case I must submit the question to you to determine whether you find the defendant was careless in not opening the lower switch or putting on locks. Personally, if I were a juror, I would say, 'No.' If I were a jurymen, I would think that the company had done all that any prudent man would do. It

braked its cars, opened the throw-off switch and left them there. But the question must be submitted to you as jurors to say whether you find it was carelessness on the part of the defendant to leave those cars there on the decline on which the cars would have run into the main road in case they had got loose." Again, he said: "There is another part of the case which is brought out with great strength under the evidence, and proved, I think, to your satisfaction,—as at least it is to mine,—that this accident was caused by the willful misconduct of certain boys; that those boys meddled with those cars and that switch, and that it was their willful misdoing that caused the accident. I leave it to you to say whether you think, under those circumstances, a company ought to be held responsible for the malicious, willful misconduct of bad boys. My own individual opinion in that case is that they ought not, but, as I am bound to leave that question to you, I do leave it to you to determine." Again, in answering defendant's fifth point, in which he was asked to say, as matter of law, that "neither the absence of a lock from the throw-off switch in the immediate vicinity of the coal cars, nor the failure to open the double rail switch, used as a throw-off, near the Corbin colliery, can be regarded as any proof of negligence on the part of the defendant," he again volunteered his own opinion on the question as one of fact, which, as he said, "must be submitted to" the jury, by saying, in substance, that the manifest acts of omission stated in the point could not be regarded as any proof of negligence. But the learned judge's oft-repeated declarations of his own opinion on questions of fact which were exclusively for the consideration and determination of the jury, and what he would do if he were a juror, etc., are not all. There are grave errors of law for which alone the judgment should be reversed. In the paragraph first above quoted from the charge the standard of duty applied to defendant company as a common carrier of passengers is ordinary care merely, viz.: "If I were a jurymen, I would think that the company had done all that any prudent man would do. It braked its cars, opened the throw-off switch, and left them there." It is no compliment, even to an ordinarily prudent man, to say that he would not have done more than brake the cars in such a way that even children could at any time start them down grade on their death-dealing errand, or open the throw-off switch, and leave the lever unlocked and unsecured in any manner, so that any thoughtless or mischievous boy could start it again with perfect ease. But when we apply to defendant's conduct, in leaving the coal cars in such an insecure condition, etc., the high standard of care which the law requires carriers of passengers to exercise, how widely different is the case? The contract to carry implies that every precaution which human skill could suggest has been taken to guard against every apparent danger that may beset the passenger, and that the same degree of care will continue to be exercised until he reaches the end of his journey. The siding or branch

on which the coal cars stood was of unusually heavy grade, descending rapidly to its junction with the main line, on which was the train in which plaintiff and other passengers were being transported. As a necessary precaution against the danger of cars escaping by accident or otherwise and running down on to the main line, the two throw-off switches were constructed; one near the point where the coal cars stood, and the double-rail switch further down. The former was opened, as is alleged, but left unlocked, and without any kind of fastening. The latter was not even opened. If it had been, the escaping coal cars would have been arrested by it in their downward course. If the upper switch, alleged to have been opened, had been locked, or otherwise securely fastened, the danger of its being opened would certainly have been greatly lessened. The omission to even open the lower switch, and to use proper means to prevent the closing of the upper one, were certainly evidence of culpable negligence on the part of the company. The construction of these throw-off switches is proof of their necessity; but if they were not used, or not properly secured, of what avail could they be in averting danger? It is too plain to admit of any doubt that even suggesting to the jury that these acts of omission should not be regarded as any proof of negligence was error.

The unqualified affirmance of defendant's second point was plain error. In affirming that point, without any qualification or explanation, the learned judge instructed the jury, in the words thereof, thus: "The uncontradicted testimony on the part of the defendant shows that the proximate cause of the collision in which the plaintiff was injured was the wrongful act of trespassers upon defendant's cars. For such wrongful act the company defendant, under the circumstances of the present case, is not responsible; and if the jury believe the said testimony as to the proximate cause of the

collision their verdict should be for defendant." The vice of this instruction is that it ignores the question of defendant's omission to exercise that high degree of care which the law requires. It was clearly the duty of the company to take every precaution which human skill and foresight could suggest to guard against every apparent danger that might beset the plaintiff and other passengers. It foresaw the danger of cars being detached, by accident or otherwise, and running down the heavy grade, uncontrolled, onto the main track; and it accordingly provided the two throw-off switches to guard against that apparent danger, but it omitted to properly use the means which it had provided expressly for that purpose. It omitted even to open one of the switches, and left the other insecurely opened. That omission was at least such evidence of negligence as would have warranted the jury in finding that its neglect of duty was the cause of the collision.

There was also error in affirming defendant's first point as presented. Other errors of minor importance might be noted, but these to which special reference has been made are sufficient to show that a fair trial was not accorded to plaintiff. The emphatic and oft-repeated expressions of opinion, etc., above referred to, were unwarranted, misleading, and erroneous. They were an uncalled-for invasion of the province of the jury. The line of demarcation between the duty of the court, as expounder of the law, and that of the jury, as the constitutional triers of fact, should be carefully observed. While, on the one hand, the court should not permit the jury to disregard or evade its instructions as to matters of law, it should be equally careful not to invade the province of the jury, and take upon itself the determination of questions of fact about which there is any doubt or dispute. For the reasons above suggested the judgment should be reversed, and a new trial ordered.

GEORGIA SUPREME COURT.

EAST TENNESSEE, VIRGINIA &
GEORGIA R. CO., *Plf. in Err.*,

v.

Annie May KANE.

(.....Ga.....)

*1. Where a nonresident witness for whom interrogatories had been sued out was in court at the time of the trial, it was error to permit the answers to the interrogatories to be read to the jury over objection of the opposite party, although the witness was in attendance upon the court at the instance of the latter, the witness being actually present when the answers to the interrogatories were offered in evidence.

2. It is not cause for a new trial that the court refused to allow certain

*Headnotes by LUMPKIN, J.

NOTE.—See preceding case and note.
23 L. R. A.

questions propounded to witnesses by defendant's counsel to be answered, it not appearing what answers were expected, and in view of other evidence and of admissions in the declaration, no possible answers to these questions being substantially material.

3. Upon the trial of an action against a railroad company for homicide resulting in part from the misplacement of a switch, it was not error to refuse to allow the defendant to show "the common experience of railroads" in getting back switch keys from their employes, and that all railroads have great difficulty in keeping up with such keys and having them returned by discharged employes because of their real or alleged loss. Nor was there error in refusing to allow defendant to prove "the custom or usage of railroads in reference to providing a watchman for each of their switches," defendant expecting to prove "that the general custom was not to provide a watchman for such switches."

4. Though one of the main issues was

whether or not the engineer for whose homicide the action was brought was guilty of negligence in bringing about the collision which resulted in his death, there was no error in refusing to allow the defendant to prove that he "was habitually reckless in running freight trains at excessive speed, and running too fast over switches," the witness' knowledge not extending to more than two or three instances.

5. The defendant may invoke and use allegations beneficial to himself made in plaintiff's declaration without offering the declaration itself in evidence, or otherwise proving the admissions contained in such allegations, and no unfavorable inference can properly be drawn against a corporation because of a failure to call as witnesses its own employes to prove the existence of facts shown by such admissions.

6. The mere fact that a railroad company fails to recover from a discharged employe a key which controls the turning of a switch is not of itself sufficient to make the company liable for the criminal act of such employe in maliciously misplacing a switch for the purpose of wrecking a train. The company is not bound to anticipate that, purely out of revenge for his discharge, a former employe might secretly commit so heinous a crime against it and the public. Nor is the company bound to exercise constant vigilance to prevent all persons whatsoever not in its employ from having the means or opportunity of tampering with its switches or its tracks. Whether or not in any particular case the company exercised the proper degree of care in protecting its switches from interference is a question for the jury, in determining which they may look to the evidence to ascertain if there was any reason for the company to apprehend such interference, and if so, whether, under all the circumstances, it used due diligence in endeavoring to prevent the same. In its charge to the jury, the court should not state or assume that a given state of facts would show negligence on the part of the company in the respect indicated.

7. A prima facie case of negligence on the part of the defendant, which the plaintiff's declaration covers, cannot be effectually answered by a given state of facts, if those facts involve a breach of diligence by the defendant in a material respect; and such breach of diligence, if shown, may be urged by the plaintiff, not to recover upon, but to defeat the defendant's justification, although no reference to it is made in the plaintiff's pleadings.

8. According to the undisputed facts, the plaintiff's husband was guilty of negligence in running his train in violation of the rules of the company, of which he had knowledge, and which he had agreed, upon entering its employment, to obey. For this reason, and because of errors committed by the court, there should be a new trial; and if, upon the next hearing, the evidence is substantially the same, there should be a verdict for the defendant.

(June 26, 1898.)

ERROR to the City Court of Macon to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

29 L. R. A.

Messrs. Hill, Harris & Birch for plaintiff in error.

Messrs. Lanier, Anderson & Anderson for defendant in error.

Lumpkin, J., delivered the opinion of the court:

1. Section 3878 of the Code declares that if the state of facts on which a commission to take the interrogatories issued ceases to exist before the trial of the cause, and the witness is then accessible by subpoena, the testimony taken on interrogatories cannot be used. It follows, necessarily, that if the witness is accessible by being actually present in court at the trial when his testimony by interrogatories is offered, his answers to the same cannot be admitted, but the witness should be examined in person. It does not make the slightest difference that his attendance upon the court was at the instance and request of the opposite party. If, because of this fact, the party who had caused the interrogatories to be sued out does not desire to introduce the witness, it is his right to decline to do so; but if he wishes the testimony of the witness to go before the jury, he must put the witness on the stand. Testimony taken by interrogatories is, at best, unsatisfactory and imperfect, and it is the policy of the law to dispense with this method of securing evidence whenever practicable. Of course, if answers to interrogatories have already been read to the jury, and the witness afterwards comes into court, this would not require that the answers be ruled out or withdrawn. Nor must anything here said be construed to prevent the introduction of answers to interrogatories for the purpose of impeaching a witness when his testimony on the stand is in conflict with that which had been taken by commission. Nor is the rule announced applicable to female witnesses, for they enjoy at least a qualified privilege as to attending court.

2. The evidence showed that a violent collision had taken place between the engine which the plaintiff's husband was running as engineer, and certain box cars which were standing upon a side track. The wreck resulting from this collision was of such character that there could be no possible doubt the engine must have been running at a very rapid rate of speed. Counsel for the railway company elicited from certain witnesses a full description of the wreck and its consequences, and then asked of each "whether or not a collision of that violence could have taken place unless the engine had been running at a very high rate of speed." Upon objection by plaintiff's counsel the court refused to allow these questions to be answered; and, although it was not stated by counsel propounding the question what answers were expected, the court, perhaps, ought to have permitted the answers to go to the jury. It being manifest, however, that the engine was running very rapidly, and the plaintiff's declaration admitting this fact, the refusal of the court to allow the questions to be answered would certainly be no cause for a new trial.

3. The defendant desired to show "the com-

mon experience of railroads" in getting back switch keys from their employes, and, in this connection, to prove that all railroads have great difficulty in keeping up with such keys, and recovering them from discharged employes. It also sought to prove "the custom or usage of railroads in reference to providing a watchman for each of their switches," and "that the general custom was not to provide a watchman for such switches." The court rejected all of this testimony, and, in our opinion, did so properly. Testimony as to the common experience, customs, or usages of railroads, without reference to whether they are wisely or badly managed, or to their particular location or surroundings, or to peculiar circumstances which, in any given instance, would tend to illustrate the diligence or negligence of a company in recovering or failing to recover its switch keys, or in guarding or failing to guard its switches, would be too vague, uncertain, and indefinite to aid a jury in determining in a case on trial whether or not the railroad company was diligent or negligent in these respects. No two cases are exactly alike, and, the facts and circumstances in each being different in greater or less degree from those arising in others, the better and safer rule is to allow the jury, as to questions of the kind presented, to determine every case upon its own individual merits, and in the light of its own particular facts. In some cases the failure to recover a switch key or to have a switch guarded, might involve little or no negligence whatever. In other cases, such failure might amount to very gross negligence. This being so, to permit evidence as to the common experience and general custom of railroads in such matters would probably be misleading, and certainly would have little weight in a given case in arriving at a fair and just conclusion upon the question of negligence.

4. The main defense relied upon was that the engineer for whose homicide the action was brought was himself guilty of negligence in bringing about the collision which resulted in his death, by running his engine at too great a speed, and in violation of the company's rules. In support of this defense the defendant offered to prove by one McCrary that the deceased was habitually reckless in running freight trains at excessive speed, and in running too fast over switches. It appeared from McCrary's testimony that he had been conductor of a freight train on defendant's road between Macon and Brunswick, on which Kane was engineer, and that Kane had pulled him two or three times on a local freight. Under these circumstances, McCrary could hardly swear with accuracy to the habitual recklessness of the deceased. The admissibility of testimony of this kind is, at best, very doubtful. While in *Savannah, F. & W. R. Co. v. Flannagan*, 82 Ga. 579, this court held that it was not error to receive evidence showing the high speed at which the same engine was habitually run by the same engineer at the same place, and that he habitually neglected to ring the bell, *Chief Justice Bleckley*, on pages 588, 589, 82 Ga., characterized this evidence as being of doubtful

admissibility, and stated that the authorities upon the question were in conflict, citing quite a number on both sides. The testimony offered in the case at bar is by no means so strong or pertinent as that in *Flannagan's Case*; so, upon the whole, we conclude there was no error in rejecting it. In this connection, see also, *Atlanta & W. P. R. Co. v. Newman*, 85 Ga. 517, and *Central R. & Bkg. Co. v. Kent*, 87 Ga. 402, 408.

5. It would be a long step forward in judicial procedure if each party was required to admit every allegation in the pleadings of the other party which he was unwilling to deny upon oath, and thus relieve his adversary of the necessity of proving matters concerning which there is no real contest, and saving the courts much time, vexation, and trouble. If this be so, certainly a party should be relieved from proving that which his adversary distinctly alleges. No sensible reason occurs to us why the defendant may not avail himself of all allegations in the plaintiff's declaration, without formally tendering the declaration in evidence, or otherwise proving the admissions it contains. The declaration being the very foundation of the plaintiff's case, he certainly should be bound by whatever he chooses to allege therein; and he can have no just reason to complain if, in the progress of the trial, his own assertions be taken as true. Nor can we see any reason for requiring the defendant to offer the declaration in evidence. It is usually read to the jury, or its contents are stated in their hearing, and they have it before them in their deliberations. It is therefore available for all proper purposes, whether it be distinctly offered as evidence against the plaintiff or not. As far back as 9 Ga., in *Peacock v. Terry*, (page 187,) the principle for which we are contending was distinctly stated in the following language: "Facts alleged positively in a bill are constructive admissions in favor of the defendant, and need not be proven. The complainant cannot deny them, even if they are not true, but must recover according to the case he makes upon the record." And *Judge Nisbet* makes the matter as clear as daylight on pages 149, 150, of the same volume. In the present case the plaintiff's declaration alleged that her husband was running his engine at a high rate of speed, and the defendant consequently had a right to rely upon this allegation as an admitted fact, and no unfavorable inference could, therefore, be drawn against the company because of any failure on its part to call as witnesses its own employes to prove this fact.

6. While a railroad company is bound to exercise ordinary diligence to recover its switch keys from discharged employes, the mere failure to do so in a particular instance would not, *per se*, make the company liable for the consequences of a criminal misplacement of a switch by a discharged employe who had retained in his possession a key which enabled him to do the mischief. What would be ordinary diligence in endeavoring to recover a switch key from one no longer in the company's employ must necessarily vary according to the facts and

circumstances surrounding each particular case. Very slight diligence would be "ordinary" in the absence of any reason to anticipate or fear that the key would be improperly used by the person who was allowed to retain it. If there was any reason to excite such fear, the company would be under greater obligations either to get back the key, or else guard all switches, an interference with which was to be anticipated; and the greater the reason for apprehending such interference, the greater should be the care and diligence of the company to prevent it. No fixed and unbending rule could be laid down which would be fixed and applicable to every case. It is simply one of those things which a jury must determine in each case in the light of its own particular and peculiar facts and circumstances. This much, however, may be regarded as well as settled, viz., that, in the absence of any reason other than the mere fact of his discharge from his service, a railway company is not bound to anticipate that a former employé, purely out of revenge for his discharge, will secretly commit so heinous a crime against it and the public as to maliciously misplace a switch for the purpose of wrecking a train. In *Keeley v. Erie R. Co.*, 47 How. Pr. 256, the evidence showed conclusively that there was no negligence or want of proper care on the part of the defendant in the management of its road or in the running of its cars at the time of the accident, but was clear and convincing that the accident was caused solely by the misplacement of a switch by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train in the night-time; and it was accordingly held that a nonsuit was proper. This case is cited approvingly in *Bishop, Non-Contract Law*, § 550. We do not think a railroad company is bound, under all circumstances, and at all times, to maintain constant vigilance to prevent all persons whatever not in its employ from having the means or opportunity of tampering with its switches or its tracks. In *Keeley's Case*, *supra*, the court does not discuss the duty of the company to keep a constant and unremitting watch against trespassers, but seems to take it for granted that usually this would be impossible, and this we think is undoubtedly true. As stated above, the only practicable way of ascertaining whether or not, in any particular instance, the company exercised the proper degree of care in protecting its switches from interference, is to leave the question to a jury; and in determining it they may look to all the surrounding circumstances to ascertain if there was any reason for the company to apprehend such interference, and if, so, whether, in the given instance, it used due diligence in endeavoring to prevent the same. In the case with which we are now dealing, the charge of the court, in effect, made the failure of the company to recover a switch key which had been suffered to remain in the hands of a discharged employé, if ordinary diligence had not been used by the company to get the key back, a ground of recovery. This charge assumed that the mere failure to recover the

key was the cause of the injury, and was therefore erroneous. Even granting that such failure amounted to a breach of ordinary diligence, it might not, of itself, have been sufficient to authorize a recovery. It was still a question for the jury, and not for the court, whether the negligence of the company, if negligent at all, in failing to recover the key, was, under the circumstances, the real cause of the injury.

7. One ground of the motion for a new trial assigned as error the refusal of the court to charge the following written request: "The plaintiff is confined to the allegations of negligence made in the petition. There is no allegation of negligence respecting the company's leaving any key in the possession of any employé, and you cannot find for the plaintiff on that ground." It is true that the plaintiff did not seek to recover because of negligence on the part of defendant in improperly leaving one of its switch keys in the custody of a discharged employé; but because of the alleged negligent misplacement of a switch which caused the death of her husband. The plaintiff proved that the switch was misplaced, and that such misplacement was the cause of the collision. The defendant sought in reply to show that the misplacement of the switch was not due to its fault, but that the mischief was done by an evil-disposed person, not in its service. The plaintiff, in turn, endeavored to meet this defense by proving that the company was negligent in affording the evil-disposed person an opportunity to carry out his designs, and in not taking the proper steps to prevent their successful accomplishment: in other words, the plaintiff sought to break down the defense of the company by showing that the facts alleged and proved by it involved a breach of diligence on its part in a material respect. It is quite clear to our minds that the plaintiff had a right to urge such breach of diligence, not as a distinct basis of recovery, but for the purpose of defeating the defendant's justification, and this the plaintiff could do although she had not in her pleadings made any special reference to this particular negligence on the part of the defendant. If the charge requested had been given, this right of the plaintiff would have been cut off, and the request was therefore properly refused.

8. The motion for a new trial contained many grounds. We have ruled upon and disposed of such of the same as bear materially upon the real merits of the case. The questions presented by those not mentioned will most probably not arise upon the next trial. According to the plaintiff's own allegations in her declaration, her husband was running his train at a high rate of speed at the time of the collision, and the undisputed evidence is, he was running it in direct violation of positive rules of the company, of which he not only had knowledge, but which he had expressly and solemnly, upon entering the service of the company, agreed to obey. The following are such extracts from the rules introduced in evidence as are pertinent: "All trains will approach stations with great care, expecting to find the

main track occupied between the station limits (switches, when no posts are up, or other point designated). The responsibility for accident between limit posts (or switches), or at fuel and water stations, will rest with approaching trains." "All trains must reduce speed, and run with great care, after rains and storms, while passing switches, through tunnels, and crossing long bridges." "When approaching stations and sidings, enginemen must observe that switches are set right, and always look out for signals." "Conductors and enginemen will be held equally responsible for the violation of any of the rules governing the safety of their

trains, and must take every precaution for the protection of their trains, even if not provided for by the rules." The plaintiff's husband being an employé of the company, and having been guilty of negligence in bringing about the catastrophe which resulted in his death, she was not entitled, under the facts as they appear of record, to a recovery. For this reason, and because of errors committed by the court, a new trial is ordered; and if upon the next hearing the evidence is substantially the same there should be a verdict for the defendant.

Judgment reversed.

MICHIGAN SUPREME COURT.

MICHIGAN SHINGLE CO.

v.

STATE INVESTMENT INSURANCE CO.,
Plff. in Err.

(94 Mich. 389.)

The knowledge of an insurance agent that a warranty by the assured that "a continuous clear space of 150 feet shall hereafter be maintained" between the property insured and any woodworking or manufacturing establishment did not represent the existing state of facts and that there was no intent to change the situation and that the insured could not control a clear space for that distance, prevents a forfeiture of the policy for breach of the warranty, where the agent accepts the premium and issues the policy without taking any steps subsequently to rescind it though knowing of the breach of the warranty, and it appears that on account of the situation of the property, the manner of its use, and its proximity to water, he considered that the existing space was equivalent to that required.

(*Grant and Montgomery, JJ., dissent.*)

(December 24, 1892.)

ERROR to the Circuit Court for Muskegon County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bunker & Carpenter and R. W. Barger, for plaintiff in error:

Plaintiff alleged it had maintained the required clear space, and under this allegation it was permitted to prove, not that it did maintain it, but that though it had not maintained it, it had been excused therefrom by other affirmative testimony in avoidance. Before this testimony could properly be admitted the plaintiff should, by his pleadings, have confessed that it did not exist, and alleged other facts which would constitute an avoidance.

Meadows v. Hawthorne Ins. Co. 62 Iowa, 387. Suppose that Mr. Smith knew when the pol-

icy was negotiated that the space did not then exist. The warranty was that thereafter this space should be maintained. Did the fact that Smith knew the situation when the policy was asked for or issued tend to prove that after the policy was issued this space was maintained? Not at all. And this space thereafter must be maintained or the policy would be void.

Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 779.

The policy provided that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached.

If this clause was a part of our policy, and itself was not also waived, then Mr. Smith had no right to strike out the space clause of the policy without at least indorsing it in writing upon the policy, and this was not done, and therefore proof of an elimination of this space clause from the contract by Mr. Smith orally or otherwise not indorsed on the policy was incompetent.

Cleaver v. Traders' Ins. Co. 65 Mich. 527; *Robinson v. Fire Asso. of Philadelphia*, 68 Mich. 90; *Hankins v. Rockford Ins. Co.* 70 Wis. 1; *Wulsh v. Hartford F. Ins. Co.* 78 N. Y. 5; *Marvin v. Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *German Ins. Co. v. Heiduk*, 80 Neb. 296; *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. 384, 42 Am. Rep. 618.

The understanding of Mr. Ducey was not competent evidence as to what this written contract was. Neither was the second-hand opinion of insurance men, as it was given by Mr. Ducey against our objection.

NOTE.—The effect of an agent's knowledge of the falsity of answers in an application for insurance is treated in an extensive note to *Clemans v. Supreme Assembly Royal Soc. of Good Fellows* (N. Y.) 16 L. R. A. 83.

The rule that has been in some cases strictly applied is

plied to deny any relief from the falsity of a warranty even if the facts were known to the insurance agent is limited in an important respect by the decision in the above case and that following, *Mutual Ben. L. Ins. Co. v. Robison*, post, 825.

Holmes v. Hall, 8 Mich. 66, 77 Am. Dec. 444; *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116; *Tompkins v. Gardner & S. Co.* 69 Mich. 62; *Jones v. Phelps*, 5 Mich. 218; *Sutherland v. Crane*, Walk. Ch. 523; *Walker v. State Ins. Co.* 46 Kan. 812; *Putnam v. Russell*, 86 Mich. 389; *McKenzie v. Sykes*, 47 Mich. 295.

The policy provided that "this policy is made and accepted subject to the foregoing stipulations and conditions," none of which they declare in writing can or shall be considered as waived, except evidence of the agreement to waive same be indorsed in writing upon the contract itself. Under these circumstances the circuit court should have sustained the motion of defendant for verdict.

Wood, Fire Ins. 2d ed. 422, 425, 428; *May, Fire, Life & Acc. Ins.* 3d ed. §§ 156, 157; *American Ins. Co. v. Gilbert*, 27 Mich. 481; *Robinson v. Continental Ins. Co.* 6 L. R. A. 95, 78 Mich. 641; *Miller v. Amazon Ins. Co.* 46 Mich. 463; *Chippewa Lumber Co. v. Phenix Ins. Co. supra*; *Etna Ins. Co. v. Reah*, 44 Mich. 55, 38 Am. Rep. 228; *Briggs v. Freeman's Fund Ins. Co. of San Francisco*, 65 Mich. 52; *Security Ins. Co. v. Fay*, 22 Mich. 467, 7 Am. Rep. 670; *New York Cent. Ins. Co. v. Watson*, 28 Mich. 486; *Worcester v. Worcester Mut. F. Ins. Co.* 9 Gray, 27; *Glendale Woolen Mfg. Co. v. Protection Ins. Co.* 21 Conn. 19, 54 Am. Dec. 309; *Stout v. City F. Ins. Co.* 12 Iowa, 371, 79 Am. Dec. 539; *Murdock v. Chenango County Mut. Ins. Co.* 2 N. Y. 210; *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Ripley v. Etna Ins. Co.* 80 N. Y. 187, 86 Am. Dec. 362; *First Nat. Bank of Ballston Spa v. North America Ins. Co.* 50 N. Y. 45; *Blumer v. Phenix Ins. Co.* 45 Wis. 622; *Bibbrough v. Metropolis Ins. Co.* 5 Duer, 587.

The meaning of the language of the contract was a question of law for the court and not of fact for the jury.

2 *Wood, Fire Ins.* p. 1112; *McKenzie v. Sykes, supra*; *Gage v. Meyers*, 59 Mich. 307; *Tompkins v. Gardner & S. Co. supra*.

Messrs. Smith, Nims, Hoyt & Erwin for defendant in error.

Durand, J., delivered the opinion of the court:

This case was brought to recover upon an insurance policy, by which the defendant had insured the plaintiff upon certain lumber, lath and shingles, owned by it, or held in trust or on commission, or sold but not delivered, piled on its mill docks Nos. 3, 4, and 5, at Muskegon, Mich. Among other things the policy contained a clause as follows: "Warranted by the assured that a continuous clear place of 150 feet shall hereafter be maintained between the property hereby insured and any woodworking or manufacturing establishment, and that said space shall not be used for handling or piling of lumber thereon for temporary purposes, tramways upon which lumber is not piled alone being excepted; but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such clear space; it being especially understood and agreed by the assured that any violation of this warranty shall render this policy null and void." Within a few days after the policy was given, the insured prop-

erty was destroyed by fire. At the time the policy was issued the agent who insured it knew the exact condition and location of the insured property, and knew that the clear space of 150 feet, actual measurement, did not exist, and he also knew that the assured did not have it in its power to control a clear space for 150 feet, as mentioned in the policy. He knew that the adjoining docks 1 and 2 were being used for the purpose of piling lumber and shingles upon, and that it was not the intention of the assured to make any change in its method of conducting the business, or in the use of the space as it was used at the time the policy was given. He also knew, as stated in the brief of defendant's counsel, that in a narrow straight line from the lumber on the docks to the plaintiff's saw-mill there was perhaps a clear space of 150 feet, but that out of a straight line this was not so, and that between the lumber on the docks and Hovey & McCracken's mill there was not a continuous clear space of even 100 feet. But the agent understood it, and knew how the docks were used and to be used. The rate of premium to be paid for insurance upon the different docks was fixed by defendant's agent with reference to the supposed risk in view of the manner in which the docks were used, and the distance from other exposure. The record shows that although the clear space referred to was not 150 feet, actual measurement yet that on account of the situation of the property, the manner of its use, and its proximity to water, it was considered equivalent to that distance by insurance men, and the testimony clearly shows that it was so considered in the office of the defendant's agent, who, in full knowledge of the actual distance maintained and to be maintained, wrote the policy referred to, and placed that distance at 150 feet. No change was made by the assured after the issuing of the policy, and of this fact, also, the defendant's agent had full knowledge. He resided in Muskegon, had examined this property with special reference to its location and to its desirability as insurance property, and, knowing these facts, issued the policy referred to, and took the premium which he charged for the insurance. The defendant insists that the clause "that there shall be hereafter maintained 150 feet clear space" must be rendered literally, and without regard to the knowledge of the agent as to what the actual distance was, thereby asserting that it has the right to accept the money of the assured, issuing its policy therefor, and lead him to understand that he has a valid insurance until a loss occurs, and then to repudiate its liability. Such a rule as this would enable it to affirm a contract entered into by it with full knowledge of all the facts in so far as such contract might be of advantage to it, and to repudiate it the moment it ceased to be advantageous. This is inequitable, and contrary to the well-established rule in reference to when and how the repudiation of a contract shall be made. The knowledge of the agent is the knowledge of the company.

"If the insurer receives the premiums with full knowledge of facts constituting a breach of one of the conditions of the policy, the

right to insist that the policy is forfeited for that cause is gone." *Mershon v. National Ins. Co.* 34 Iowa, 87. In *Piumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 892, 73 Am. Dec. 526, where the agent of a company had incorrectly filled in the measurements, he himself knowing that they were incorrect, it was held that his knowledge bound the company,—that they were estopped to deny the assertion. In *Rowley v. Empire Ins. Co.*, 3 Keyes, 557, the application stated: "I own the property; there is no incumbrance." But there was a mortgage upon the property, of which the insurer's agent had notice, but notwithstanding that notice the agent filled up the policy, setting forth falsely that there was no incumbrance. It was held that the insurers were estopped to set up the incumbrance as a defense to the action. In *Hodgkins v. Montgomery County Mut. Ins. Co.*, 34 Barb. 213, the application stated: "The above property is owned and occupied by me."

As a matter of fact these words were inserted by the defendant's agent after plaintiff had informed him as to the particular nature of his title and interest, which was a contract for the purchase of the land, and for which a deed was not demandable at the time the fire occurred. It was held that the knowledge of the agent was the knowledge of his concern, and that the insurers were estopped to defend on the ground that the interest was misstated. In *Howard F. Ins. Co. v. Bruner*, 23 Pa. 50, the description and survey were made a part of the policy and a warranty on the part of the insured, and one of the conditions was that a false description should vitiate the policy. The application failed to disclose mortgages to the amount of \$6,000 which were upon the property. It stated that the works were operated by the proprietor, and lighted by closed lamps. The proof showed that an open light was used to light up with; that the works were not exclusively operated by the proprietor; but it was proved that the company's agent knew how the building was occupied, and knew of the mortgage; and it was held that the plaintiff was entitled to recover. In *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. 81, insurer's agent examined the premises, and wrote the description in the application, but nothing was said about an oven contained in the building. Held, that it would not avoid the policy if the material matter was open to view, or if the insurer's agent had notice of it. The same rule was held in *Columbia Ins. Co. v. Cooper*, 50 Pa. 331. In *People's Ins. Co. v. Spencer*, 53 Pa. 353, 91 Am. Dec. 217, the policy stated that "the risk shall not be increased without the consent of insurers." The insured did increase the risk by using it for the purpose of distilling whiskey. It was held a question of fact for the jury whether the agent ought to have known from the examination he made, or was told, that the premises would be used for distilling, and, if he did know it, the company must be held to have taken the risk with their eyes open. In *James River Ins. Co. v. Merrill*, 47 Ala. 387, the application described the property as a frame steam sawmill and machinery contained therein. As a matter

of fact there was a planing machine in the building, which was a class of property for which a higher rate of premium would have been charged. The insurer pleaded that the presence of the planing machine was concealed. The plaintiff replied that the application was written by the defendant's agent after an inspection of the property. It was held that the replication was good. In *Franklin v. Atlantic F. Ins. Co.*, 42 Mo. 456, it was stipulated that the interest of the insured in the property must be an entire, unconditional, and sole ownership. The company's agent was informed that the insured was only a part owner, and that the property was incumbered. It was held that the company was estopped to set up the conditional interest as a defense to the action. In *Atlantic Ins. Co. v. Wright*, 23 Ill. 463, it was stipulated that, if the interest of the insured was other than absolute, the insurance should be void. The fact was that the absolute title was held by trustees for the use of his wife, which fact was not stated in the policy, but the particulars of the title were made known to the company's agent. It was held that the company was estopped to contradict the description stated in the policy. In *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 27, it was stipulated that if the interest of the insured be less than a fee it must be stated in the policy. The insured stated that it was a fee. The agent of the company knew that he had made a mortgage upon the premises to secure \$10,000, and the policy was made payable to the mortgagee. It was held that to permit the company to defend on that ground would countenance the perpetration of a gross fraud. The same rule is held in *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Anders Ins. Co. v. Shipman*, 77 Ill. 189. In *McBride v. Republic F. Ins. Co.*, 30 Wis. 563, the application was filled up by the company's agent, stating the title to be in the plaintiff. It was held that if the agent was informed in regard to the title, and he inserted in the application an untruth in respect to it, the misrepresentation would not affect the plaintiff's right to recover; and in *Winnans v. Allemansia F. Ins. Co.* 38 Wis. 843, where the insurer was prohibited, among other things, from using gasoline within the insured building, except by writing indorsed on the policy, it was proved that the agent consented that the premises might be lighted with gasoline until a change in the manner of lighting could be effected. The premises were consumed by fire before the change was made. It was held to be settled law in that state that an agent of an insurance company, authorized to take risks and issue policies against fire, may waive by parol any conditions in the policies issued by him. The agent who has power to accept applications and issue policies, but who with knowledge of the facts fails to state them correctly, binds the company to the misdescriptions made by him; and although the statements made in the application were untrue, yet if the insurer was informed of and knew the truth, and after such knowledge received the application and premium and issued the policy, he must be held liable, and the knowledge of the agent is

the knowledge of the insurer. *Miller v. Mutual Ben. L. Ins. Co.* 81 Iowa, 216, 7 Am. Rep. 122; *Ayres v. Home Ins. Co.* 21 Iowa, 185. In *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202, the policy prohibited keeping gunpowder without permission written upon the policy. It was held if the agent who issued the policy knew that gunpowder was kept, and to be kept, the contract was valid, whether permission was indorsed or not, notwithstanding the printed condition in the contract showing the agent's authority was limited, for the company must be regarded as having known that gunpowder was and would be kept; the knowledge of the agent being the knowledge of the principal. It would be a fraud to permit him to issue a policy which they intended to treat as void if loss occurred. In *Atina Live Stock, F. & T. Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 483, the application was required to state what, if any, incumbrances were upon the property insured, and the amount. There were two mortgages upon it. The company's agent admitted that he knew of the mortgages when he drew up the application. The application was made part of the contract, and the answers were expressly made warranties. It was held that the failure to disclose the mortgages was to be attributed either to the agent's ignorance, negligence, or fraudulent pretense; he was giving an indemnity when he knew he was giving none; and that it was fraud on the insured to take the premium; hence the insurers were estopped on that ground. The same rule was laid down in *Michigan State Ins. Co. v. Lewis*, 80 Mich. 41; *Hall v. Concordia F. Ins. Co.* 90 Mich. 403; *Haire v. Ohio Farmers' Ins. Co.* 93 Mich. 481.

In commenting on this subject, in *Atina Live Stock, F. & T. Ins. Co. v. Olmstead*, *supra*, Mr. Justice Cooley says: "It is true that in this case the paper in question was drawn by an agent, but we do not think that in a legal point of view the rights of the parties are any different from what they would be had the agent himself been the insurer. The insurance business of the world is done through agents almost exclusively, and the maxim, *qui facit per alium facit per se*, applies with special force to their acts. These agents assume to have, and generally do have, much more intimate knowledge of the business than those with whom they deal, . . . and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts the paper, which he declares satisfactory, induces the other party to sign it, receives and retains the insurance money, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that the community is at the mercy of the insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive."

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Act 149 of the Session Laws of 1881, which is an act to provide for a standard form of fire insurance policy, was evidently intended by the legislature to prevent some of the abuses complained of by Mr. Justice Cooley, for it is expressly stated in the act that the form of policy contemplated by it was for the purpose, among other things, of "securing fairness and equity between the insurers and insured," and for the "avoidance of conditions, the violation of which by the assured would, without being prejudicial to the insurer, render the policy void, or voidable at the option of the insurer." If the end sought for by the legislature has not been accomplished it is no fault of the act. It is certain, however, that it was not thought desirable that the insurer should be furnished with any more avenues for the avoidance of its policies than had already been recognized by the courts, when dealing with the forfeiture clauses usually contained in policies of insurance. No different rule should be adopted in this class of cases than is in others, and the same rules in relation to estoppel and waiver should be applied. In this case the agent of the company knew the exact amount of continuous clear space kept, and to be kept, by the plaintiff, and decided that such clear space, in consideration of the situation of the property and its surroundings, was equivalent to 150 feet, as ordinarily understood by insurance men. He wrote the distance in the policy himself. He took the plaintiff's money for a supposable valid insurance, and led him to believe it was such. He knew that no change was made by the plaintiff to increase the actual amount of continuous clear space after the policy was issued, and that it was not expected by either party that he should do so. Yet, knowing these facts, no steps were taken by him to cancel the policy, or to refund the money obtained from plaintiff on account of it. The benefits of the transaction were all retained by the defendant so long as no liability was impending, and it was not until after the loss occurred that a forfeiture was claimed by it. To allow this to be done under these circumstances would be to permit a person to keep silent when he should speak, and to enable him to reap the benefit of his own wrongdoing after having himself led his victim into a trap. It must be held that the defendant is estopped from avoiding the policy for the reasons claimed by it.

The judgment should be affirmed, with costs.

McGrath, Ch. J., and Long, J., concurred with Durand, J.

Grant, J., dissenting:

This is a suit upon a policy of insurance dated September 2, 1890, and covering the same property as that in the case of the same plaintiff v. *London & Lancashire Fire Ins. Co.*, 91 Mich. 441. The policy is one known as the "Michigan Standard," being the one required by the Michigan statute. Its terms are identical in language with that of the *London & Lancashire Fire Insurance Company*. The warranty for the maintenance of 150 feet clear space is the same. The only dif-

policy." One Easton, a local insurance agent, testified that he knew the use to which these docks were put, and that the rate of \$2.75 per hundred on docks 3, 4, and 5 was because there was 150 feet space from the mill. On cross-examination the witness was asked, "When you say that that rate was fixed because it was more than 150 feet from any woodworking or manufacturing establishment, you mean that it was because there were more than 150 feet of clear continuous space between the property rated and such an institution, do you not?" *Answer.* I mean to say that there was 150 feet space between the shingle company's mill and this lumber. *Question.* In fixing the rate at \$2.75 on lumber, it is established only in such cases where it is at least 150 feet of continuous clear space between the property rated and such an establishment, is it not? *A.* I don't think there was 150 feet space. *Q.* You don't answer my question. *A.* That is the basis the rate is fixed."

One Wood, another local insurance agent, testified that he thought the space between dock 1 and the westerly dock of the adjoining mill owners, which was less than 100 feet, was considered equivalent to 150 feet. He further testified that sometimes docks 1 and 2 were covered with shingles, and sometimes they were not, and that they varied at different times in amount and in places where they were piled, according as they were manufactured and shipped. In reply to the question whether in placing insurance under the circumstances it would be expected by insurance men that the material on docks 1 and 2 should be removed, or whether he would simply expect to maintain substantially the same conditions as existed at the time the insurance was effected, this witness said: "That would be considered as maintaining it at the time insurance was effected by some insurance men. I don't know that all would consider it so." All this testimony was received under objection and exception. At the time of the fire, shingles were piled upon docks 1 and 2 to within 25 or 30 feet of the mill, and lumber was also piled upon the docks of the adjoining mill owner to the west. The above is the substantial statement of all of the material testimony.

The court submitted the case to the jury, and the theory upon which this was done appears in the following portion of his charge: "The main controversy in question for you to decide is whether or not the plaintiff did maintain, during all the time this policy of insurance was in force,—that is, from the time it was issued up to and including the time of the fire,—this continuous clear space of 150 feet between the property insured on these three docks and any woodworking or manufacturing establishment, according to the true intent and meaning of that language as employed in that policy, and as the parties understood it. The plaintiffs claim that they did. The defendant claims that they did not. To entitle the plaintiff to recover, it must have satisfied you by a fair preponderance of the testimony in the case that it did maintain that clear space. Now, the contention is right there. The plaintiff says, 'We did maintain

it; we made the contract; we don't deny it; it is there just as it reads; but we insist that we did maintain that space just as we understood it, and just as you understood it,—just as you knew we understood it.'" The jury found a verdict for the plaintiff. The facts were undisputed, and the question was one of law to be determined by the court. The jury must have found that the plaintiff and defendant's local agent understood and agreed that 25 or 30 feet between docks 1 and 2 and the mill was the equivalent of the 150 feet provided by the contract, and that the space of 96 feet between dock 1 and the next dock to the west was also the equivalent of 150 feet. The warranty was not one as to existing facts, but of conditions to be maintained in the future. There is nothing upon this record to show, nor is it claimed, that the plaintiff did not fully understand the terms of its contract. It knew that it had agreed to maintain 150 feet clear space. The condition was not impossible of performance. The result of this holding would be to set aside the plain and unmistakable terms of a contract, and substitute therefor by implication another and entirely different contract. The warranty was not affirmative, but promissory, in its character. If this be the rule, then if plaintiff had been in the habit of keeping a pile of lumber midway, and in a direct line, between these docks and its mill, and the defendant's local agent had known this when the policy was issued, the subsequent maintenance of such a pile of lumber would not have vitiated the policy, and the space would be held to be the equivalent of 150 feet clear space. Again, if there had been another mill or woodworking establishment situated 20 feet, or any number of feet less than 150, to the northward of docks 3, 4, and 5, this must in law be held to have been the like equivalent. Many other illustrations will readily suggest themselves to show the consequences of such a rule. *Mr. May, in his work on Insurance, (sec. 156,) says: "One of the very objects of the warranty is to preclude all controversy as to the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction no latitude, no equity. If the warranty be a statement of fact, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed."*

Plaintiff averred that it had kept 150 feet clear space. It did not allege that in one direction it kept only 25 or 30 feet, or that in another it kept only 96 feet, and that this was understood and agreed to be the equivalent of 150 feet. No such issue was framed for trial. If this clause had been inserted in the contract by fraud or mistake, plaintiff's remedy would have been in equity to reform the contract. The testimony admitted to change the express terms of the contract was incompetent. It did not tend to show any fraud or mistake, nor refer to any statements of the agents of either party affecting the question. When a principal has received a contract, made in his name by his agent, which on its face has but one meaning, such contract cannot be changed or avoided by showing a custom of business prior to the contract, and

leaving a jury or court to infer that something else was meant. This case is in my judgment clearly ruled by *Michigan Shingle Co. v. London & Lancashire Fire Ins. Co.*, *supra*.

It is the duty of courts to interpret contracts, not to make them. When the language is susceptible of but one meaning, courts have no right to say that the parties meant something else. This is not a case where the insured disclosed his title to the agent of the insurer, and the agent neglected to disclose it to his principal, as was the case in *Rowley v. Empire Ins. Co.* 8 Keyes, 557; *Hodgkins v. Montgomery County Mut. Ins. Co.* 84 Barb. 218; *Franklin v. Atlantic F. Ins. Co.* 42 Mo. 456; *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Home Mut. F. Ins. Co. v. Garfield*, 60 Ill. 124, 14 Am. Rep. 127; *Atina Live Stock, F. & T. Ins. Co. v. Olmstead*, 21 Mich. 246, 4 Am. Rep. 488; *McBride v. Republic F. Ins. Co.* 30 Wis. 562; nor the failure of the agent of the insurer, who wrote the application and took the risk, to insert in it that a planing mill was used in the mill, as was the case in *James River Ins. Co. v. Merritt*, 47 Ala. 387; nor of the parol waiver of a condition in the policy by the agent till a change could be made to correspond with its terms, as in *Winans v. Allemantia F. Ins. Co.*, 38

Wis. 342; nor where the insured was induced by the agent to believe that he could keep gunpowder, which was prohibited by the policy, as in *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 213. These cases, and many like them, are based upon the fact that there is a difference between the representations in the policy and the actual facts existing at the time, or that there was an express waiver by the agent of a condition in the policy. In the present case there was no misrepresentation, no misunderstanding, no statement made to induce the assured to believe that his contract meant other than it read, or that it would be relieved from the full performance of its provisions. Plaintiff's warranty was not that a certain state of facts existed, but that a certain state of facts should exist in futuro. If it did not desire such a contract it should have declined to make it. It cannot now be heard to say to the defendant: "You knew that I did not intend to keep my warranty, and therefore are estopped to say that I did not keep my contract."

Judgment should be reversed, and no new trial ordered.

Montgomery, J., concurred with **Grant, J.**

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MUTUAL BENEFIT LIFE INSURANCE CO., *Appt.*,

v.

Charles W. ROBISON.

(55 Fed. Rep. 723.)

- 1. The difference between a warranty and a representation** in an application for insurance is that a warranty must be literally true without regard to its materiality to the risk, while a representation must be true only so far as it is material to the risk.
- 2. An insurance company is estopped to question the truth of answers in an application**, notwithstanding the application warrants the answers to be true, where they are made under a requirement of the company by its own medical examiner who deduces the answer from facts correctly stated to him by the applicant.
- 3. The construction of the words "spitting of blood"** by a medical examiner in filling out answers to an application for insurance, as it was his duty to do, to mean the spitting of blood from the lungs or bronchial tubes only, is conclusive on the insurance company.
- 4. A clause in a policy withholding from agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance"** has no reference to the application which precedes the policy.
- 5. The rule that the breach of a warranty of the truth of an applicant's answer avoids an insurance policy without reference to his good faith or the ma-**

teriality of the answer cannot be applied to avoid a policy for the falsity of an answer resulting from a mistake in judgment, or an error, or blunder of the company's agent who was specially charged by the company with the preparation of the application and who made the answers upon a full and truthful statement of the facts by the applicant.

- 6. A rule of evidence under a state statute as to privileged communications must be regarded in a circuit court sitting in that state**, under U. S. Rev. Stat., § 863, making the laws of the state the rules of decision as to competency of witnesses, except as affected by the color or interest of the witness, or in actions against executors and administrators or guardians.
- 7. Judicial notice will be taken by a federal court** that the distance between Dubuque, Iowa, and Asheville, N. C., is more than 100 miles.
- 8. A witness "lives" where he is sojourning** for his health for an uncertain time within the meaning of U. S. Rev. Stat., § 863, in respect to the taking of depositions of a witness who lives more than 100 miles from the place of trial.

(November 13, 1896.)

A PPEAL by complainant from a decree of the Circuit Court of the United States for the Northern District of Iowa dismissing a bill filed to cancel certain life insurance policies. *Affirmed.*

The facts sufficiently appear in the opinion. Argued before Caldwell and Sanborn, Circuit Judges.

Mr. Francis B. Daniels, for appellants: The statute of Iowa in respect to testimony of physicians, etc., does not apply in this court.

NOTE.—See case preceding and reference note thereto.

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Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; *Liggett v. Glenn*, 4 U. S. App. 438, 51 Fed. Rep. 381.

In the absence of a statute "medical men and (probably) clergymen, may be compelled to disclose communications made to them in professional confidence."

Stephen, Dig. Ev. Reynold's ed. 1879, art. 117; Greenl. Ev. § 248.

There is a difference between the common law of Iowa and that of New Jersey, in the construction of written contracts of insurance as to the distinction between warranties and representations. The supreme court of Iowa is also at variance with the Supreme Court of the United States regarding these particulars. If these differences should seem material in the case at bar, either the construction of the courts of New Jersey, or that of the Supreme Court of the United States, should prevail.

Carpenter v. Providence Washington Ins. Co. 41 U. S. 16 Pet. 495, 10 L. ed. 1044.

This policy was subjected to the New Jersey construction by the express stipulation of the parties themselves.

Andrews v. Pond, 88 U. S. 13 Pet. 77, 78, 10 L. ed. 66, 67; Story, Conf. L. 6th ed. § 380; *Pritchard v. Norton*, 106 U. S. 124, 27 L. ed. 104, approved in *Watts v. Camors*, 115 U. S. 363, 362, 29 L. ed. 406, 409; *Coghlan v. South Carolina R. Co.* 142 U. S. 101, 109, 85 L. ed. 951, 954.

In the authorities cited below there is nothing against the application of the New Jersey construction to the policy, in particulars not embraced by the statutes of Iowa.

Wall v. Equitable L. Assur. Soc. 32 Fed. Rep. 278; *Equitable L. Assur. Soc. v. Pettus*, 140 U. S. 226, 35 L. ed. 497; *Berry v. Knights Templars' & Masons' Life Indemnity Co.* 46 Fed. Rep. 489, affirmed in 50 Fed. Rep. 511; *Fletcher v. New York L. Ins. Co.* 18 Fed. Rep. 526; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934.

Dr. Staples knew, and Mr. Robison knew, that Mr. Robison's spitting of blood was not the kind of spitting of blood that every one has. They knew that his spitting was of a character exceptional to that experienced by all men. When they knew that, they knew that it was, at the least, a case of which the particulars should be given under head of "Remarks," so that the company could determine their importance at the home office.

I have no doubt that, if a man had spit blood from his lungs, no matter in how small a quantity, or even had spit blood from an ulcerated sore-throat, he would be bound to state it. The fact should be made known to the office, in order that their medical adviser might make inquiry into the cause.

Geach v. Ingall, 14 Mees. & W. 95.

The policy provides: "Nor are agents authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture thereof." This provision denies any right of the examiner to construe the terms of the application which is a part of the contract.

Globe Mut. L. Ins. Co. of N. Y. v. Wolff, 95 U. S. 326, 24 L. ed. 387.

But even if this were not so, the authority 23 L. R. A.

relied on by Mr. Robison must be proved by him, which has not been done.

See *First Unitarian Soc. of Chicago v. Faulkner*, 91 U. S. 417, 23 L. ed. 284.

In order to bind the company by the construction given by the local examiner, it is necessary that express authority in the examiner be shown.

Connecticut Gen. L. Ins. Co. v. McMurdy, 89 Pa. 363.

This answer is false, even if Dr. G. M. Staples' construction of the words "spitting of blood" should be regarded as binding upon the company. There is a clear preponderance of the evidence that this spitting of blood was from the lungs, or hæmoptysis. If so, the applicant's misstatement was fatal, no matter how he was led into the error.

Chrisman v. State Ins. Co. 16 Or. 283; *Cooper v. Farmers Mut. F. Ins. Co.* 50 Pa. 299, 88 Am. Dec. 544; *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. 41; *Voss v. Eagle Life & Health Ins. Co.* 6 Cush. 42; *Tebbetts v. Hamilton Mut. Ins. Co.* 8 Allen, 569; *Thomas v. Fame Ins. Co.* 108 Ill. 91; *Foot v. Athena L. Ins. Co. of Hartford, Conn.* 61 N. Y. 571; *Clemans v. Supreme Assembly R. S. of G. F.* 16 L. R. A. 88, 181 N. Y. 485; *State Mut. F. Ins. Co. v. Arthur*, 30 Pa. 815.

Anything, small or great, which was of sufficient importance to consult a physician for, and happened within seven years, is asked for. It is clear that the intention is to embrace the small things which might perhaps have been outgrown in seven years, but if within the seven years they should be reported to the home office for it to determine whether they might affect the risk.

United Brethren Mut. Aid Soc. of Lebanon v. O'Hara, 120 Pa. 256; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587; *Cobb v. Covenant Mut. Ben. Assn.* 10 L. R. A. 686, 158 Mass. 176.

The court below seems to argue good faith from the fact that the matters so carefully concealed from the home office were talked over with the local agents. It seems to us that this fact makes the other way, that the very thing one should do to present the most honest face while working dishonestly through a conniving agent is to assume the appearance of the utmost frankness before the agent.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934; *Globe Reserve Mut. L. Ins. Co. v. Duffy*, 76 Md. 293.

A warranty is a part of the contract. A representation is preliminary or collateral to the contract. The warranty—a part of the contract itself—cannot be modified or affected by prior or contemporaneous oral agreements or statements. Whether the matter covered by the warranty be material or immaterial, whether the truth respecting it be known or unknown, makes no difference. With regard to a representation, on the other hand—being only collateral—it cannot affect the rights of the parties unless it be material, and its legal effect will be the same whether it be verbal or written, or partly verbal and partly written.

May, Ins. 8d ed. § 156, note 3.

If upon the facts, the person to whom the representations are made is held to be such an agent that he can be treated as standing in the

place of the company to receive the representations, it follows, as a matter of course, that the company will be held to know everything that is represented, whether by word of mouth, or by paper and pen, and consequently that the company cannot escape liability on the plea that it acted in ignorance of such of the representations as were made by word of mouth.

Angell, *Fire & Life Ins.* 2d ed. §§ 145, 147, 147a; *Chrisman v. State Ins. Co.*, *Cooper v. Farmers Mut. F. Ins. Co.*, *Tebbetts v. Hamilton Mut. Ins. Co.* and *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, *supra*; *Devees v. Manhattan Ins. Co.* 35 N. J. L. 366; *Vose v. Eagle Life & Health Ins. Co.* *supra*; *Ripley v. Aetna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Thomas v. Fame Ins. Co.*, *Foot v. Aetna L. Ins. Co.* of *Hartford, Conn.*, *Clemans v. Supreme Assembly R. S. of G. F. and State Mut. F. Ins. Co. v. Arthur*, *supra*; *Western Assur. Co. v. Rector*, 85 Ky. 294; *Fitamaurice v. Mutual L. Ins. Co. of N. Y.* 64 Tex. 61; *New York L. Ins. Co. v. Fletcher*, *supra*.

If the cases holding that an insurance company cannot avoid liability by a fact the existence of which was communicated orally to the agent, are carefully examined, they will be found (questions of positive fraud aside) to come under one or the other of the following categories:

1. The statements are mere representations, not warranties.
2. The distinction between warranties and representations is lost sight of.
3. The application is the work of the agent, and is signed by the applicant without reading or knowing its contents.
4. The doctrine of estoppel is announced as the reason for holding the company.

Cases of mere representations are not relevant. The case at bar is one of unquestionable warranty.

Angell, *Fire & Life Ins.*; *Devees v. Manhattan Ins. Co.*, *Vose v. Eagle Life & Health Ins. Co.*, *Tebbetts v. Hamilton Mut. Ins. Co.*, *Ripley v. Aetna Ins. Co.*, *Foot v. Aetna L. Ins. Co. of Hartford, Conn.* and *Clemans v. Supreme Assembly R. S. of G. F.* *supra*.

The second category comprises the cases which confuse warranties with representations.

Miller v. Mutual Ben. L. Ins. Co. 81 Iowa, 216; *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 80 U. S. 18 Wall. 223, 20 L. ed. 617.

All these cases which fail to distinguish between the principles governing warranties and those governing representations must give way, in this court, before the authority of the Supreme Court of the United States. It is clear in its doctrine that where the matter is a part of the contract "the duty of the court is to enforce it according to its terms." If the statements "are untrue in any respect the policy shall be void." "There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it."

Jeffries v. Economical Mut. L. Ins. Co. 89 U. S. 22 Wall. 47, 22 L. ed. 833; *Aetna L. Ins. Co. of Hartford v. France*, 91 U. S. 510, 23 L. ed. 401; *Moulou v. American L. Ins. Co.* 111 23 L. R. A. .

U. S. 835, 28 L. ed. 447; *Phania Mut. L. Ins. Co. v. Raddin*, 120 U. S. 183, 30 L. ed. 644.

The third category comprises cases where the applicant lets the agent of the company fill up the application and then signs without reading. Such cases are not relevant to that at bar, and moreover are expressly discountenanced by the Supreme Court of the United States.

New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934.

The fourth category concerns the doctrine of estoppel. This category presents the distinction between the case at bar and every case wherein the question now under consideration has been determined adversely to the company. In every such case the company had received and retained the premium and attempted to raise the question after loss. In every such case the company's position could not be sustained without inflicting an irreparable injury upon the other party.

Bergeron v. Pamlico Ins. & Bkg. Co. 111 N. C. 45.

In the case at bar, on the other hand, the company has tendered back the premium without delay, and during the life of the policy holder, and is seeking to restore him, as well as the company to his original condition. To sustain the company's position is not to injure the other party. To refuse to sustain the company's position imposes upon the company a burden which as between man and man it ought not to bear.

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618; *Globe Mut. L. Ins. Co. of N. Y. v. Wolff*, 95 U. S. 326, 24 L. ed. 837; *Devees v. Manhattan Ins. Co.* 35 N. J. L. 566.

Messrs. Utt Bros. & Michel for appellee.

Caldwell, Circuit Judge, delivered the opinion of the court:

This is a suit in equity commenced on the 23d of June, 1891, in the United States circuit court for the northern district of Iowa, by the appellant, the Mutual Benefit Life Insurance Company, hereafter called the "Company," against Charles W. Robison, the appellee, to cancel four policies of insurance on the life of the appellee of \$5,000 each, issued by the company to him March 17, 1890. The circuit court dismissed the bill for want of equity. The opinion of Judge Woolson is reported in 54 Fed. Rep. 580.

The application for the insurance was taken in Dubuque, Iowa, where the assured then resided, by the agents of the company in that state. The application consists of four parts: First, the application to be signed by the applicant for insurance; second, questions to be asked by the agent and answered by the applicant; third, questions, to be asked by the medical examiner of the company and answered by the applicant, the answers to be written by the examiner; fourth, questions asked the examiner, to be answered by him. A clause of the application expressly provides that the answer to the question which the medical examiner is to ask "must be written by one of the company's examiners," who is instructed to "see that the answers are free from ambiguity, and that diseases are distinguished from mere

symptoms," and referring to a long list of diseases, among which is "spitting of blood," he is directed to "ask concerning each and give particulars under head of remarks." The application signed by the assured contains this provision: "I agree that the answers given herewith to the questions of the agent and examiner, which I declare and warrant to be true, shall be the basis of my contract with the company;" and the policies contained this clause: "This policy does not take effect until the first premium shall have been actually paid, nor are agents authorized to make, alter, or discharge this or any other contract in relation to the matter of this insurance, or to waive any forfeiture hereof."

For about three years before the assured was examined, the local agent of the company, Charles J. Brayton, had been soliciting him to take out a policy in the appellant company. The assured finally consented to take out a policy for \$5,000, and by direction of the agent went to the office of Dr. G. M. Staples, the medical examiner of the company, to be examined. There he met Brayton, the local agent, T. F. McAvoey, the state agent, and Dr. G. M. Staples, the medical examiner, of the company. It is conceded that these gentlemen were the agents of the company, and there is nothing to show that they were not clothed with all the powers and authority which ordinarily pertain to insurance agents in their respective positions. Dr. Staples had been the medical examiner of the company at Dubuque for twenty-five years. He had also been the family physician of the assured for many years, and had known him from childhood.

The ground set up in the original bill for a cancellation of the policies was that the answer to the fifteenth question asked by the medical examiner was "untrue, false, and fraudulent." An amended bill was filed, alleging that the answer to the eleventh question asked by the medical examiner was false and fraudulent. That question was:

"(a) For what have you sought medical advice during the past seven years? (b) Dates? (c) Duration? (d) Physicians consulted?"

The answer to this question, as written by the medical examiner, was: "(a) Debility from overwork. (b) Feb., 1888. (c) ten days. (d) G. M. Staples." The answer to this question, as given by the applicant, included the name of Dr. M. H. Waples as one of the physicians he had consulted. The fifteenth question was, "Have you ever had any of the following?" Here follow the names of forty diseases, and among them "spitting of blood." To this question the applicant made this answer to the examiner:

"On October 17, 1887, when starting for my office, Dr. S. H. Guilbert, who was attending my wife in her approaching confinement, gave me directions that he would telephone me as soon as I was needed, and to hurry home, bringing with me a prescription of chloroform. I went to my office, buying the chloroform on the way. A little after 2 o'clock, the telephone came for [me] to come instantly. I went to the horse stall in the rear of my office, where I generally kept

my horse, and found that some one was using it. I next hurried to the corner of Jones and Main streets, hoping to catch a street-car, and thereby reach my home quickly. I was then living at 1468 Main street. Not finding a street-car in sight, my only recourse was to get home as quickly as my legs would carry me; and I started up Main street, running for a square or two at a time, and then resting by walking for another square, and kept up that pace, coming up Main street on the west side of the street. Between Tenth and Eleventh, on Main street, I crossed the street by running, and about 50 feet from the corner of Eleventh I jumped across the curbstone. As I did so, I tripped on the curb, and fell. I had hardly picked myself up, and started again, when I noticed that I had expectorated a mouthful of blood. As this was the first time I had ever expectorated blood without knowing where it came from, I was very much shocked, and frightened beyond measure. I turned, and ran as fast as I could to the nearest doctor's office, which was Dr. Waples, a square down, and on the opposite side. I went in, found him there, and begged him to tell me what was the matter. He said that I was very much excited; to sit down and try and compose myself; that the blood, probably, did not amount to much. He gave me a drink of water, and tried to soothe my agitation as much as possible. After staying there a short time, and finding that the bloody expectoration had stopped, I started to go home.

After narrating what I have just stated to Dr. Staples, in his office, on the 19th of October, 1887, he began an examination of my throat and lungs. He made what appeared to me a careful examination of my throat and lungs. He said he saw in my throat a dilapidated blood vessel, that looked as if it had bled away. I asked him if, in his opinion, there was any question but that this blood came from this blood vessel in my throat. He assured me that it did not amount to anything, and to go on about my business; that he had similar cases in his office every day,—of perfectly healthy men expectorating blood from their throat."

The applicant having made this answer, Dr. Staples, the medical examiner of the company, himself testifies that:

"I recollect that I told him that the question, 'spitting of blood,' had a definite significance; that it meant hemorrhage from the lungs or bronchial tubes; and that the spitting of blood, as described by him and as known by me, because I was consulted by him, was manifestly not hemorrhage. I explained to him that this question, 'spitting of blood,' was, in my judgment, as medical examiner of the company, put there for the purpose of determining whether there was any evidence of consumption; that the question could not be answered categorically. If you meant spitting of blood from the mouth, probably no person living but what has spit some blood on some occasion, when a tooth has been extracted, or after having the nose-bleed. Spitting of blood did not mean that. It meant as evidence of hæmoptysis, or diseases of the pulmonary organs."

I said that it was not necessary for him to state that he had had spitting of blood; that the question did not imply the spitting of blood, as he had reported it."

And the examiner thereupon directed his son, who was acting as his amanuensis, the examiner himself having pen paralysis, to write the word "No" as the answer to this question, assuring the applicant that that was the proper answer to be drawn from the facts which he had narrated, and which were known to the examiner himself to be true. The applicant at the same time narrated to the local and the state agents of the company all the facts connected with the incident of spitting of blood, as he had stated them to the medical examiner, and asked them if the answer which the examiner had directed him to make to this question was the proper one, and they assured him that it was. The assured, the medical examiner, and the two agents of the company are agreed in their testimony as to what took place. In answer to the question whether he examined the applicant's lungs at the time he examined him for insurance, Dr. Staples says:

"I did as thoroughly as possible; stripping him, and examining him by ear and by use of the stethoscope. I had been Mr. Robison's physician, and had examined him from time to time for various little troubles; and, when I came to examine him for life insurance, I made a most thorough examination of him. I made a more thorough examination of him than of any one. I took three days to satisfy myself about the case, and I positively believe there was no disease of the lungs, and I wanted to satisfy myself whether there was. After making this examination, I came to the conclusion that, so far as his lungs were concerned, they were sound."

So well satisfied were the agents of the company that the assured was a good risk that they pressed the examiner to report him as a preferred risk, which, however, he declined to do; and they persuaded the assured to increase the insurance from \$5,000, as originally contemplated, to \$20,000.

The assured stated to the examiner and to the agents of the company every fact and circumstance connected with his spitting of blood. He concealed nothing. He added nothing. And the categorical answer to the question which was written down by the examiner was dictated by him, and approved by the two agents. There was no fraud on the part of any one connected with the transaction. The assured, the medical examiner, and the two agents were all acting honestly and in good faith, and the charge in the bill to the contrary is wholly unsupported by the evidence. But it is said, conceding this to be so, that the answer to the question was in fact untrue, and that the assured had no right to rely upon the assurance of the medical examiner and agents of the company that the answer written down by the examiner was a truthful and proper answer, upon the facts narrated by the assured. To support the contention that, upon the facts stated by the assured, the answer to the question was false, the company introduced as a witness its

medical director, who testifies that the term "spitting of blood," as contained in the application, "means ejection of blood from the mouth, without reference to the cause or source." But the medical examiner of the company, who examined the applicant and dictated the answer to this question, gives a different definition to the term. Dr. Staples says: "The phrase 'spitting of blood' is, and has been for many years, come to be regarded as synonymous of 'hæmoptysis,' which term is applied to the raising of blood from the lungs,—that is, the bronchial tubes, lungs, or membrane of the lungs,—and not when it comes from any other source."

And, when asked the meaning of the term as used in the application for insurance in this case, he answered: "Blood coming from the lungs or bronchial tubes."

In Quain's Dictionary of Medicine, the term is thus defined: "Spitting of Blood. A proper synonym of 'hæmoptysis.' See 'hæmoptysis.'" "Hæmoptysis. Spitting of blood, having its source in pulmonary or bronchial hemorrhage. The restriction of the term 'hæmoptysis,' as thus defined, has the sanction of long usage and convenience."

In the Century Dictionary the definition is: "Spitting of Blood. Same as 'hemoptysis,' which see." "Hemoptosis. Hemoptysis. In pathol., spitting of blood, usually restricted to raising blood from the lungs."

And see *Singleton v. St. Louis Mut. L. Ins. Co.* 66 Mo. 63, 27 Am. Rep. 321.

It will be observed that the medical director and the medical examiner of the company differ as to the meaning of the term. It is not necessary for the court to determine which one of these agents of the company gives the right definition, or whether either is right. The fact that they differ shows that the term is ambiguous. It was the medical examiner's duty to ask this question and write down the answer. For this purpose he was the agent of the company, and whatever he said or did in the discharge of this duty was the act of the company. In view of his instructions and the ambiguous character of the question, he was clearly acting within the line of his authority when he assumed to interpret and explain to the applicant the meaning of the question, and to interpret and dictate his answer thereto. His special knowledge of medicine and diseases qualified him to do this. The applicant could not have written the answer to the question, if he had desired to do so. Under the instructions of the company, the answer had to be written by the medical examiner. Upon these facts, the act of the medical examiner was the act of the company, and the answer to this question which he dictated and wrote down must be treated as the answer of the company. The answer which the medical examiner deduced from the facts stated by the applicant was probably the right one; but, assuming that it was not, and that he ought to have written "Yes" instead of "No," the fact remains that it was the answer of the company, and the company is estopped to question the truth of its own answers, notwithstanding the application warrants the answer to be true. The usual

clause in an application for insurance to the effect that the applicant warrants his answers to be true does not operate as a limitation or restriction upon the powers of the company's agent. The difference between a warranty and a representation is that a warranty must be literally true, without regard to its materiality to the risk, while a representation must be true only so far as the representation is material to the risk. But this difference does not affect the powers of the company's agents. They remain the same whether the application contains a warranty or only representations, and when the assured, in answer to a question, states the facts fully and truthfully, and the agent of the company, authorized to ask the question and write the answer, putting his own construction upon such facts, deduces therefrom an erroneous answer, which he writes down, assuring the applicant that it is the proper answer upon the facts stated, and the one the company wants, the assured is not estopped by his warranty from showing these facts, and when they are proved they operate to estop the company from questioning the truth of the answer. The same rule obtains where the applicant answers fully and truthfully, and the agent charged with the duty of asking the question and writing down the answer abbreviates the answer or omits part of it, as happened in this case to the answer to the eleventh question. All of the agents agree that in answer to this question the applicant stated distinctly that he had consulted Dr. M. H. Waples and Dr. G. M. Staples. Any other rule would result in holding the applicant responsible for mistakes, oversights, blunders, or omissions of the company's own agent, who was, in the case at bar, indisputably, the full and complete representative of the company in all that was said or done in the medical examination of the applicant.

The application contains no limitation of the powers of the agents or the medical examiner. Their powers were coextensive with the business intrusted to them respectively. The clause in the policy withholding from the agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance" is not a limitation of the powers of the agents in preparing and accepting the application for insurance. This provision of the policy does not take effect until the application is made and accepted, and the policy is issued. It has relation to the policy and other completed contracts concerning the insurance, and has no reference to the application, which precedes the policy, and which, until it is accepted and the policy issued, is a mere offer or proposition for a contract of insurance. *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249; *Kausal v. Minnesota Farmers Mut. F. Ins. Asso.* 31 Minn. 17, 47 Am. Rep. 776.

It is conceded that a breach of a warranty of the truth of the applicant's answer avoids the policy, without reference to the good faith of the applicant or the materiality of the answer. But it is a grave mistake to suppose that this rule can be extended so as to hold the applicant responsible for the

truth of an answer which was the result of a mistake in judgment or an error or blunder of the company's agent, who was specially charged by the company with the preparation of the application, and who himself dictated the answers upon a full and truthful statement of the facts by the applicant. In such a case there is no difference between a warranty and a representation. Whether it is the one or the other, the company is estopped to take advantage of its own wrong or mistake, as the case may be. Intolerable injustice and wrong would result from any other rule. This case will serve to illustrate how extremely unjust and oppressive the rule contended for by the company would be. Its position is that "spitting of blood," in the language of its medical director, means "ejection of blood from the mouth, without reference to cause or source," and that, inasmuch as the assured did once spit blood from his mouth, his answer to the question should have been in the affirmative, and, that not being so, there is a breach of the warranty of the truth of the answer, and the policy is void, notwithstanding the medical examiner, whose duty it was to make the examination and write down the answers, assured the applicant, upon a full statement of all the facts, that he had not had "spitting of blood," in the sense of these words as used in the application, and directed the applicant to answer the question in the negative. If this is a sound position, it is equally true that if the applicant had, upon this same statement of the facts, by direction of the company's medical director, answered the question in the affirmative, the company could have claimed the answer was not a true answer, within the meaning of the question in the application, and proved its claim by calling its medical examiner, who has testified that the applicant never had "spitting of blood," in the sense of these words as used in the application, and that there was therefore a breach of the warranty of the truth of the answer, which avoided the policy. Such unreasonable claims and contentions are answered by the familiar and fundamental rule of the law of agency, that the principal is bound by the acts of his agent, in all matters within the apparent scope of his agency, as fully and completely as if the act had been performed by the principal himself, and that in such cases the principal is as effectually estopped by the act of his agent as if he had performed it himself. The sound rule in this class of cases is clearly and forcibly stated in the case of *Affina Live Stock, F. & T. Ins. Co. v. Olmstead*, 21 Mich. 251, 4 Am. Rep. 483. Judge Cooley, in delivering the opinion of the court in that case said: "It cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation which was, by the very terms of the contract, to render it void. When an agent, who at the time and place is the sole representative of the principal, assumes to know what the principal requires, and after being furnished with all the facts, drafts a

paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness or fraud."

We content ourselves with citing a few of the many well-considered cases which fully sustain the doctrine of this opinion: *Continental L. Ins. Co. of Hartford, Conn. v. Chamberlain*, 132 U. S. 304, 33 L. ed. 841; *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 80 U. S. 18 Wall. 222, 20 L. ed. 617; *Knickerbocker L. Ins. Co. v. Trefftz*, 104 U. S. 197, 26 L. ed. 708; *American L. Ins. Co. v. Mahone*, 88 U. S. 21 Wall. 152, 22 L. ed. 593; *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610, 24 L. ed. 268; *Eames v. Home Ins. Co. of N. Y.* 94 U. S. 621, 24 L. ed. 298; *Graitan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 86 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 373; *Flynn v. Equitable L. Ins. Co.* 78 N. Y. 568, 84 Am. Rep. 561; *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 428; *Equitable L. Ins. Co. v. Haelewood*, 75 Tex. 388, 7 L. R. A. 217; *Pacific Mut. L. Ins. Co. v. Snowden*, 58 Fed. Rep. 842; *Sawyer v. Equitable Acc. Ins. Co.* 42 Fed. Rep. 30. In many of these cases there were warranties. There is nothing in the case of *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519, 29 L. ed. 934, contrary to the views we have expressed, or that qualifies the doctrine of the cases we have cited. In that case the powers of the agent were limited. The application provided that: "No statements or representations made, or information given, to the persons soliciting or taking the application for the policy, should be binding on the company, or in any manner affect its rights, unless they were reduced to writing, and presented to the home office, in the application."

And this limitation was brought to the notice of the assured at the time the application was made. So far from overruling, the court reaffirms, the rule firmly established by its previous decisions, and says: "Where such agents, not limited in their authority, prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the insured, should be regarded as the act of the company."

Dr. Waples, who was consulted by the assured at the time he spit blood, was called as a witness by the company, and asked to describe the spitting of blood, and explain the nature of it. The defendant objected to the question upon the ground that the information sought was privileged, the witness being the physician of the defendant at the time. The court sustained the objection, and this ruling is assigned for error.

Section 3643 of the Code of Iowa reads as follows: "No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose

any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to a case where the party in whose favor the same are made waives the rights conferred."

Section 858 of the Revised Statutes of the United States provides: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, interstate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Construing this section, the Supreme Court of the United States, in *Potter v. National Bank of Chicago*, 108 U. S. 183, 26 L. ed. 111, said: "The existing statute (Rev. Stat. § 858), seems too plain to require construction," and after pointing out that "the first clause of that section shows that there was in the mind of congress two classes of witnesses" that should never be excluded from testifying, added: "In all other respects, that is, in all cases not provided for by the statutes of the United States, the laws of the state in which the federal court sits constitute rules of decision as to the competency of witnesses in all actions at common law, in equity, or in admiralty."

The precise question we are considering was before that court in the case of *Connecticut Mut. L. Ins. Co. v. Union Trust Co. of N. Y.*, 112 U. S. 250, 28 L. ed. 708. The case was tried in New York, which state has a statute similar to the Iowa statute which we have quoted. The court said: "Since it is for the state to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the circuit court of the United States is required by the statutes governing its proceedings to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative."

And, after referring to the state and federal statutes on the subject, the court said: "For these reasons, it is clear that the circuit court properly refused to admit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity."

These cases contain the last, and therefore the authoritative, expression of the opinion of the supreme court on this question, and are controlling in this court. If the case of *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251, on this point, con-

ficts with the later cases in that court, then, to that extent, it must be regarded as having been overruled. In the case of *Liggett v. Glenn*, 4 U. S. App. 438, 51 Fed. Rep. 381, this court referred to the rule announced in *Connecticut Mut. L. Ins. Co. v. Schaefer*, *supra*. The later decisions of that court were not called to our attention, and not considered, and, as stated in the opinion, the correctness of the ruling of the trial court was "not dependent upon the question whether the state statute is applicable or not."

The overruling of a motion to suppress the deposition of the defendant was also assigned for error. The deposition was taken under section 868 of the Revised Statutes of the United States, which authorizes a deposition to be taken "when the witness lives a greater distance from the place of trial than one hundred miles." The ground of the motion was that there was nothing in the deposition showing that the witness lived at a greater distance from the place of trial than 100 miles. The place of trial was Dubuque,

Iowa, and the deposition was taken at Asheville, N. C. The court will take judicial notice that the distance between these places is more than 100 miles. For the purpose of taking a deposition under this statute, a witness "lives" where he can be found, and is sojourning, residing, or abiding for any lawful purpose. The witness in this case had gone to Asheville for his health. The duration of his stay there was uncertain. It was not probable that he would return to his former place of residence, or come within the jurisdiction of the court, in time to take his deposition, and therefore the taking of it at Asheville was an eminently prudent and proper act. The company attended and cross-examined, and this was a waiver of all irregularities in the notice of taking the deposition. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 10 U. S. App. 209, 51 Fed. Rep. 649.

The decree of the Circuit Court dismissing the bill for want of equity is affirmed.

INDIANA SUPREME COURT.

George H. SH EMAKER, *Appt.*,

v.

SOUTH BEND SPARK ARRESTER CO.

(.....Ind.)

1. The title to letters-patent does not necessarily involve the validity or infringement of the patent so as to defeat the jurisdiction of a state court.
2. An injunction may issue against false and malicious claims of title to a patent, with threats of infringement suits against the customers of a competitor, at least where the defendant is insolvent.
3. The constitutional guaranty of the freedom of the press and of speech will not protect against an injunction one who publishes false and injurious statements against a competitor's business.
4. Previous employment of a special judge, to whom a case is sent on change of venue, as counsel for one of the parties in a similar proceeding, this not being a statutory cause for change of venue, does not make it necessary to grant a second change, where but one change is allowed by statute for any statutory cause.
5. A ruling of the postmaster general ordering a postmaster to deliver to one party mail addressed to another is not admissible on the question of malice in publishing circulars which are injurious to the business of the other party.
6. A deed, the effect of which has been adjudicated in a prior suit, is not admissible for the purpose of collaterally attacking the prior decision.
7. A transcript of judicial proceedings, which is not made a part of the bill of

exceptions, cannot be considered on appeal, although an offer of it in evidence is recited.

(November 22, 1903.)

A PPEAL by defendant from a decree of the Circuit Court for St. Joseph County in favor of complainant in an action brought to enjoin defendant from asserting claims to certain letters-patent which complainant alleged belonged to it. *Affirmed.*

The facts are stated in the opinion.

Mr. F. J. L. Meyer for appellant.

Mr. Lucius Hubbard for appellee.

Hackney, J., delivered the opinion of the court:

The appellee sued the appellant in the court below upon a complaint alleging title to certain letters-patent granted by the United States government, derived through a judgment of the St. Joseph circuit court, theretofore rendered in an action between appellee's assignors and this appellant, wherein the title to said letters-patent was in issue, and was claimed by such assignors and by this appellant. Enough of the issues and judgment in that case is pleaded in the complaint herein to show that said action was to quiet the title to said letters-patent, and settle the conflicting claims of the parties thereto, and to restrain the appellant from asserting adverse claims thereto. The title was found to be in others, and that this appellant had no interest therein. Upon the title so derived the appellee sought and secured in this suit an injunction against the appellant from representing to the public and to the customers and agents of the appellee that he owned said letters-patent, or had any interest therein, and from issuing and publishing any demand for royalty or license fees for the use of the invention and improvement covered by such letters, and from threat-

NOTE.—For note on injunction against false statements as to plaintiff's property or business, see *Flint v. Hutchinson Smoke Burner Co. (Mo.)* 16 L. R. A. 243, in which the weight of authority is shown to be in harmony with the above decision.
22 L. R. A.

ening litigation with any person who had bought or might buy or offer to buy spark arresters covered by such patents, and from advertising that appellee had not the right to collect the price of any such sales, and from questioning appellee's title to such letters. The theory of the complaint is that the false and malicious claims of title by appellant, and threats to collect royalties from appellee's customers, and to involve them in litigation for infringements, was injurious to appellee's business and materially affected its property rights in said letters-patent, and in the value of spark arresters made by it, in that such claims persuaded and deterred persons from buying them, and rendered their invention and investment valueless.

The appellant attacks the jurisdiction of the St. Joseph circuit court to adjudge upon the title to letters-patent as pleaded in this complaint, and to enter the decree herein appealed from. The allegations of the complaint before us do not disclose the character of the claims asserted in the former action by the appellant and by the appellee's assignors,—whether they grew out of letters granted to either, or whether they depended upon contracts between the parties, under which interests were sold. By reference to the evidence in this case we find that the complaint in the action involving title alleged an ownership in part by appellee's assignors, and a dispute between this appellant and others named as to the ownership of the remaining interests. The character of the claims to such remaining interests, it was alleged, was unknown, and the allegations did not state the character or source of the claims of the plaintiffs in that case. The evidence in that case is not before us, and we would be slow to look into it, to ascertain the jurisdiction of the court, if it were. The finding having been adverse to this appellant, his pleadings in that case cannot supply the light necessary. The decree in that case does not disclose the character of the claims alleged to be made by any of the parties, and does not afford the means of enlightening us upon this subject. We are, then, as to the former proceeding, obliged to rest upon such presumptions as the law indulges from the absence of any information upon the subject. The inquiry is suggested by the contention of the appellant that in the former case, the decree in which is pleaded as the source of appellee's title in this case, the St. Joseph circuit court had no jurisdiction, and, in consequence, its decree was void. It is a well-settled rule that, where a court of general or superior jurisdiction, in some view of the case, may have jurisdiction, and it does not affirmatively appear from the record that the case is one in which jurisdiction does not exist, jurisdiction will be presumed. In view of this rule, we must presume in favor of the jurisdiction of the court in that case if, under any reasonable circumstances, jurisdiction could have existed. The insistence of the appellant is that no jurisdiction existed to try conflicting claims to letters-patent, because, as urged, the rights in such letters are granted under, and depend upon, the federal laws. To this point are cited:

Rich v. Atwater, 16 Conn. 409; *Brooks v. Stolley*, 3 McLean, 525; *Goodyear v. Union India Rubber Co.* 4 Blatchf. 65; *Dukes v. Graham*, 19 Fed. Rep. 647; *Campbell v. James*, 2 Fed. Rep. 844, and *Elmer v. Pennel*, 40 Me. 480. The effect of the holdings in these cases is, as we understand them, that, where the validity of the patent or infringement is the question directly involved, the United States courts have jurisdiction. But by an almost unbroken line of decisions it has been held that, even where the validity of the patent is involved, if it arises collaterally, the state courts may have jurisdiction. To this effect are the following cases: *Albright v. Teas*, 106 U. S. 618, 27 L. ed. 295; *Ingalls v. Tice*, 14 Fed. Rep. 352; *Mid-dlebrook v. Broadbent*, 47 N. Y. 443, 7 Am. Rep. 457; *Rich v. Atwater*, *supra*; *Burrall v. Jewett*, 2 Paige, 184, 2 L. ed. 845; *Sherman v. Champlain Transp. Co.* 81 Vt. 162; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 51, 31 L. ed. 685; *Slummer's App.* 58 Pa. 165, 98 Am. Dec. 248; *Parkhurst v. Kinman*, 6 N. J. Eq. 600; *Rice v. Garnhart*, 34 Wis. 458, 17 Am. Rep. 448; *Saxton v. Dodge*, 57 Barb. 64. The rule which may be deduced from these cases is that, where the cause of action depends primarily upon some contract of the parties, jurisdiction exists in the state courts, although the validity of the patent may arise incidentally. This rule has been applied to the enforcement of the assignment of letters-patent under agreement of the parties, and to receivers appointed under state statutes. *Binney v. Annan*, 107 Mass. 94, 9 Am. Rep. 10; *Fuller & J. Mfg. Co. v. Bartlett*, 68 Wis. 78. Such an infinite variety of transactions may arise and find enforcement in the state courts, under the rule stated, that we are not permitted to presume that the title involved in the case pleaded did not depend upon a contract enforceable within the jurisdiction of the St. Joseph circuit court. We have been cited to no case, and our researches have discovered none, where the title to letters-patent necessarily involved the validity of the patent or the infringement of the rights of the patentee as granted by the laws of the United States. Ownership, legal or equitable, of the letters-patent, or of an interest in the invention, does not, in our opinion, necessarily involve the validity of the patent or its infringement; for, presuming the patent to be valid and in no manner issued or used contrary to the laws of the government or the rights of patentees of similar inventions interests may arise and be enforced under contracts between the parties and within the jurisdiction of the state courts.

As above indicated the jurisdiction of the St. Joseph circuit court in the present case is attacked. The assault proceeds from a construction of the complaint that the gist of the action is in the enjoining of mere libels upon the title of the appellees to letters-patent. From the premises assumed the conclusion urged would follow, as held in the following cases: *Whitehead v. Kitson*, 119 Mass. 484; *Kidd v. Horry*, 28 Fed. Rep. 773; *Life Assn. of America v. Boogher*, 8 Mo. App. 178; *Baltimore Car Wheel Co. v. Bemis*, 29

Fed. Rep. 95; *Mauger v. Dick*, 55 How. Pr. 132; *Singer Mfg. Co. v. Domestic Sewing Mach. Co.* 49 Ga. 70, 15 Am. Rep. 674. However we do not concur in the construction of the complaint insisted upon by the appellant. The complaint before us involves more than libel of title. It charges the false and malicious destruction of the appellee's property rights, in injuring its business, deterring others from dealing with it, and rendering valueless its inventions and improvements, its investments and manufactures. It is more than a mere libel not interfering with property rights. The distinction between the two classes of cases is made and enforced by *Mr. Justice Blodgett in Emaek v. Kane*, 34 Fed. Rep. 46. In that case in speaking of *Kidd v. Horry*, *supra*, it was said: "The principle of this case, concisely stated, is that a court of equity has no jurisdiction to restrain the publication of a libel or slander. But it seems to me the case now under consideration is fairly different and distinguishable from the cases relied upon by the defendants in what seems to me a material and vital feature. In *Kidd v. Horry*, the owner of a patent sought the interference of a court of equity to restrain the defendants from publishing and putting in circulation statements challenging the validity of his patent and of his title thereto, on the ground that such publications were libelous attacks upon his property. Here the complaint seeks to restrain the defendant from making threats intended to intimidate the complainant's customers, under the pretext that the complainant's goods infringe a patent owned or controlled by the defendant, and threats that if such customers deal in complainant's goods they will subject themselves to a suit for such infringement; the bill charging, and the proof showing, that these charges of infringement are not made in good faith, but with a malicious intent to injure and destroy the complainant's business. While it may be that the owner of a patent cannot invoke the aid of a court of equity to prevent another person from publishing statements denying the validity of such patent by circulars to the trade or otherwise, yet if the owner of a patent, instead of resorting to the courts to obtain redress for alleged infringements of his patent, threatens all who deal in the goods of a competitor with suits for infringement, thereby intimidating such customers from dealing with such competitor, and destroying his competitor's business, it would seem to make a widely different case from *Kidd v. Horry*, and that such acts of intimidation should fall within the preventive reach of a court of equity. It may not be libelous for the owner of a patent to charge that an article made by another manufacturer infringes his patent; and notice of an alleged infringement may, if given in good faith, be a considerate and kind act on the part of the owner of the patent; but the gravamen of this case is the attempted intimidation by defendant of complainant's customers, by threatening them with suits which defendant did not intend to bring, and this feature was not involved in *Kidd v. Horry*. I cannot believe that a man is remediless against per-

sistent and continued attacks upon his business and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. . . . Redress for mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious, can wholly destroy a man's reputation with those who know him; but statements and charges, intended to frighten away a man's customers and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ." Little has been said by the learned judge in that case which is not fully applicable in this case, and here we have an element not included in that case, namely, the insolvency of the appellant, whereby an action at law would be wholly inadequate. In the case of *Life Assn. of America v. Boogher*, *supra*, it was held that insolvency did not enlist the aid of a court of equity, but we are disinclined to accept that case as authority. It is not only out of line with the holdings of this court upon that question, but it holds that the constitutional guaranty of the freedom of the press and of speech is a protection to one against equitable interference in publishing false and injurious statements. In neither of these positions can we believe it sound.

It is urged that the lower court erred in refusing a change of venue in the cause from the special judge before whom it was set by the regular judge, a change having been taken from such regular judge. The affidavit in support of the motion so denied did not set out any statutory cause for such change, but stated the employment of such special judge as counsel for some of the parties in the former proceeding involving the question of the ownership of the patent. While a breach of propriety to have accepted the special appointment under such circumstances, we are not enabled to say that the appellant was harmed by the denial of his application. If the affidavit had stated a statutory cause for the change, it should have been denied under the rule that but one change is allowable. Rev. Stat. 1881, § 413. Certainly, the special affidavit did not make a stronger showing than one including the statutory causes.

Under the claim of rebutting the inference of malice in publishing the circulars complained of, and to prove the truth of the statements in such circulars, the appellant sought to prove a ruling of the postmaster general, upon which the local postmaster was ordered to deliver to the appellant mail addressed to the appellee. We are unable to

observe the force of either claim in support of the offered evidence. The postmaster general had no authority to decide between the conflicting claims of ownership to the patent, and the effect of any holding by that officer could be no justification or excuse for publishing an injurious claim of title and false demand for royalties when the proper courts were open to him, and when in one of such courts an adverse decision had already been rendered. There had been no effort to disprove the truth of appellant's statements of the postmaster general's ruling. The ruling was used in the statements manifestly for the purpose of lending force to the appellant's claim of ownership, but the ruling could give no real strength to his claim, and could furnish no such advice to the appellant as would excuse the publications.

The appellant complains of the exclusion of a deed of assignment to him by one Rose, offered in defense of his claim of title adverse to that asserted by the appellee. The deed is not in the record, and we have no means of judging of its relevancy. If it antedated the judgment in the former case, the issue arising upon it was there determined adversely to him, and he could not again assert it in this action, thereby collaterally attacking the former decree. Nor can we say that a decree in disregard of such deed was unconscionable, as counsel insists. We do not know that the former decree was in disregard of the deed. It may have been found to have been a forgery, or to have lapsed for nonpayment of the consideration, or set aside

as procured by fraud. To permit an inquiry as to the justice of the former decree in its effect upon the assignment would introduce a collateral inquiry, one that appellant was bound to make upon appeal, or by other direct proceeding. It is urged that, defending the former suit as a poor person, appellant was assigned unskilled counsel, by whose mistake the deed was not introduced in evidence, and that his interests were thereby unjustly defeated. In the absence of fraud, the appellant was bound by the decree, and for fraud his remedy is not against the appellee by collateral inquiry. It is further complained that the trial court erred in excluding as evidence a transcript of certain proceedings in the circuit court of the United States for the district of Indiana in support of his assertion of former adjudication of title in his favor. The bill of exceptions states the offer of a transcript, but the same is not made part of the bill of exceptions, and we are deprived of any means of judging of its relevancy. We are not at liberty to decide such questions upon the statement of counsel to this court or to the lower court as to the contents of a transcript or other document.

The questions already passed upon render it unnecessary to inquire whether the decree was contrary to law. The record discloses no error for which the decree of the lower court should be reversed, and the same is therefore *affirmed*.

Howard, J., did not participate in this case.

NEBRASKA SUPREME COURT.

ST. JOSEPH & GRAND ISLAND R. CO.,

Plff. in Err.,

v.

DeWitt W. PALMER.

(.....Neb.....)

***1. The state courts have not lost their jurisdiction** of the subject-matter of actions against carriers because of interstate shipments by reason of the fact that congress has legislated upon the subject.

2. A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in this state, by special contract, limit or relieve itself from this liability.

3. The fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule.

(November 22, 1893.)

*Headnotes by IRVING, C.

NOTE.—The above decision seems to add a new point to the law of interstate commerce, in deciding that such commerce is subject to the law of the state as expressed in its constitution and statutes denying the right to limit the liability of carriers. These provisions seem to go somewhat beyond 22 L. R. A.

ERROR to the District Court for Adams County to review a judgment in favor of plaintiff in an action brought to recover the value of goods lost while in possession of defendant or a connecting carrier for transportation. *Affirmed*.

The facts are stated in the commissioner's opinion.

Messrs. John M. Thurston, W. R. Kelly and E. P. Smith, for plaintiff in error:

It is alleged that the bill of lading was not the contract, that plaintiff did not know of nor consent to the terms thereof, that defendant's agent asked them to sign a receipt for the goods, and that they did so without reading it, supposing it to have been a receipt. That defendant's agents did not call their attention to the contents thereof, and that he "fraudulently concealed" from them the terms thereof; that the release clause was not called to their attention, and that the insertion thereof was a fraudulent attempt by defendant to limit the contract actually made.

There is absolutely no proof tending to support the allegation of fraudulent concealment,

the common law as held in most states and in the federal courts; but we understand the decision to be that federal statutes or decisions on this question cannot control even in the case of interstate shipments, especially in respect to the liability of a corporation of the state.

or of any act of omission or commission on the part of defendant's agent amounting to or tending to show fraud, or any other thing outside of a proper and fair conduct of the matter in hand.

It conclusively appears that plaintiff knew all about the uses and purposes of such documents, and that in his business he had become familiar with it. They were made out in duplicate in his presence, after he had twice applied for such documents, and after discussion of, at least, some of the conditions thereof, signed in duplicate and mutually delivered. He had ample time and opportunity to and did in fact examine them. After this the defendant entered upon the performance of the contract, and promptly and fully upon its part complied therewith. Under such circumstances plaintiff cannot now be heard to deny that he made it, or to offer as evidence of another contract the verbal negotiations of the parties which resulted in the written contract.

Delaney v. Linder, 23 Neb. 280; *Morrissey v. Schindler*, 18 Neb. 672; *Clarke v. Omaha & S. W. R. Co.* 5 Neb. 322; *Hamilton v. Thrall*, 7 Neb. 210; *Dodge v. Kiene*, 28 Neb. 216.

The facts in law estopping the plaintiff to deny the contract, the court should have enforced it.

Taylor v. Fox, 16 Mo. App. 527; *Mulligan v. Illinois Cent. R. Co.* 86 Iowa, 181, 14 Am. Rep. 514; *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13; 2 Rorer, Railroads, p. 1819; Wheeler, Modern Law of Carriers, p. 22; 3 Wood, Railway Law, p. 1578, note; Hutchinson, Carr. § 241, p. 240; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 222, 2 Am. Rep. 391; *St. Louis, K. C. & N. R. Co. v. Cleary*, supra; *Hopkins v. St. Louis, I. M. & S. R. Co.* 29 Kan. 544; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 175, 23 L. ed. 872.

It not appearing that any fraud or imposition was practiced, or that any mistake intervened, the plaintiff must be conclusively presumed to have become acquainted with its contents, and if he did not do so the consequences of his folly and negligence must rest upon himself. Courts cannot undertake to relieve parties from the effects of such inattention and want of care. If once they should enter this doubtful domain, it is impossible to foresee to what lengths their interference might be pressed, or of what limits it would finally admit.

Mulligan v. Illinois Cent. R. Co. 86 Iowa, 188, 14 Am. Rep. 514; *Robinson v. Merchants Despatch Transp. Co.* 45 Iowa, 470; *Goetter v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Ala. 111; *Western R. Co. v. Harwell*, 91 Ala. 340.

If a bill of lading is delivered to the shipper at the time when the carrier receives the goods all prior negotiations are merged in the writing and the shipper is charged with notice of its contents. The writing becomes the sole evidence of the undertaking.

Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; *O'Bryan v. Kenney*, 74 Mo. 125; *Hill v. Syracuse, B. & N. Y. R. Co.* 73 N. Y. 351, 29 Am. Rep. 163; *Germania F. Ins. Co. v. Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 422; 22 L. R. A.

Kirkland v. Dinamore, 63 N. Y. 171, 20 Am. Rep. 475; *Louisville, E. & St. L. Consol. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 859.

The legal effect of an instrument cannot be avoided by showing that it was signed in ignorance of its contents, when the person who signed it did not read it or if unable to read, did not ask to have it read, in the absence of some fraud or deceit or misrepresentation, having been practiced upon him.

Taylor v. Fleckenstein, 30 Fed. Rep. 99; *Wallace v. Chicago, St. P. M. & O. R. Co.* 67 Iowa, 547; *McKinney v. Herrick*, 66 Iowa, 414; *Gullisher v. Chicago, R. I. & P. R. Co.* 59 Iowa, 416; *Western R. Co. v. Harwell*, 91 Ala. 340, 45 Am. & Eng. R. R. Cas. 358; *Pacific Guano Co. v. Anglin*, 82 Ala. 492; *Cannon v. Lindsey*, 85 Ala. 198.

A party who signs a written contract without reading it, or causing it to be read to him, when there is an opportunity afforded him of doing so, is guilty of such negligence as will prevent him from escaping from the legal effect of the contract.

Keller v. Orr, 106 Ind. 406; *McCormack v. Molburg*, 48 Iowa, 561; *Nebeker v. Cutsinger*, 48 Ind. 436; *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 118, 18 L. ed. 172; *Squires v. New York Cent. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Grace v. Adams*, 100 Mass. 505, 1 Am. Rep. 181, 97 Am. Dec. 117; *Steers v. Liverpool S.S. Co.* 57 N. Y. 1, 15 Am. Rep. 458; *Long v. New York Cent. R. Co.* 50 N. Y. 77; *Kirkland v. Dinamore*, 62 N. Y. 171, 20 Am. Rep. 475; *Belger v. Dinamore*, 51 N. Y. 166, 10 Am. Rep. 575; *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 79, 98 Am. Dec. 208.

A carrier may by express contract limit his liability, provided the limitation is just and reasonable.

3 Wood, Railway Law, §§ 425, 1576. See also Hutchinson, Carr. §§ 222, 244 et seq.; and Wheeler's Modern Law of Carriers, p. 221.

A railroad company may limit its liability as a common carrier to the line of its own road by express contract.

Detroit & M. R. Co. v. Farmers & M. Bank, 20 Wis. 123; *Mulligan v. Illinois Cent. R. Co.* 86 Ill. 181, 14 Am. Rep. 514; *Jones v. Cincinnati, S. & M. R. Co.* 89 Ala. 376, 45 Am. & Eng. R. R. Cas. 321; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 850, 16 Am. & Eng. R. R. Cas. 194; 3 Wood, Railway Law, 1572, and note; *Ort v. Minneapolis & St. L. R. Co.* 38 Minn. 396; *Hunter v. Southern Pac. R. Co.* 76 Tex. 195; *Harris v. Grand Trunk R. Co.* 15 R. I. 371.

The service to be rendered was that of transporting the goods from Hastings, Nebraska, to Grants' Pass, Oregon. The contract was one relating to interstate business. The service itself, and the contract in relation thereto, were subject to the terms and conditions of the Act of Congress.

There is no reason why the supposed inhibition of the Nebraska constitution should now be applied to determine the rights of parties who have made a contract relating to the business of interstate commerce.

Hart v. Pennsylvania R. Co. 112 U. S. 331, 28 L. ed. 717; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 80 L. ed. 244, 1 Intern. Com. Rep. 31.

The Constitution of the United States having given to the courts the power to regulate commerce, not only with foreign nations but among the several states, that power is necessarily exclusive when the subjects that are national in their character admit only of one uniform system or plan of regulation.

Robbins v. Shelby County Tax. Dist. 120 U. S. 492, 30 L. ed. 695, 1 Inters. Com. Rep. 45; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 485, 31 L. ed. 700, 1 Inters. Com. Rep. 828; *Brimmer v. Reiman*, 3 Inters. Com. Rep. 485, 138 U. S. 78, 34 L. ed. 862; *Lynn v. Michigan*, 3 Inters. Com. Rep. 146, 135 U. S. 161, 34 L. ed. 150; *Leisy v. Hardin*, 3 Inters. Com. Rep. 36, 135 U. S. 100, 34 L. ed. 128.

No appearance for defendant in error, *Mr. John M. Ragan* having been of counsel in the lower court.

Irvine, C. filed the following opinion:

The plaintiff in error was a railroad company operating a line of railroad between St. Joseph, Mo., and Grand Island, Neb., and passing through the city of Hastings, Neb. In December, 1889, certain goods were loaded into a car at Hastings for shipment to Grant's Pass, Or. These goods consisted of furniture, wearing apparel, and household goods, belonging partly to one Pardee, and partly to one Hart, and of a stock of drugs and drugstore fixtures belonging to the defendant in error, Palmer. The goods were carried to Grand Island by the plaintiff in error, and there turned over to the Union Pacific Railway Company, on the line of whose road the car was wrecked, and no part of the goods was ever delivered at Grant's Pass. Pardee and Hart assigned their claim to Palmer, who brought suit in the district court of Adams county to recover damages for the loss of the goods. The petition of the plaintiff below, in addition to the foregoing facts, which are undisputed, pleads, among other things, that Palmer, Pardee, and Hart entered into a verbal contract with the defendant to transport said goods and property to Grant's Pass, and there safely deliver them in ten days, in consideration of the sum of \$200, and that after the goods were loaded into the car a paper was presented to Pardee for signature, and he signed it believing it to be a receipt, and in ignorance of certain clauses therein contained; that after the goods were turned over to the railroad company for shipment, and the freight of \$200 paid, the railroad company's agent stated to the owners that the \$200 might not be enough to pay the freight, and extorted from the owners a promise that, in case the freight should exceed \$200, they would pay the excess; that the paper referred to was not the contract of shipment, but that the contract was as first stated, and that the contents and limitations of the paper were fraudulently concealed from the owners of the goods. The paper referred to was in fact a bill of lading, and the clauses in regard to which fraud was alleged were two: The first was that the railroad company assumed no liability beyond the end of its own line; that is, at Grand Island, Neb. The other is as follows: "One

car emigrant outfit O. R. Rel'd val. of \$5. per cwt. in case of total loss S. L. & C."

The answer, so far as it is material, may be analyzed as follows: First. That the railroad was engaged in the business of interstate commerce, and that this was an interstate shipment, and not within the jurisdiction of the state courts. Second. That the bill of lading constituted the contract between the parties, that the first provision quoted exempted the defendant beyond the end of its own line, and that there was no fraud or concealment. Further, that the somewhat cabalistic letters and words quoted from the bill of lading meant, and were understood to mean, owner's risk released to the value of five dollars per hundred weight in case of total loss, and that the shippers were to load and count the goods. Third. That the contract between the parties contemplated merely the shipment of an emigrant outfit, which was understood to mean household goods alone, and that the stock of drugs was fraudulently loaded into the car; the established rate on a car containing drugs being very much greater than the established rate on an emigrant outfit. Fourth. That, under the interstate commerce law, false representations as to the contents of the package, with the consent and connivance of the carrier or its agent, is constituted a misdemeanor, and bars the plaintiff from relief.

The evidence upon the part of the plaintiff tends to show that Pardee and Hart went to the agent of the company at Hastings, stating to him that they wished to ship their household goods and stock of drugs, and asked him for the rate to Grant's Pass upon the carload; that the agent informed them that the rate would be \$200, and that there would be nothing to pay at the other end of the line; that thereupon the goods were loaded upon a car furnished by the railroad company for that purpose; that, after the loading was complete, Pardee and Palmer went to the agent for the bill of lading; that the agent told them that, inasmuch as the drugs had been loaded upon the car, he was not sure that \$200 would pay the freight, but that he would mark upon the bill of lading a receipt for the \$300, to apply on the freight, and if there was more to pay it must be paid at the other end; that they consented to this because there was no other course left open to them; that the bill of lading was then handed to them, and Pardee signed it, none of the owners reading its conditions, or having his attention called thereto. Upon the part of the railroad company the testimony tends to show that, at the first interview, nothing was said about the stock of drugs, but that, when Pardee came for the bill of lading, the agent told him that he would not give him a clear bill of lading, for he had reason to believe that "there was other stuff in the car besides household goods," but would accept \$200, to be applied, the owners to pay the difference at the other end; that Palmer then handed him \$200, and Pardee signed the bill of lading in duplicate.

The case was submitted to the jury under long instructions, the general effect of which was to submit the question as to whether the

oral agreement pleaded, or the bill of lading, constituted the contract between the parties; further, to instruct the jury that under the laws of this state no limitations upon the liability of a common carrier could be imposed, except upon proof that such limitations had been called to the attention of the shipper, and by him expressly assented to, and submitted to the jury whether or not attention had been called to the limitations and assent obtained. There was a verdict for the plaintiff in the sum of \$5,461.53.

1. The question of jurisdiction was first raised by demurrer to the petition, and then by answer. The theory of the railroad company in this regard seems to be that, the shipment being from one state to another, it became subject solely to the laws of the United States. If that were so, it would not oust the court of jurisdiction. It would only determine upon what principles of law the rights of the party would depend. The record shows that an attempt was made to remove the case to the federal court; that the court refused to order the removal. Nevertheless, it would appear that an order of removal must have been obtained from some source, for there is in the record an order of the federal court remanding the case to the district court of Adams county. These proceedings are a part of the law of the case and conclusively determine the question of jurisdiction in favor of the plaintiff.

2. The questions of law in regard to the transaction are discussed in the briefs under a number of heads relating to objections to the evidence, and to the instructions of the court. To state each in its order would consume much space, and a detailed consideration is unnecessary, for the reason that all these exceptions and assignments of error relate to a very few main questions. Great stress is laid upon the point that the bill of lading must be treated as the conclusive evidence of the contract between the parties, and that parol evidence was not admissible to show a prior verbal contract contrary to the terms of the bill of lading. In this connection it is also urged very strenuously that the court erred in submitting the question raised by this evidence to the jury; further, it is urged that the instructions to the court are conflicting; and, still further, that the limitations imposed by the bill of lading upon the carrier's liability are, upon principles of common law, valid obligations, and that they must be enforced, in the absence of actual misrepresentations or concealment, which, it is contended, the evidence does not establish. Numerous authorities are cited upon both sides upon these points. A single consideration disposes of all of these questions. Under the law of Nebraska, whatever the law may be elsewhere, it is beyond the power of a common carrier, by such provisions as appear in the bill of lading,—assuming it to be the contract of the parties,—to so limit its liability. In *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, it is said: "The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, with-

out any legal distinction, as being gross or ordinary." That the better rule of law, sustained by the weight of authority, is that "it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty." This case arose before the Constitution of 1875 went into force. By article 11, section 4, of that Constitution, it is provided that "the liability of railroad corporations as common carriers shall never be limited." While the writer might, if the question were a new one, construe this provision as simply a restriction upon the legislature against the limitation of carriers' liabilities by law, and not as preventing such limitation by special contract, the question is no longer an open one, and has otherwise been determined. In *Missouri Pac. R. Co. v. Vandeventer*, 26 Neb. 232, 3 L. R. A. 129, by contract, the railroad company sought to relieve itself from liability for injury to livestock, unless notice in writing were given before the removal of the stock from its place of delivery. This provision of the constitution was there considered and discussed. The court, speaking through *Judge Cobb*, says: "So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to, was to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreement with shippers, and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might, of necessity, follow the release of their responsibility, and that of their agents, therefor. See *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117, a case which arose under the old constitution, but heard in this court under the new."

In addition to this constitutional provision, section 111, chap. 16, Comp. Stat., provides that "any railroad companies receiving freight for transportation shall be entitled to the same rights and be subject to the same liability as common carriers." This is a portion of the general incorporation act, under which the plaintiff in error derives its existence as a corporation. Comp. Stat., chap. 72, art. 1, § 5, provides: "No notice either express or implied shall be held to limit the liabilities of any railroad company as common carriers unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms before such limitation shall take effect." This section was discussed by the court in *Union Pac. R. Co. v. Marston*, 30 Neb. 241, and held to apply to just such a case as this, where the limitation was contained in a bill of lading which the shipper alleged was given after the making of an oral contract for shipment. Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of

this state is settled that a common carrier cannot, even by the terms of an express contract, relieve itself of its common-law liability. It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivers the goods to a connecting carrier. To this it should be added that the contract of the shipper was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked. In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank. In the other, the language was: "Received of Palmer and Pardee the following described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point." Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Or. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only twenty-four miles from Grand Island, where the car was delivered to the Union Pacific; and the \$200 received by the railroad company if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance. There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier.

3. The plaintiff in error seeks to avoid the effect of these constitutional and statutory enactments and judicial construction by pleading and arguing the effect of the act of congress known as the "Interstate Commerce Law," and amendments thereto. The particular provision relied upon is from the Act of 1889, as follows: "Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representations of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or servant, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district within which such offense was committed, be subject, for each offense, to a fine of not exceeding \$5,000 or imprison-

ment in the penitentiary for a term not exceeding two years or both in the discretion of the court." Conceding that the construction of such acts into misdemeanors should render the contract contrary to public policy, to such an extent as to deprive the shipper of his remedy against the carrier, the evidence wholly fails to make out a case within the section quoted. Whatever false billing there may have been was by the company itself, as all the evidence shows that the agent knew before the car was moved after loading that it contained articles other than household goods. Under the most favorable construction of the evidence on behalf of the railroad company, if there was any false representation as to the contents of the "package," its true contents were known before the railroad company took charge of the car, and an agreement was made for the payment of any additional freight by reason of the introduction of drugs into the car. We cannot see, therefore, how this section, conceding it to have the effect claimed for it by plaintiff in error, could affect the right of recovery. To give it such effect would be to declare that the section quoted absolutely protects a railroad company from liability in any case where the shipper uses general terms in describing the goods to the carrier or agent, and the agent paraphrases such language into a technical phrase, and such phrase does not correctly describe the goods, or where the carrier's agent, of his own volition, makes false statements of the character of the shipment. The section referred to was chiefly designed as a restriction upon the carrier. Its whole aim was to prevent false billing or false representations in order to conceal discriminations in favor of particular shippers. It was not intended, and should not be construed, as a means of relieving a carrier from liability because its own agents have committed an error.

But it is argued that, upon general grounds, the whole subject-matter of interstate transportation was by the constitution placed within the power of congress, and that congress, having enacted the interstate commerce act, assumed such jurisdiction, and thereby nullified existing state laws; that not only the acts of congress must be treated, upon these subjects, as the supreme law of the land, but that the decisions of the federal court must be accepted as the final statements of the law, prevailing against state statutes and state decisions. Without discussing the question as to whether the federal decisions are opposed to the constitutional and statutory provisions of this state, referred to, it is sufficient to say that we cannot accept the theory of the railroad company, as above outlined. It is admitted in the pleadings that the company is a corporation organized under the laws of the state of Nebraska. The time of this organization does not appear, but the statutory provisions date from the very earliest period of the state's history. The statute quoted above is a portion of the general incorporation act relating to railroads, the act under which this company derives its right to exist. To say that an act of congress—especially, one not, in express

terms, contrary to these provisions—shall be given the effect of nullifying them, would be to say that this state must cease to exercise its sovereign powers of creating corporations for railroad purposes, else it must content itself with creating such corporations absolutely untrammelled by conditions, or permit them to exist subject only to such conditions as the congress of the United States may see fit to impose. While this state forms a constituent part of the Union, under its present constitution, this court should never yield its consent to such a doctrine. If such be the law, it must be declared by another tribunal: and, in case it should be so declared, the exercise by the state of its sovereign power of creating such corporations should, from every motive of self-preservation, cease.

4. In addition to the general verdict rendered by the jury, there was an attempt to have certain special findings returned. One of the errors assigned is the refusal of the court to mark upon the margin of the submission of those findings the word "given." If the submission of these findings amounted to an instruction, the objection would be purely technical, and the refusal of the court to use the word "given" could not operate to the prejudice of the plaintiff in error. Instead of marking the submission given, the court made a note as follows: "As I have said in the attached submission, I submit these special findings for you to pass upon; and, in the opinion of this court, it would be the grossest kind of error to attempt to control your discretion in passing on these special findings." There also appears to have been indorsed upon the questions submitted a quotation of that portion of the statutes whereby it is permitted to the jury, in their discretion, to return a general or special verdict. Of the special questions submitted, the first related to the value of the goods at Hastings, and was answered. The second related to the value of the goods at Grant's Pass, Or., at the time when they should have been received there. In answer to this, the

jury stated, "We do not know." The other questions related to the freight rates under different circumstances. All these questions were answered, "We do not know." By the instructions, the jury was told that if it should find for the plaintiff the verdict should be for the market value of the goods at Grant's Pass, at the time they should have been there delivered, together with interest. The second question submitted was material to the case. The others were entirely immaterial, and the discharge of the jury without answering them was in no way prejudicial. It is urged, however, that, when the jury answered that they did not know the market value of the goods at Grant's Pass, they, in effect, stated that they were unable to fix the measure of damages, and that the general verdict could not, therefore, have been founded on the evidence, and in obedience to the instructions. But, under the evidence given as to the value of the goods at Grant's Pass, no verdict less than that returned could be sustained. There is evidence tending to show that the value of the goods at Hastings was less than the value marked upon an inventory offered in evidence, and one witness testified that the goods were worth no more at San Francisco than at Hastings, but there is nothing to show that he even had any knowledge of the value at San Francisco. The only competent evidence of the value of the goods at Grant's Pass, Or., fixes it at more than \$7,000; so that the verdict rendered could not have been affected by any findings based upon the evidence in answer to the special question submitted.

Some of the instructions do not state the law correctly. Some of them are apparently conflicting, but, in any view of the evidence, for the reasons already stated, no verdict different in character, or less in amount, could be sustained.

The judgment is therefore affirmed.

Ryan, C., concurs. **Ragan, C.**, took no part in the consideration or decision of this case.

ILLINOIS SUPREME COURT.

BRACEVILLE COAL CO., Appt.,

v.

PEOPLE of the State of Illinois.

(147 Ill. 66.)

1. The liberty to enter into contracts by which labor may be employed in such

NOTE.—On the rapidly developing subject of the constitutionality of statutes restricting the contracts between master and servant the decisions are yet in much conflict. As to the power to restrict such contracts between corporations and their employes the above decision is directly contrary to that of *State v. Brown & S. Mfg. Co.* (R. L.) 17 L. R. A. 856.

As to the classification of corporations the decision is in harmony with *State v. Loomis* (Mo.) 21 L. R. A. 789, while *State v. Goodwill* (W. Va.) 6 L. R. A. 22 L. R. A.

way as the laborer may deem most beneficial, and to others to employ such labor, is necessarily included in the constitutional guaranty of the right to property.

2. A statute requiring weekly payment of wages "by every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph,

A. 621, and *State v. Fire Creek Coal & C. Co.* (W. Va.) 6 L. R. A. 859, condemn similar discriminations which are not confined to corporations. On the other side is the case of *Hancock v. Yaden* (Ind.) 6 L. R. A. 576.

See also, as to kindred decisions, *Com. v. Perry* (Mass.) 14 L. R. A. 825, and note; *Peel Splint Coal Co. v. State* (W. Va.) 17 L. R. A. 385; *Ramsey v. People* (Ill.) 17 L. R. A. 863; also note to *State v. Loomis*, *supra*.

telephone, and municipal corporation, and every incorporated express company and water company," makes an unconstitutional discrimination between those corporations and others which are organized for pecuniary profit and employ labor.

3. A restriction of the right of corporations to contract with employes as to payment of wages requiring weekly payments denies the constitutional rights of the employes, and does not affect the corporation merely.
4. Judicial notice is taken of the fact that many corporations are organized and doing business in the state outside of certain classes of corporations enumerated in the statute.
5. It is a matter of common knowledge that during the year 1893 a large number of manufacturing were shut down because of the stringency in the money market.
6. An amendment to the charter of certain corporations by providing for weekly payments of wages, but not applying to all corporations created under the general law, is in violation of a constitutional provision that the charter of no corporation shall be changed by special law.

(October 28, 1894.)

APPEAL by defendant from a judgment of the Grundy County Court convicting it of violating the weekly payment law. *Reversed.*

Statement by Shope, J.:

The appellant was tried before a justice of the peace, and found guilty of violating an act of the legislature entitled "An Act to Provide for the Weekly Payment of Wages by Corporations," approved April 23, 1891, and the penalty of \$50 imposed, for which and costs judgment was rendered accordingly. The case was taken by appeal to the county court of Grundy county, where a trial was held by the court, a jury having been waived, and appellant again found guilty, and the penalty of \$50 imposed, and judgment entered for that amount and costs; and the case is brought here by further appeal.

The act of the legislature above referred to provides "that every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone and municipal corporation and every incorporated express company and water company, shall pay weekly each and every employé engaged in its business the wages earned by such employé to within six days of the date of such payment; provided, however, that if at any time of payment any employé shall be absent from his regular place of labor he shall be entitled to said payment at any time thereafter upon demand." And, after providing a penalty of not less than \$10 nor more than \$50 for each violation, that such action be commenced within thirty days after the violation, notice to the corporation that an action will be brought, defenses that may not be set up, etc., proceeds: "No assignment of future wages payable weekly under the provisions of this act shall be valid if made to the corporation from whom such wages are to become due, or to any person on behalf of such corporation or if made or procured to be made to any person for the purpose of re-

lieving such corporation from the obligations to pay weekly under the provisions of this act. Nor shall any of said corporations require any agreement from an employé to accept wages at other periods than as provided in section 1 of this act, as a condition of employment."

Appellant became a corporation under the General Incorporation Law, in force July 1, 1872, and for several years past has been engaged in the business of coal mining, with its principal office at Braceville, Grundy county, this state. A certain contract is provided by appellant, which all persons desiring employment in its service are required to sign as a condition precedent to such employment. The complaining witness, Thomas McGuire, in November, 1891, applied to the superintendent of appellant's mines for work, and was required to sign one of its contracts, which was done, in duplicate, each party retaining a copy. Certain rules and regulations of the company on the back of its contracts are, by the terms of each contract, made a part of the same. The contract of witness McGuire, after stipulating, among other things, the wages to be paid, etc., provides: "All payments hereunder to be made on regular pay day, and in compliance with the rules and regulations above named; and pay day is hereby fixed for and on the first Saturday after the 10th of each month, when and at which time all wages or moneys that may have been earned during and in the calendar month next prior to such pay day shall be paid, less all moneys owing said party of the first part on any account whatever." By the seventh rule, printed on the back of said contract, and made part thereof, it is provided: "Every employé will be paid once a month at regular pay day all wages or moneys he may have earned during and in the calendar month next prior to such pay day, after deducting any indebtedness which such employé may owe to the company, or which the company, with the consent of such employé, may have assumed to pay to any other person." McGuire entered upon the employment under the contract November 3, 1891, and quit November 13, 1891, and demanded his wages. The company refused to pay him before the next pay day, when he gave the notice under the statute, and caused this suit to be brought.

Mr. George S. House for appellant.
Mr. William Mooney, with Mr. Samuel C. Stough, State's Atty., for the People.

Shope, J., delivered the opinion of the court.

The principles that must control the decisions of this case were announced in *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492. Unless we are prepared to recede from the doctrine of that case, and the subsequent case of *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, the act under consideration must be likewise held unconstitutional and void. Section 2, article 2, of the Constitution of this state guarantees that no person shall be deprived of life, liberty, or property without due process of law. We said in the

Fraser Case, the words "due process of law" "are to be held synonymous with 'the law of the land,'" and, quoting from *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, said: "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals." There can be no liberty, protected by government, that is not regulated by such laws, as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject to the restraints necessary to secure the same right to all others. The fundamental principle upon which liberty is based in free and enlightened government is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. *Fraser v. People*, *supra*; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325; *People v. Gillson*, 109 N. Y. 389; *Live Stock D. & B. Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, 83 U. S. 16 Wall. 36, 21 L. ed. 394; *Godcharles v. Wigman*, 113 Pa. 431; *State v. Goodwill*, 38 W. Va. 179, 6 L. R. A. 621. Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it. And the right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. In the *Fraser Case* we said: "The privilege of contracting is both a liberty and a property right, and if A. is denied the right to contract, and acquire property in the manner which he has hitherto enjoyed under the law, and which B., C., and D. are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property, to the extent that he is thus denied the right to contract;" and quoted with approval: "The man or the class forbidden the acquisition or enjoyment of the property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness." *Cooley*, Const. Lim. 393. It is undoubtedly true that the people in their representative capacity may, by general law, render that unlawful,

in many cases, which had hitherto been lawful. But laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some existing distinction or reason, not applicable to others, not included within its provisions. *Id.* 391. And it is only when such distinctions exist that differentiate in important particulars, persons, or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments. In the *Millett Case* we held that it was not competent, under the constitution, for the legislature to single out operators of coal mines, and impose restrictions in making contracts for the employment of labor which were not required to be borne by other employers. And in the *Fraser Case*, a law singling out persons, corporations, or associations engaged in mining and manufacturing, and depriving them of the right to contract as persons, corporations, and associations engaged in other business or vocation might lawfully do, was in violation of the constitution, and void. So in *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, "An Act to Provide for the Weighing in Gross of Coal Hoisted from Mines," approved June 10, 1891, was held unconstitutional and void for the same reason.

The act under consideration applies not to all corporations existing within the state, or to all that have been or may be organized for pecuniary profit under the general incorporation laws of the state. There is no attempt to make a distinction between corporations and individuals who may employ labor. The slightest consideration of the act will demonstrate that many corporations that may be and are organized and doing business under the laws are not included within the designated corporations. No reason can be found that would require weekly payments to the employes of an electric railway that would not require like payment by an electric light or gas company; to a corporation engaged in quarrying or lumbering that would not be equally applicable to a corporation engaged in erecting, repairing, or removing buildings or other structures; to mining that would not exist in respect of corporations engaged in making excavations and embankments for roads, canals, or other public or private improvements of like character; that will apply to a street or elevated railway that will not make it equally important in other modes of transportation of freight and passengers. The public records of the state will show, and it is a matter of common knowledge, that very many corporations have been organized and are doing business in the state which necessarily employ large numbers of men that are not included within the act under consideration. The restriction of the right to contract affects not only the corporation, and restricts its right to contract, but that of the employes as well. We need not repeat the argument of the *Fraser Case* upon this point. An illustration of the manner in which it affects the employe, out of many that might be given, may be found in the conditions arising from

the late unsettled financial affairs of the country. It is a matter of common knowledge that a large number of manufactories were shut down because of the stringency in the money market. Employers of labor were unable to continue production for the reason that no sale could be found for the product. It was suggested in the interest of employers, as well as in the public interest, that employes consent to accept only so much of their wages as was actually necessary to their sustenance, reserving payment of the balance until business should revive, and thus enable the factories or workshops to be open and operated with less present expenditures of money. Public economists and leaders in the interest of labor suggested and advised this course. In this state, and under this law, no such contract could be made. The employé who sought to work for one of the corporations enumerated in the act would find himself incapable of contracting as all other laborers in the state might do. The corporations would be prohibited entering into such a contract, and, if they did so, the contract would be voidable at the will of the employé, and the employer subject to a penalty for making it. The employé would, therefore, be restricted from making such a contract as would insure to him support during the unsettled condition of affairs, and the residue of his wages when the product of his labor could be sold. They would, by the act, be practically under guardianship; their contracts voidable, as if they were minors; their right to freely contract for and to receive the benefit of their labor, as others might do, denied them.

But, treating the restrictions as affecting the corporations only, it is insisted that the reservation of authority by the general assembly in section 9 of the General Incorporation Act (Rev. Stat. chap. 83) authorized the passage of the act in question. That section provides: "The general assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under this act." It is said this section entered into and formed a part of the contract under which the grant of the corporate franchise was conferred upon appellant company, it having been organized under the general law. It was expressly held that the

reservation of the right to alter, amend, or repeal the charter entered into and formed a part of the contract between the state and the corporation chartered under the Constitution of 1848, and that the power reserved might be constitutionally exercised. *Butler v. Walker*, 80 Ill. 345. And undoubtedly the same construction should be placed upon the reservation of power in the section quoted. But by section 1, article 11, of the Constitution it is provided: "No corporation shall be created by special laws, or its charter extended, changed, or amended, . . . but the general assembly shall provide by general laws for the organization of all corporations hereafter to be created." The manifest intention of this provision of the constitution was to require not only the creation of corporations, but amendments to charters of those existing, to be made by general laws, applicable alike to all occupying like circumstances and existing under the same conditions; and it necessarily follows that special acts, applying to particular corporations only, and not to the general body of corporations created under the act, would fall within the prohibition of this section. By the general incorporation law appellant company was granted the right to contract as a corporation in and about the business for which it was organized. A restriction of its right to thus contract is necessarily an amendment or change of its corporate powers and functions of its charter. If, therefore, the restriction is held to fall within the power reserved in section 9 of the Act, it must, in view of the constitutional provision, be construed as reserving the power to prescribe such regulations and provisions as the legislature may deem advisable by general law. The act under consideration, not being a general law, is therefore not a warranted exercise of power. We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each are essential elements of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property.

The enactment being unconstitutional, *there is no law authorizing the judgment of the County Court, and it will accordingly be reversed.*

CONNECTICUT SUPREME COURT OF ERRORS.

Mabel L. FORCE, by Next Friend,

v.

Edward P. GREGORY, *Appt.*

(.....Conn.....)

The treatment of a patient by a physician is to be tested by the general doctrines of his school and not by those of other schools.

NOTE.—The discussion of the required skill of physicians as involving the merits of the school to which they belong is interesting although the decision seems to be fully supported by precedent
23 L. R. A.

(May 22, 1898.)

A PPEAL by defendant from a judgment of the District Court for Waterbury County in favor of plaintiff in an action brought to recover damages for alleged malpractice on the part of defendant, a physician, which was alleged to have resulted in the loss of plaintiff's sight. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Webster & O'Neill*, for appellant: When a party employs a physician to treat him the contract relation subsisting between

the two is that the physician, educated in theory and practice of a particular school, impliedly engages that he will use the ordinary care and skill of his profession in that school. His acts must be judged and tested by the treatment and methods adopted by the school of practice in which he was educated.

A physician in attending his patients engages he will use due care to discover the nature of the disease which gives occasion for his services, and in applying the usual remedies, but beyond this measure of skill and diligence the law makes no exactions; if he is to be held for results, or as a guarantor of success, it can be only on his express agreement.

Smith v. Hyde, 19 Vt. 54.

The most skillful practitioner may mistake the disease, apply improper remedies and even destroy life, by mismanagement, and yet be wholly innocent.

Sumner v. Utley, 7 Conn. 264.

It was in evidence, and was found by the court, that the defendant in treating the plaintiff adopted the remedies and methods prescribed by the homœopathic school of practitioners.

And this was what his implied contract called for.

The court should have instructed the jury in conformity to our request.

2 Shearm. & Redf. Neg. ed. 1889, § 609; 3 Wharton & Stillé, Medical Jurisprudence, § 766; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593; *McCandless v. McWha*, 22 Pa. 261; *Corsi v. Maretsak*, 4 E. D. Smith, 1; *Bowman v. Woods*, 1 G. Greene, 441; Rogers, Expert Testimony, § 64, p. 148.

Mr. Charles G. Root, for plaintiff:

Action on the case will lie against all professional men, tradesmen, and mechanics for unskillfulness and negligence in their professions, trades, and callings.

1 Swift, Dig. * 563.

Every one who undertakes any office, employment, duty, or trust, contracts to perform it with integrity, diligence, and skill. And if by this want of either of those qualities any injury accrues to individuals, they have therefore their remedy in damages by a special action on the case.

3 Bl. Com. 165.

Liability in cases of malpractice does not arise out of any contract or direct privity, but out of the duty which the law imposes upon the physician to avoid acts in their nature dangerous to the lives of others; and it need not, therefore, be stated by whom the defendant was employed.

1 Boone, Code Pl. § 182; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298.

If there was either carelessness, or a want of ordinary diligence, care, and skill, then the plaintiff was entitled to recover.

Landon v. Humphrey, 9 Conn. 210, 23 Am. Dec. 388.

One who offers himself for employment in a professional capacity undertakes . . . that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed.

Carpenter v. Blake, 75 N. Y. 12; 2 Shearm. & Redf. Neg. §§ 606, 607.

22 L. R. A.

In a case like this the school of medicine may be on trial as well as the physician. It would be a strange doctrine that negligence in the treatment of disease should be excused if the physician had adopted a course of treatment prescribed by any individual or any combination of individuals.

The true test of the admissibility of expert testimony is "whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions of issue."

Taylor v. Monroe, 43 Conn. 44.

Fenn, J., delivered the opinion of the court:

This is an action by a minor child to recover damages against the defendant, who is a homœopathic physician, for alleged malpractice in treating her for ophthalmia. The jury returned a verdict for the plaintiff, and from the judgment rendered thereon the defendant appealed to this court.

The only questions presented, which are necessary to consider, relate to the charge of the court to the jury. Evidence was offered to show that the defendant, in treating the plaintiff, adopted the remedies prescribed by the homœopathic practitioners. It appeared that the allopathic school of medicine would treat such a case differently, and in the latter way the plaintiff claimed that she ought to have been treated. The defendant asked the court to charge the jury "that treatment by a physician of one particular school is to be tested by the general doctrines of his school, and not by those of other schools." The court refused to so charge, and charged as follows: "In regard to that matter, I will say that the defendant's negligence or want of skill in the treatment of the plaintiff's eye must be determined by all of the evidence in the case, and if the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudice that might influence the testimony of those who belonged to a different school from that of the defendant. You should also take into consideration the training and education of the defendant for his profession, the experience which he has had, and the degree of skill with which he handled the case, all bearing upon the question whether the defendant used ordinary care and skill in the treatment of the plaintiff." The defendant claims that the court erred, both in refusing to charge as requested, and in charging as it did.

In the absence of special contract physicians and surgeons, by holding themselves out to the world as such, impliedly contract that they possess the reasonable and ordinary qualifications of their profession, and are under a duty to exercise reasonable and ordinary care, skill, and diligence. *Landon v. Humphrey*, 9 Conn. 209, 23 Am. Dec. 383; *Kendall v. Brown*, 74 Ill. 232; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363; *Ballou*

v. *Prescott*, 64 Me. 805; *Leighton v. Sargent*, 81 N. H. 119, 64 Am. Dec. 323; *Ely v. Wilbur*, 49 N. J. L. 685, 60 Am. Rep. 668; *Potter v. Warner*, 91 Pa. 362, 36 Am. Rep. 668; *Hathorn v. Richmond*, 48 Vt. 557; *Gates v. Fleischer*, 67 Wis. 504.

In determining what constitutes reasonable and ordinary care, skill, and diligence, the test is that which physicians and surgeons in the same general neighborhood and in the same general line of practice ordinarily have and exercise in like cases. *Hathorn v. Richmond*, *supra*; *Utley v. Burns*, 70 Ill. 162; *Almond v. Nugent*, 84 Iowa, 300, 11 Am. Rep. 147; *Small v. Howard*, and *Leighton v. Sargent*, *supra*. In addition to this, however, regard must be had to the advanced state of the profession at the time of the treatment. *Small v. Howard*, and *Gates v. Fleischer*, *supra*; *Smothers v. Hanks*, 84 Iowa, 286, 11 Am. Rep. 141; *Nelson v. Harrington*, 72 Wis. 591, 1 L. R. A. 719.

Premising these general principles, we come to the precise question presented by the appeal: Ought the defendant's request to charge to have been complied with? And was the charge, as given, correct and sufficient? The language of the request may be found in *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593, where the following charge was held to be correct: "If there are distinct and different schools of practice, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools. It is to be presumed that the parties so understood it. The jury are not to judge by determining which school, in their own view, is best." And the same principle was clearly stated, in an able opinion, in *Bowman v. Woods*, 1 G. Greene, 441, and we are aware of no authority to the contrary. But, notwithstanding this, it seems to us that the inherent difficulty in an endeavor to vindicate the action of the court below is not because the court failed to charge in the identical language of the request, nor because of the language actually used by the court, which appears correct so far as it goes, but rather because the court, in refusing to charge as requested, and only charging as it did, omitted to bring to the attention of the jury a consideration which, in view of the testimony received, and the claims made thereon by counsel, ought to have been presented to them. It having appeared how the allopathic school of medicine would treat a case of the character of the one in question, the court, as we have seen, said: "If the defendant adopted the treatment laid down by one particular school of medicine, and the medical testimony offered by the plaintiff related to the treatment prescribed by a different school, you will weigh the testimony, having regard to any bias or prejudices that might influence the testimony of those who belonged to a different school from that of the defendant." Doubtless, this is correct. The testimony should be so weighed. But if the defendant adopted the treatment, not of one particular school in the abstract, but of his own particular school, which he publicly professed

and practiced, and the medical testimony offered by the plaintiff related to treatment prescribed by a different school, such testimony should be weighed, not alone with regard to bias or prejudice influencing the testimony of witnesses, but with regard to bias or prejudice which might influence or incline the jury in favor of one school rather than the other; for, as was said in *Patten v. Wiggin*, *supra*, "the jury are not to judge by determining which school, in their own view, is best." And as it seems to us, from the testimony presented, which did not stop with the statement of how, in the view of the witnesses, such a case ought to be treated, but went further, and stated how "the allopathic school of medicine would treat it," it was precisely from such bias or prejudice the defendant stood in danger. Indeed, the counsel for the plaintiff freely admitted, in argument before us, that the respective merits of the two schools of medical practice were—and, as he claimed, of right ought to have been—on trial before the jury. We cannot concede such right, and the jury, we think, should have been told that the relative merits of the two schools were in no sense before them for their consideration; that, so far as the defendant was to be judged by either, it was by the tenets, rules, principles, and practices of his own school, not by those of another; and that, if the defendant adopted the treatment laid down by his own school, the fact that another school prescribed another treatment tended in no wise to show that the defendant was chargeable with lack of skill or negligence. It would seem that if it could be held negligent or unskillful, in a given case, to use the treatment prescribed by the school to which the practitioner belonged, such negligence or want of skill must consist either in the mode of use, the application of such remedies under improper circumstances, or because they were intrinsically wrong, inappropriate, or inadequate. If there be any valid objection to the language quoted from *Patten v. Wiggin*, *supra*, it is in the failure to incorporate with the general statement the further one that the test there given does not exclude the duty of keeping pace with the progress of professional knowledge, ideas, and discoveries, to the extent that a faithful, conscientious, and competent practitioner, of whatever school, may be reasonably expected, and is therefore lawfully required, to do, not because the test of the treatment of some other school can be applied. It may be added that the general expressions in the charge under consideration, that the question of the defendant's negligence "must be determined by all of the evidence in the case" and that the jury should consider "the training and education of the defendant for his profession, the experience which he had had, and the degree of skill with which he handled the case," in no sense appear to meet or supply the wanting element in the charge, and that because of such element, if the unqualified language of the request was too broad, still the rule stated in *Seeley v. Litchfield*, 49 Conn. 188, applies, and that, "if it was not the duty of the court

to charge precisely as requested, yet it was its duty to respond to the request by charging the jury correctly on that subject."

It was not claimed that the fact that the plaintiff was an infant of tender years, incapable of contracting, and that the physician was called by her father, in any way extended or altered the implied contract and duty of the defendant, nor do we think such a claim,

if made, would have been valid. It appeared that the defendant had, at least to some extent, been the family physician, and had previously, as such, prescribed for the plaintiff; but this circumstance, also, is one to which no importance had been attached.

There is error, and a new trial is granted.

The other Judges concurred.

MISSISSIPPI SUPREME COURT.

Wirt ADAMS, State Revenue Agent, *Appl.*,
v.

Theodore TONELLA *et al.*

(.....Miss.....)

1. A constitutional provision requiring uniformity and equality of taxation is violated by a statute authorizing a state revenue agent to levy and collect back taxes, when, in his opinion, the assessed value on which taxes have been collected was too little.

2. The reopening of the decision of tax officers, by which the valuation of taxable property has been fixed and taxes thereon collected, under a subsequent statute authorizing a state revenue agent to assess and collect additional taxes, where, in his opinion, the tax assessment had been too small, is an unconstitutional interference with vested rights.

3. A statute giving a state officer unlimited power and discretion to fix the valuation of property which he thinks has been assessed for too little, without any opportunity to the taxpayer to be heard, except in defense of a suit to collect the taxes, is in violation of a state constitution which provides that property shall be assessed under general laws by uniform rules according to its true value, and which also provides for assessors as county officers.

(March —, 1893.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Warren county in favor of defendants in an action brought to recover taxes which plaintiff alleged should have been, but were not, paid upon certain personal property owned by defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. Calhoun & Green, for appellant:

The form of remedy for taxes in the absence of constitutional limitations is at the election of the legislature.

2 Desty, Taxn. p. 708.

Inasmuch as it is entirely competent for the legislature to prescribe such formulas as it pleases, with regard to the levy and collection of taxes, it is fully within its power, by retroactive legislation, to dispense with their necessity and obviate the evils of their non-observance.

Cooley, Const. Lim. 371, and cases; *Vaughan v. Swazie*, 55 Miss. 709.

If the person owned property which the leg-

NOTE.—The above decision is a notable one as to the invalidity of a statute which attempted a new departure in tax proceedings.

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See also 23 L. R. A. 82.

islature sought to reach by its then laws, and which he, in disregard of his duty morally, civilly, and legally, failed to return for assessment, and thereby evaded his share of the burdens of government, he is a delinquent, and it is clearly within the power of the legislature to devise a civil proceeding to remedy the evil. No injury is done him. He is merely made to do that which the law tried to compel him to do and which by artifice has been evaded.

State v. Piazza, 66 Miss. 429.

The powers of the assessor and collector vested by the constitution extend only to the right of assessment and collection of revenue for the current fiscal year.

It was held, under the Constitution of 1869, that it was not a part of the collector's official duty, in the absence of statute, to collect delinquent taxes, and that neither he nor his sureties were liable for failure to do so.

State v. Harris, 52 Miss. 686.

Taxes for schools under the constitution and laws are based upon the annual scheme.

Foot v. Brown, 60 Miss. 155; *Cowart v. Foxworth*, 67 Miss. 322.

A fortiori this rule would apply to assessors.

With these judicial interpretations of the Constitution of 1869, article 5, section 21, the Constitution of 1890 was made, and no change in this regard was made.

Under the Constitution of 1869 the legislature had power to provide for the performance of the duties of the assessor when the assessor had failed to perform them as to current revenue.

Wolfe v. Murphy, 60 Miss. 1; *Corburn v. Crittenden*, 62 Miss. 125.

By section 513, Code 1880, the legislature conferred power on the collector to assess where the assessor had failed to assess; and this for the fiscal year, but after the delinquency of the assessor.

State v. Adler, 68 Miss. 487.

If the collector whose duties were prescribed by the constitution could have the power of assessment conferred on him by the legislature, and if the board of supervisors could be given power to appoint assessors to perform the duties of the assessor for current revenue, it is manifest that under the Constitution of 1890 the legislature had the power to provide for the assessment of revenue made delinquent through the failure of the assessor.

Even judges can be created by statute to perform judicial duties which the constitutional judges are unable to perform; such as to decide cases in which they are interested, etc.

Grinstead v. Buckley, 32 Miss. 148.

Unless another method is prescribed by the constitution, the legislature has power to provide for assessments of overlooked or omitted property, and for the collection of these assessments.

Welty, *Assessments*, pp. 36, 37.

On the same principle property invalidly assessed may be re-assessed.

Id. § 197.

In *Cedar Rapids & M. R. Co. v. Carroll County*, 41 Iowa, 153, it was held that, as the duty was imposed on the citizen to make the return for assessment, and as the property had escaped by reason of the failure to perform this duty, and as the treasurer had assessed it for back taxes, the taxpayer being a delinquent, could not complain of any irregularity in the assessment.

The delinquent taxpayer cannot complain for he has refused to avail of the constitutional remedy of assessment for current revenues, and, by his default, the time has passed for application of the constitutional scheme.

Metcalfe v. Perry, 66 Miss. 76.

The rights of the state, then, are only to be cared for. The scheme provided by the constitution having been willfully abandoned by the taxpayer, and the time for the performance of the functions of his office as secured by the constitution having passed by the assessor's default, it is perfectly competent for the state in protection of its revenue to confer the power of collection of its revenue upon another by statute, and to prescribe any method it may see proper to devise for its collection.

Vaughan v. Swayzie, 56 Miss. 709.

Mr. R. H. Thompson, also for appellant: Mr. Tonella, and his co-defendants, are charged in the declaration, and of course the demurrer admits the charge, to have so conducted themselves in the premises to deprive the state, county, and city of the revenue which in justice and in right ought to have been paid, and thereby they have increased the burden to be borne by more conscientious citizens. Have the defendants a right to do that thing? Surely no man has the legal or moral right to do as defendants have done; their conduct is contrary to good morals, and wrong.

State v. Adler, 68 Miss. 487.

That property which has escaped taxation can afterwards be assessed is, under the decisions of this court, beyond dispute; it can be done by the assessor, or by the tax-collector. Can it be done by any other officer whom the legislature may designate?

The opinion in *French v. State*, 52 Miss. 759, carefully read will produce the conviction that the judge who delivered it would not have decided that the legislature was without power to provide that, after the assessor and tax-collector had failed to collect taxes, they might be collected by some other officer.

That the legislature has power to provide for the assessment of taxes not paid in past years is practically illustrated in this state, and received legislative and judicial sanction, in case of the Act approved April 3, 1888 (Laws 1888, p. 49), and the case of *Yazoo & M. V. R. Co. v. Thomas*, 65 Miss. 553.

While taxes are not debts in the ordinary sense, neither is the right to recover for a tort

debt, and many other things are not debts which may be sued for. If a remedy for the collection of taxes is not given, an action will lie, but generally speaking the remedy, as by distress, if given, is regarded as exclusive. See Cooley on Taxation, 18, and notes. The authorities show that it is a disputed question whether an action will not lie for delinquent taxes in any and all cases, even if a remedy other than by action be provided. Surely the legislature may provide for the bringing of such suit. Such a remedy is provided by sections 4190 and 4191, Annotated Code.

Surely no man, not even Mr. Tonella, has a vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of the character of vested rights.

Randall v. Krieger, 90 U. S. 23 Wall. 149, 23 L. ed. 126.

Messrs. Murray F. Smith and J. Hirsh for appellees.

Cooper, J., delivered the opinion of the court:

This is a suit by the revenue agent of the state, Wirt Adams, against Theodore Tonella, a resident of the city of Vicksburg, in the county of Warren, and Brennan and Sproules, sheriff and assessor of said county of Warren, and Keirsky, the assessor of the city of Vicksburg. The declaration avers that during the year 1891 the defendant Tonella was the owner of certain personal property, to wit, "notes, accounts, and valid securities for loaned money," of the value of \$7,200, which was subject to assessment and liable to taxation for said year in said county and city; that the levy for state and county taxes for the year 1891 was 12 mills on each dollar of taxable property, and that for city taxes was 20 mills on the dollar; that it was the duty of Tonella to return said credits for assessment and taxation, and was also the duty of said assessors and collectors to have caused the same to be assessed according to law, which they willfully failed and neglected to do; that in September, A. D. 1892, the plaintiff, as by law he was authorized to do, assessed the said credits to the defendant Tonella, and reported the same to the proper officers, to be by them noted on the assessment rolls, and gave notice of his action to Tonella. The plaintiff demanded judgment against Tonella for \$144, the amount claimed as taxes due to the city of Vicksburg, and for \$86.40 as state and county taxes. He also demanded judgment against Brennan, the sheriff, and Sproules, the county assessor, and Keirsky, the city assessor, for the amount of the commissions to which plaintiff would be entitled if successful in this suit. The defendants demurred, and, their demurrer having been sustained, the plaintiff appeals.

The office of state revenue agent is created, or the statutes relative to the same revised and amended, by chapter 126 of the Code of 1892. The first three sections of the chapter (4187-4189) have relation to the creation, election, and qualification of the officer. The last nine sections relate to the procedure by the agent to enforce the payment of taxes after they have been imposed, or to other matters

not now necessary to review. The question involved in the present suit arises from a consideration of sections 4190-4193, which are as follows: "Sec. 4190. After the expiration of the fiscal year in which the taxes become due and payable, and that, too, whether the taxes were assessed or properly assessed or not, the revenue agent may assess and collect all past-due taxes, whether the same be caused by the default of the assessor, tax collector or tax-payer; but if the revenue agent institute suit against any person or corporation who has been correctly assessed, and the taxes so assessed paid, he shall be liable on his bond to such person or corporation for all costs and expenses incurred in defending such suits, if the judge will certify that the suit was frivolous, or that there was no ground for the action. Sec. 4191. It is the duty of the state revenue agent to investigate the books, accounts, and vouchers of all fiscal officers of the state, and of every county, municipality and levee board, and to sue for, collect, and pay over all revenue improperly withheld from either; and he has power, and it is his duty, to proceed against all such officers and their sureties by action to recover any such revenue; and it is his duty to proceed, by suit in the proper court, against all officers, persons, corporations, companies and associations of persons, for all past-due and unpaid taxes owing to the state, counties, municipalities and levee boards, whether *ad valorem*, privilege, license, poll or other, and whether assessed or properly assessed or not, if the fiscal year in which the same ought to have been paid have expired; and his duty to proceed by suit for the collection of any such taxes arises whether the failure to pay the taxes originated from the neglect or failure of any officer or board to perform his or its official duty, or from the failure of any person or corporation to fully give in his or its property to the assessor, or at a sufficient valuation or otherwise. But his right and duty to collect money from a fiscal officer, where the delinquency appears by correct open account on the books of the proper accounting officer, shall only arise after he has given thirty days' notice to the officer to pay over the amount, and his failure to do so. Sec. 4192. It is the duty of the state revenue agent, when any person, corporation, property, business, occupation or calling liable to an *ad valorem* or privilege tax has escaped or shall escape taxation by reason of not being assessed or of not being demanded, or otherwise, to assess the same as the tax-collector is authorized to do, and to collect and pay over the taxes thereon in like cases. He shall report all additional assessments, in writing, to the tax-collector, whose duty it will be to enter the same on the assessment-roll, as in case of an assessment by him, only he shall note that the assessment is made by the state revenue agent. The taxes on all such additional assessments may be recovered by the state revenue agent by action, if not paid within ten days after notice to the party assessed, if he be a resident of the state, or, if a nonresident, within ten days after the date of the assessments; and the proceedings may be against the per-

son or property assessed, or both. Sec. 4193. The state revenue agent shall not assess taxes accruing prior to the year 1896; and in all cases the burden of proof shall be on the agent to show that the property or person was not assessed, or properly assessed; and the person assessed or reassessed shall have ten days' notice, in writing, before bringing suit. But when the revenue agent shall think property which has been assessed and approved by the board of supervisors, has been improperly assessed, he shall notify the board of supervisors, and summon the party assessed to appear before it for a rehearing. The board shall hear both parties, and decide the matter of difference, from which either party may appeal." Section 112 of the Constitution of 1890 declares as follows: "Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." Under the Constitution of 1869, the provision was that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." Article 12, § 20. By section 21, article 5, of the Constitution of 1869, it was provided: "A sheriff, coroner, treasurer, assessor and surveyor shall be elected in each county by the qualified electors thereof, who shall hold their offices for two years, unless sooner removed." Section 138 of the Constitution of 1890 is as follows: "The sheriff, coroner, treasurer, assessor, surveyor, clerks of courts and members of the board of supervisors of the several counties, and all other officers exercising local jurisdiction therein, shall be selected in the manner provided by law for each county."

The provisions of our revenue laws for the assessment of property for taxation, aside from those of chapter 126 of the Code of 1892, now under consideration, have remained practically unchanged since the adoption of the Code of 1871. Every person owning property subject to taxation is required to render a schedule thereof, with its value, under oath, and upon a form supplied by the assessor. If the property inventoried is, in the opinion of the assessor, undervalued, he is required to make report thereof to the board of supervisors under oath, and he may add to his roll any property discovered by him not returned by the owner. At stated times, fixed by law, the board of supervisors met to examine, correct, and equalize the assessments, and, this being done, they enter an order approving the rolls. Any person feeling himself aggrieved by any order of the board in reference to the assessment of property may appeal to the circuit court. Two copies of the roll, as approved by the board, are then made by the clerk of the board, one of which is delivered to the collector and the other to the auditor, the original remaining in the office of the clerk. The roll delivered to the collector is the authority by which he collects the taxes levied. It is also provided by law that the collector may add to the roll any property he may discover as unassessed

after the roll comes to his possession, making return of such additional assessment to the board of supervisors. If at any time the assessor shall discover that any person or property has escaped taxation in former years, it is his duty to assess the same, making due return thereof with his next assessment, and giving the person who, or whose property, is thus assessed, notice thereof, if he be a resident of the county. The primary purpose, in all just schemes of taxation, is to distribute its burdens equally and uniformly upon all persons and property, and the requirement of our constitution that all property shall be taxed in proportion to its value, is but the statement in another form of the provision that taxation shall be equal and uniform. If all property was assessed at one half or one third its value, the rule of uniformity of taxation would not be disturbed. But the constitution, in providing for the office of assessor, and confining the office to territorial limits of his county, divided the state into as many taxing districts as there are counties; and since, if one rule of valuation should be adopted in one county and another in another, there would not be equality of taxation, it prescribed the standard of valuation for all property in all the counties should be the real value. The office of assessor, spoken of in section 138 of the Constitution, is one of known and settled functions; and in providing that an assessor should be selected, in the manner provided by law, for each county, it is to be presumed that the framers of that instrument intended to provide for the performance by him, substantially at least, of those duties which have hitherto pertained to his office. *French v. State*, 52 Miss. 760. The constitution declares the rule of uniformity and equality of taxation. It fixes the standard of valuation by which the rule shall be preserved and enforced. It provides for the selection of an officer for each county to perform the duties of assessing persons and property. It is silent as to details, leaving to the legislature the power and duty of formulating the scheme of taxation, subject to the restrictions imposed by the general provisions it does contain. Unquestionably, the constitution contemplates and requires an assessment of property as a condition of its taxation. Assessment is the listing and valuation of property liable to taxation according to law. It is essential for the apportionment of all *ad valorem* taxes. *Cooley*, Taxn. 259. And an assessment can only be made by the officer designated by law to make it. *Welty, Assessments*, § 10. When the constitution devolves that duty upon a particular person, the legislature may not substitute another. *Ibid.*; *People v. Kelsey*, 84 Cal. 478; *People v. Hastings*, 29 Cal. 450; *People v. Sargent*, 44 Cal. 434; *Houghton v. Austin*, 47 Cal. 646; *Richmond & D. R. Co. v. Orange County Comrs.* 74 N. C. 508; *Wilmington, C. & A. R. Co. v. Brunswick County Comrs.* 72 N. C. 10.

In *Houghton v. Austin*, above cited, the rule that the legislature could not devolve the duty of assessing property upon any other tribunal or officer than the assessor provided

for by the constitution was carried to the extent of annulling a law creating a state board for equalization of taxation among the several counties of the state.

It is said by counsel for appellant that the power of the legislature to devolve the duties of the assessor upon others has been recognized in many decisions of this court. First, it is said that in *Wolfe v. Murphy*, 60 Miss. 1, the Act of March 5, 1878, which provided that, if the assessor should fail to complete his roll as required by law, the board of supervisors should "appoint some suitable person to make and complete such assessment-rolls, in the same manner as the assessor is required by law to do," was held to be a valid exercise of legislative power; and, second, that in *State v. Alder*, 68 Miss. 487, the authority of the collector to assess such persons or property as had been omitted by the assessor, as directed by section 518 of the Code of 1880, was also upheld. It would be sufficient to reply that in neither of these cases was the validity of the legislation challenged by counsel, or adverted to by the court. But it is to be observed that the statutes construed in these cases have existed in this state since the year 1846 (*Hutch. Code*, pp. 185-189, §§ 9-23), and were in operation at the adoption both of the Constitution of 1869 and of 1890. The Code of 1857 provided that, upon failure of the assessor to make and return his roll as required by law, the board should have power to remove him from office, and to appoint some suitable person to complete the roll; and in *Wolfe v. Murphy*, this court assumed, without expressly deciding, that the effect of the Act of 1878 was to authorize the board to declare the office vacant *pro tempore*, and to appoint an incumbent. The provisions of the statute authorizing boards of supervisors to appoint a suitable person to make the assessment when the assessor has failed to discharge his duty, and conferring power on the sheriff to add persons or property to the roll which have been omitted by the assessor, are widely different in their scope, purpose, and effect from the scheme provided by chapter 126 of the Code in relation to the state revenue agent. They are provisions to meet emergencies, and displace as little of the machinery by which a general and uniform plan of assessment is carried on throughout the state as is possible. They substitute one local officer for another, and in case of the appointed assessor, at least, the duties he performs are precisely those which should have been performed by the assessor, and are subject to the same supervision by the board of supervisors. But chapter 126 of the Code displaces the whole scheme of taxation. It substitutes a state officer provided for by law for the local officer designated by the constitution. All idea of equality and uniformity of taxation, and of assessment of property "under general laws and by uniform rules, according to its true value," is abandoned, and the discretion of the officer is the limit of his power. Every judgment of every board of supervisors since the year 1886 is, in effect, nullified. Any citizen whose horse or cow or land or other property has been

assessed in all these years, and who has paid his taxes according to such assessment, is subject to be proceeded against by the agent. It is indeed, the imperative duty of the officer to proceed in all cases which, in his opinion, the valuation of property, as fixed by the taxpayer and the assessor and approved by the supervisors, was too little. Never before in the history of this state have such onerous duties been imposed upon, or such unlimited power vested in, a single person. We have said that all idea of equality and uniformity of taxation is abandoned. This is true, if the scheme is in its nature such that its practical operation must be effectual only in exceptional instances; for, if this be true, the law, though in form, is not in effect, a general law, prescribing uniform rules for the assessment of property of all the citizens of the state. If the approval of values, as they have been fixed by the authorities charged with that duty, on all the rolls since the year 1886, could be nullified by the legislature, it would yet be necessary that any scheme in which no provision is made for preserving uniformity and equality of taxation would violate the constitutional provisions by which such equality and uniformity is declared. Now, if the revenue agent may proceed against any taxpayer, whose property, in his opinion, has been undervalued, he must do so, unless his arbitrary discretion may be substituted for the legislative will. Nor can he proceed against one and refuse to proceed against another standing in the same condition. But the agent cannot determine whether property has been undervalued in former years unless he shall and can inform himself of its then condition and value, and this, being a matter of fact, must be decided upon by some sort of evidence. No provision is, however, made for the investigation and decision of this preliminary fact, and the proceeding, when instituted, must rest upon the mere un-instructed discretion of the officer. The question of value is one of the most difficult of solution in the administration of the law. One man may value an article at one price, and another at another, and all be equally honest in their action; but it is also a relative question, for the value of one horse or cow or tract of land is largely determinable by the value of other horses and cows and lands at the same time and place. When the agent proceeds to re-examine the value of property assessed in years past, no just conclusion could be reached without consideration of the property of others assessed on the same roll. If the valuation of the property of one man is increased, so, also, must be that of every other man, if it has been undervalued; otherwise, the principle of uniformity and equality is departed from. It is to be remembered that, in all the assessments which are reopened by the law under consideration, the boards of supervisors had been charged with the duty of examining and equalizing the rolls; and if this was done, as must be presumed, any action by the revenue agent in changing one assessment would disturb the uniformity and equality of the burden, unless his jurisdiction may be considered as

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a revisory one, and his finding of the fact of undervaluation of particular property be considered as a judicial determination that all other property appearing thereon had been assessed at its true value. It has long since been decided in this state that it is not within the legislative power to provide by retroactive legislation for the reopening of judgments final in their nature, and under which rights had become vested. *Hooker v. Hooker*, 10 Smedes & M. 599. *A fortiori*, can it not annul them by a mere legislative declaration?

When we consider the duty and power of the agent to collect taxes on property which has escaped taxation, the provisions of the law are found yet more objectionable. As to such property, the agent, without notice to the taxpayer, and without giving him an opportunity to be heard, determines that certain property, of a certain valuation, should be assessed against a particular person. He thereupon notifies the collector to place such property on the roll, and having given the owner ten days' notice of his action, may, in default of payment of the tax claimed, proceed by suit to recover the amount. It is true the act calls this an "assessment," but it is not such in fact. No opportunity to be heard in reference to the assessment is afforded to the citizen. His first information is that his property has been assessed by the *ex parte* act of the agent, and a liability fixed upon him, upon which suit will be brought unless immediate payment is made. He must, it is true, be summoned to defend the suit at law, and may then disprove the legality of the assessment, which becomes final against him only upon full hearing before the court. But the question is, not whether the assessment is conclusive against the citizen when the suit is brought, but it is whether he may be subjected to a suit at all unless a tax is due by him at the time, and whether a tax is ever due until assessment is duly made, in conformity to the constitution. Either what the agent does before suit brought is an assessment of the property, fixing liability for its taxes, which liability is the foundation and support of the suit at law, or there is no assessment at all preceding the suit; and the anomaly is presented of an action on a nonexistent cause of action, with power in the plaintiff to create, pending the action, the right of action on which the suit rests.

We are not certain that we appreciate the precise position of counsel. The assumption runs throughout their briefs that a person owning property which has not been assessed is a delinquent, who cannot complain of any legislation having for its purpose the taxation of the property. Counsel do not expressly declare that such persons are not entitled to the protection of the constitution, but they suggest that, having failed to obey the law by giving in their property for taxation when all other property was assessed, such delinquents should be left to be dealt with at the discretion of the legislature. But the fact that such persons may have violated the law, either by neglecting or willfully refusing to return their property for taxation,

is no reason why constitutional safeguards provided for the protection of all classes should be destroyed or ignored. The question is not one of policy, but of power; and, if it is competent for the legislature to dispense with an assessment of property as to one class, it would be equally within its power to dispense with it for any or all other classes. It is not too much to say that, if it were possible for one man to perform the duties of the office of revenue agent according to the provisions of the Code, there are not enough courts in all the states to determine in a lifetime the suits which would be brought in one year. But it is obvious that no purpose is disclosed of preserving

the rule of uniformity and equality prescribed by the constitution. The evident purpose is to vest power in the agent to sue in the most flagrant instances of undervaluation of property heretofore taxed, or of non-assessment. Each case stands separate and distinct from each other, and, in lieu of the local agencies provided by the constitution, with local tribunals for equalization of values, the scheme of the act is to vest unlimited power and discretion in a state officer, with a trial by jury in each suit to finally settle the question of valuation. This is a total departure from the scheme of the constitution, and it is therefore invalid.

The judgment is affirmed.

PENNSYLVANIA SUPREME COURT.

Rosa FLEMING

PITTSBURGH, CINCINNATI, CHICAGO
& ST. LOUIS R. CO., *Appt.*

(158 Pa. 180.)

No presumption of negligence on the part of a railroad company arises from injury to a passenger by the fall upon a train of a rock which became detached from the natural hillside more than 300 feet from the top of the cut through which the railroad ran.

(October 30, 1893.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Washington County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's daughter while a passenger in the defendant's cars, which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. A. M. Todd and E. Y. Breck, for appellant:

Where a passenger is injured, either by anything done or omitted by the carrier, its employees or anything connected with the appliances of transportation, the burden of proof is upon the carrier to show that such injury was in no way the result of its negligence. But to throw this burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation.

Thomas v. Philadelphia & R. R. Co. 15 L. R. A. 416, 148 Pa. 180.

The plaintiff did not show anything done or omitted to be done by the carrier or its employees, causing the accident; there was no "breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation," and if a nonsuit had been asked for it must have been granted.

Mr. M. L. A. McCracken, for appellee:

NOTE.—The limitation in the above case of the presumption of negligence on the part of a carrier when a passenger is injured is an interesting addition to the subject as very fully shown in *Barnow*—23 L. R. A.

The mere happening of an injurious accident raises prima facie a presumption of neglect and throws upon the carrier the *onus* of showing it did not exist.

Laing v. Colder, 8 Pa. 482, 49 Am. Dec. 533.

When a passenger in a railroad train is injured without fault on his part, the law presumes negligence in the carrier, and the burden is on the carrier to disprove the plaintiff's prima facie case.

Little Schuylkill Nav. & R. Coal Co. v. Norton, 24 Pa. 469, 64 Am. Dec. 672; *Meier v. Pennsylvania R. Co.* 64 Pa. 226, 8 Am. Rep. 581; *Philadelphia & R. R. Co. v. Anderson*, 94 Pa. 351, 39 Am. Rep. 787.

In *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. 284, 72 Am. Dec. 608, this court held, there was "something improper or unsafe in the conduct of the business or in the appliances of transportation;" and that "something" was a cow that had wandered onto the track.

In *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. 61, there was an explosion of some foreign substance on a steamboat owned and operated by the railroad, by which the plaintiff's husband was killed. The explosion was in no way connected with the boilers or any part of the machinery of the boat. The supreme court says: "The evidence of the plaintiff, with the legal presumption arising therefrom, made a case of negligence on which the plaintiff was entitled to recover when her case closed."

This question has recently been determined in plaintiff's favor by the Supreme Court of the United States, in *Gleason v. Virginia Midland R. Co.* 140 U. S. 435, 35 L. ed. 459.

It is no defense that the stone which killed the plaintiff's daughter came from a point on the hill which did not belong to the defendant, and in which it had no right of possession.

Gates v. Pennsylvania R. Co. 16 L. R. A. 554, 150 Pa. 53.

The plaintiff having made out a prima facie case, it could not be taken from the jury.

Sullivan v. Philadelphia & R. R. Co. supra; *Pennsylvania R. Co. v. Weiss*, 87 Pa. 449; *Spear v. Philadelphia, W. & B. R. Co. supra*.

ski v. Helson (Mich.) 15 L. R. A. 33, and *note*, with the later case of *Spellman v. Lincoln Rapid Transit Co.* (Neb.) 20 L. R. A. 316.

Thompson, J., delivered the opinion of the court:

The first two assignments of error are based upon the refusal of the learned judge to charge as follows: First. "The burden of proof is on the plaintiff to show that the death of her daughter was caused by the defendant; and, under the circumstances of the present case, the burden resting on the plaintiff is not satisfied by the mere presumption of negligence which sometimes arises against the carrying company when a passenger is killed or injured." Second. "Under the circumstances of the present case, the burden of proof is not shifted from the plaintiff by the mere fact that her daughter was killed while a passenger on the defendant's railroad; but the plaintiff must show such facts as will connect the defendant, or its servants, or some of the appliances of transportation, with the happening of the injury."

Authority need scarcely be cited that where an injury occurs to a passenger in consequence of something done or not done, connected with the appliances of transportation, there arises the presumption of negligence, which the carrier is required to rebut. This presumption necessarily arises from the contract of carriage, under which the passenger passively trusts himself to the safety of the carrier's means of transportation, and to the skill, diligence, and care of his servants, and by which the carrier, in consideration of the fare, undertakes to carry safely, and, to do so, to furnish the best means and appliances for the purpose, and competent, skillful, and diligent servants. An accident connected with them raises the presumption that they were not such, and that the carrier was guilty of negligence. But if the accident has no connection with the appliances or machinery,—if it is so disconnected with the operation of the business of the carrier as not to involve the safety or sufficiency of the instrumentalities, or the negligence of his servants,—no such presumption arises, and the burden of proof to show negligence is upon the plaintiff, who avers it. In *Thomas v. Philadelphia & R. R. Co.*, 148 Pa. 183, 15 L. R. A. 416, where the accident occurred to a passenger seated at an open window, who was struck by a missile causing the injury, and where there was no evidence as to how the missile came to be thrown, *Mr. Chief Justice Paxson* said: "The rule appears to be that, where a passenger is injured, either by anything done or omitted by the carrier, its employes, or anything connected with the appliances of transportation, the burden of proof, is upon the carrier to show that such injury was in no way the result of its negligence. But, to throw its burden upon the carrier, it must first be shown that the injury complained of resulted from the breaking of machinery, collision, derailment of cars, or something improper or unsafe in the conduct of the business, or in the appliances of transportation."

In the present case, it is not shown that the accident was in consequence of a defect in any of the appliances or machinery used, or of the negligence of appellant's employes in 22 L. R. A.

their conduct of the train. It was the result of a rock becoming detached, and falling upon the train, while passing a point where the hill descends precipitously to the track. From it, at the place of the accident, to the top of the hill, is a distance of 456 feet. The cut for the railroad extends upward 33 feet, and above it is the natural hill. The rock which fell started at about 100 feet from the top of the hill, bounded down some 40 feet, struck, again bounded 20 or 30 feet; making four bounds before it struck the train, and caused the death of the appellee's daughter. It is clear that the fall of the rock was in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employes in the conduct of the train, or in the construction of the road, and therefore there is no presumption of negligence on the part of appellants. But appellee contends that the presumption of negligence arises in this case, and in support of her contention cites the following cases: *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. 234, 73 Am. Dec. 698. In this case the accident was caused by a cow upon defendant's track; and the opinion indicates that, in the conduct of its business, it was the duty of the company to fence the track, or enforce the owner's obligation to keep his cattle at home. *Spear v. Philadelphia, W. & B. R. Co.* 119 Pa. 68. In this case, *Mr. Justice Williams* says: "The person injured was a passenger. The injury occurred after the carriage had begun, and the cause of the injury was an explosion on the boat which was the vehicle or instrument of carriage, and which was under the exclusive care and control of defendant's servants." *Gleason v. Virginia Midland R. Co.*, 140 U. S. 495, 35 L. ed. 459. In this case, the accident was caused by a landslide in a cut some 15 or 20 feet deep. In the opinion of the court, it is said: "The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary, and both are intended for one result, which is the production of a level track over which the trains may be propelled. The cut is made by the company, no less than the fill; and the banks are not the result of natural causes, but of the direct intervention of the company's work. If it be the duty of the company (as it unquestionably is), in the erection of the fills and the necessary bridges, to so construct them that they shall be reasonably safe, and to maintain them in a reasonably safe condition, no reason can be assigned why the same duty should not exist in regard to the cuts." Thus, the cause of the accident was connected with the construction of the road. The difference between the cases cited and the present one is clear. In them, the cause of the accident was connected with the means and appliances of transportation, and the construction of the road; and, in this, it was disconnected with them.

As the first two assignments of error are sustained, it is not necessary to discuss the others.

The judgment is reversed, and a venire facias de novo awarded.

COMMONWEALTH of Pennsylvania,
Appt.,
v.

Rolla LINN *et al.*

(158 Pa. 22.)

An indictment is insufficient to charge
a common-law nuisance by profane

swearing and cursing, unless the profane language is charged to have been uttered in the presence and within the hearing of citizens present, although it is alleged that it occurred on the public streets and highways.

(October 30, 1893.)

APPEAL by the Commonwealth from a judgment of the Court of Quarter Sessions

NOTE.—Blasphemy and profanity as crimes.

- I. Definitions.
- II. Indictable at common law.
- III. Constitution of the offense.
- IV. The indictment.
- V. State statutes.
- VI. Constitutionality of statutes.
- VII. English decisions.

I. Definitions.

Blackstone speaks of this offense as "blasphemy against the Almighty" by denying His being or providence, or by contumelious reproaches of our Saviour, Christ. 4 Bl. Com. 59.

It is an oral or written reproach maliciously cast upon God, His name, attributes, or religion. 2 Bishop, Crim. L. § 78, p. 45.

Every one who publishes any blasphemous document, or who speaks blasphemous words, is guilty of a misdemeanor. Desty, Crim. L. § 118, p. 308.

In *Com. v. Kneeland*, 20 Pick. 203, Shaw, Ch. J., defined blasphemy as consisting in blaspheming the holy name of God, by denying, cursing or contumeliously reproaching God, His creation, government or final judging of the world; and this may be done by language orally uttered, which would not be a libel; but is none the less blasphemy, if the same thing be done by language written, printed, and published, although when done in this form it also constitutes the offense of libel.

It has been described as consisting in speaking evil of the Deity with an impious purpose to derogate from the Divine Majesty, and to alienate the minds of others from the love and reverence of God. *Com. v. Kneeland, supra*.

Purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to Him, as the intelligent creator, governor and judge of the world, constitute the offense. *Ibid.*

It embraces the idea of detraction, when used towards the Supreme Being, as "calumny" usually carries the same idea, when applied to an individual. *Ibid.*

It is a willful and malicious attempt to lessen men's reverence of God, by denying His existence, or His attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in Him, as such. *Ibid.*

Blasphemy, according to the most precise definitions, consists in maliciously reviling God or religion. Bell's Case, 6 City Hall Rec. 38.

To it may be referred all profane scoffing at the Holy Scripture or exposing it to contempt and ridicule. 4 Bl. Com. 59.

Profanity in its nature is a form of blasphemy; any words which amount to an imprecation of divine vengeance constitute the offense.

See further hereon, the statutes of the different states, *infra*.

II. Indictable at common law.

Whatever amounts to a public wrong may be made the subject of an indictment. *Respublica v. Teischer*, 1 U. S. 1 Dall. 385, 1 L. ed. 163.

By the common law, blasphemy against the Deity in general, or a malicious and wanton attack against the Christian religion individually, for the purpose of exposing its doctrines to contempt and ridicule, is indictable and punishable as a tem-
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poral offense. *State v. Chandler*, 2 Harr. (Del.) 553; *Rex v. Taylor*, 1 Vent. 293; *Rex v. Carlile*, 3 Barn. & Ald. 181; *Atty-Gen. v. Pearson*, 3 Meriv. 352; *Rex v. Waddington*, 1 Barn. & C. 26; *Rex v. Woolston*, 2 Strange, 334; *Rex v. Clendon*, cited in 2 Strange, 790; *Andrew v. New York Bible & Prayer Book Soc.* 4 Sandf. 155.

Wicked and malicious words, writings, and actions which go to vilify the gospels, continue, as at common law, to be an offense against the public peace and safety. *People v. Ruggles*, 8 Johns. 290, 5 Am. Dec. 335.

The public use of profane and blasphemous language, in the presence and hearing of divers persons is as indictable offense. *State v. Steele*, 8 Heisk. 135.

As tending not only to a disturbance of the peace and to corrupt the morals of the community, but also to undermine the foundations of Christianity, which is justly regarded in a certain sense as a part of the common law of the land. *Goree v. State*, 71 Ala. 7.

So public profane swearing, as well as blasphemy, was an indictable offense at the common law, but it must take such form and be uttered under such circumstances as will constitute a public nuisance, the mere utterance of a single profane word not being sufficient to constitute an offense punishable by indictment provided it be not loud or with repetitions. *Ibid.*

Where the indictment charged the defendant with the unlawful, wicked, and scandalous use of vulgar, obscene, and indecent language in a certain large assembly and in the hearing of said assembly, the court held the offense constituted a misdemeanor at common law. *State v. Appling*, 25 Mo. 315, 69 Am. Dec. 469.

But the single utterance of a profane word is not *per se* indictable, if it be not spoken, at least, with a loud voice, nor with repetitions. *Goree v. State, supra*.

To be indictable, profanity should take such form, and be uttered under such circumstances, as to constitute a public nuisance. *Ibid.*; *Ex parte Delaney*, 43 Cal. 478, where the use of profane language was prohibited by a city ordinance.

The acts should be so repeated and public as to amount to an annoyance and inconvenience to the public and in the nature of such nuisance. *State v. Jones*, 31 N. C. 39; *State v. Ellar*, 12 N. C. 267; *State v. Graham*, 3 Sneed, 134; *State v. Steele*, 3 Heisk. 137.

If three or four persons be present and hear the words uttered there is sufficient evidence of guilt. *Goree v. State, supra*.

The use of vulgar, indecent, and obscene words in public is an offense at common law, being against good morals and public decency. *State v. Appling*, 25 Mo. 315, 69 Am. Dec. 469.

Where defendant was charged with uttering grossly obscene language "in public and in the hearing of divers citizens" the court held that the uttering in public of obscene words was indictable as it was a violation of public decency and good morals. *Bell v. State*, 1 Swan, 42.

Where the defendant caused a large collection of people in the streets by reason of loud and indecent language the court held him indictable as for a common nuisance. *Barker v. Com.* 19 Pa. 412.

of the Peace for Clarion County in favor of defendants upon an indictment for alleged profane swearing. *Affirmed.*

The indictment originally contained three counts. The first charged a riot. Upon this the defendants were acquitted. The second count charged an affray and threats, but was ignored by the grand jury. The third count was as follows:

So where the defendant was charged with the continued and public use of profane oaths and the frequent loud repetition thereof for the space of five minutes the court held the offense indictable as a common nuisance. *State v. Chrisp*, 85 N. C. 528, 39 Am. Rep. 713.

Although profane swearing of itself, and independent of the disturbance and injury which it may produce to those who hear it, may not form the subject of an indictment, though cognizable before a justice of the peace, under the Act of 1741, chap. 14, yet where charged as a nuisance it is indictable. *State v. Kirby*, 5 N. C. 254.

So where the defendant was charged that he "did in the public streets . . . profanely curse and swear, and take the name of God in vain to the evil example, etc., and to the common nuisance of the good citizens of the state," the court found an indictable offense even though, under the Act of 1741, the justices of the peace had power to punish summarily. *State v. Ellar*, 12 N. C. 287.

Where a municipal body were empowered to prohibit or suppress anything tending to hurt good morals or public decency, it was held that they had power to punish the use and utterance of profane language, no matter whether its utterance was frequent or one isolated case. *Ex parte Delaney*, 43 Cal. 478.

III. Constitution of the offenses.

Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law. *Kent, Ch. J.*, in *People v. Ruggles*, 8 Johns. 230, 5 Am. Dec. 385.

The common law, regarding Christianity as part of the law of the land, respects and protects its institutions and assumes likewise to regulate the public morals and decency of the community. *Bell v. State*, 1 Swan, 42.

The common law is the guardian of the morals of the people, and their protection against offenses notoriously against public decency and good morals. *Grisham v. State*, 2 Yerg. 589.

So far as enforcing the provisions of the law is concerned the offense is considered as committed against man as being against society and tending to disturb the public peace. *State v. Chandler*, 2 Harr. (Del.) 558.

And as to the constitution of the offense of blasphemy, it matters not whether there be a written or an oral publication of the words used. *Ibid.*; *People v. Ruggles*, *supra*; *Rex v. Taylor*, 3 Keb. 607; *Rex v. Atwood*, Cro. Jac. 421.

The gist of the offense is the gross violation of good morals and public decency. *Bell v. State*, 1 Swan, 42.

It is the speaking of the words "profanely." *Com. v. Spratt*, 14 Phila. 385.

The gravamen of the offense of using profane, obscene, and blasphemous language is in its being a public or common nuisance, and the averment of the common nuisance is essential. *Young v. State*, 10 Lea, 165; *Com. v. Spratt*, *supra*.

The law does not look to the language alone, but to the ideas of which that language is the intelligible expression. *Com. v. Kneeland*, 20 Pick. 208.

Where the words are spoken in a wanton manner, and import a wicked and malicious disposition, and not a serious discussion upon any controverted 22 L. R. A.

"The grand inquest of the commonwealth of Pennsylvania aforesaid, upon their oath aforesaid, do further present that Rolla Linn, late of said county, yeoman, Daniel Linn, late of said county, yeoman, being evil-disposed persons, on the day and year aforesaid, and divers other times, as well before as since, at the county aforesaid, and within the jurisdiction of this court, did, on the

point in religion, they are blasphemous in a legal sense. *Bell's Case*, 6 City Hall Rec. 83.

To revile with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of the right of free, equal, and undisturbed enjoyment of religious opinion, and of free and decent discussions on religious subjects. *Ibid.*

If the blasphemous words were not heard by any person, no crime has been committed. *People v. Porter*, 2 Park. Crim. Rep. 14.

A person cannot be convicted of the crime of blasphemy on his own confession, made out of court, without first proving a crime committed, or giving testimony in addition to the confession, from which the court and jury can legally infer that the offense has been committed by some one. *Ibid.*

It has been held, under the Massachusetts statute, that the willful denial of God, His creation or government, or final judging of the world with the intent to disparage and calumniate Him and destroy and impair the reverence due to Him, constitute the crime of blasphemy. *Com. v. Kneeland*, 20 Pick. 208.

So cursing and contumeliously reproaching God have been held blasphemy under the same statute. *Ibid.*

The offense intended to be prohibited is the willful denial with the intent and purpose to impair and destroy the reverence due to Him. *Ibid.*

Where the words used amounted to imprecations of future Divine vengeance they were held to be profane and within the Connecticut statute. *Holcomb v. Cornish*, 8 Conn. 375.

In *Updegraph v. Com.*, 11 Serg. & R. 394, where the defendant stated that "the Holy Scriptures were a mere fable; that they were a contradiction, and that, although they contained a number of good things, yet they contained a great many lies,"—the court held that to maliciously vilify the Christian religion was an indictable offense, Christianity being part of the common law of Pennsylvania.

The principles declared in the above case were approved of and sustained in *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 138, 11 L. ed. 205, 234, and *Zeisweiss v. James*, 63 Pa. 465, 8 Am. Rep. 558.

Where the indictment charged the defendant with wickedly, maliciously, and blasphemously uttering, in the presence and hearing of divers good and Christian people, the words "Jesus Christ was a bastard and his mother must be a whore," the court held the offense blasphemy not only in a popular but in a legal sense by the common law of the state. *People v. Ruggles*, 8 Johns. 230, 5 Am. Dec. 385.

So in *State v. Chandler*, 2 Harr. (Del.) 558, where the indictment charged the defendant with the public and malicious proclamation of similar words with the intent thereby to vilify the Christian religion, and blaspheme God, the court held the offense blasphemy.

But where the indictment charged the offense in the speaking of words even more profane, the court held that the proving of the admission of the making of the statement to a witness was not sufficient to establish the charge. *People v. Porter*, 2 Park. Crim. Rep. 14.

public streets and highways, profanely curse and swear, and take the name of God in vain, to the evil example and to the common nuisance of the good citizens of the state of Pennsylvania, and contrary to the form of the act of assembly in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

Profane swearing is irreligious beyond doubt. *State v. Powell*, 70 N. C. 67.

If loud and continued it may constitute a nuisance. *State v. Powell*, Id. 68.

The use of the name of the Deity is not absolutely necessary to constitute profanity. *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64.

Any words importing an imprecation of divine vengeance or implying divine condemnation, so used as to constitute a public nuisance, will be sufficient. *Ibid.*

The act must be of such a nature as tends to annoy good citizens, and does in fact annoy such of them as are present and not favoring it. *Com. v. Harris*, 101 Mass. 29.

Profanity is indictable when it becomes a public nuisance. *Gaines v. State*, *supra*; *State v. Graham*, 3 Sneed, 184; *State v. Steele*, 3 Heisk. 185.

The peace may have been disturbed by loud talk alone, but the peace may be disturbed by the use of profane language. So held in *Topeka v. Heitman*, 47 Kan. 739, where the defendant was indicted under section 22 of Ordinance 861, with disturbing the peace of the city.

Whenever, upon a trial under a sufficient indictment, there is evidence that the swearing or profane language was a nuisance to the public, the offense is made out. *Gaines v. State*, *supra*.

The fact that there are persons present who encourage and countenance the illegal act makes no difference in the illegality of the act. *Com. v. Harris*, *supra*.

Neither does the fact that such words were spoken while the defendant was drunk, make any excuse, but rather aggravates the offense. *People v. Porter*, 2 Park. Crim. Rep. 14.

The single utterance of a profane oath, not repeated nor in a loud voice, has been held not to be ordinarily indictable *per se*. *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64; *Young v. State*, 10 Lea, 165.

A single oath, however, might by its terms, its tone, or manner, constitute, under the peculiar circumstances of the case, a nuisance. *Gaines v. State*, *supra*; *State v. Graham*, 3 Sneed, 184; *Young v. State*, *supra*.

So the use of profane and vulgar language does not *per se* constitute an indictable offense, but only when so publicly indulged in and so long continued, or often repeated, as to become annoying and hurtful to the community. *State v. Brewington*, 84 N. C. 733.

Whether it was or not is a question for the jury to consider under the charge. *Young v. State*, *supra*.

Where the words charged were only uttered once in the hearing of any other person than the prosecutor, the court held there was no offense. *Gaines v. State*, *supra*.

The utterance could not be a nuisance unless it was in the presence of other persons, whose presence makes any place for the occasion public. *Young v. State*, 10 Lea, 165; *Hackney v. State*, 8 Ind. 484.

In *Com. v. Murray*, 14 Gray, 397, where the prisoner was indicted for being an idle and disorderly person, the court allowed evidence of the habitual use of profane language as evidence of disorderly conduct, as profaneness was a violation of law and contrary to the good order of society.

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Messrs. G. G. Sloan, District Attorney, W. L. Corbett and Weidner & Geary, for appellant:

While we have not been able to find a case decided by the supreme court of this commonwealth where the same words were held to be indictable, yet we find a number of analogous cases where indictments have been held good

Where the defendant applied abusive language to a police constable using profane language, which could be heard at a distance, and thereby collected a crowd some of whom encouraged him, the court held it sufficient to support a conviction. *Com. v. Harris*, 101 Mass. 29.

Where the indictment charged the defendants with "openly and publicly speaking with a loud voice, in the hearing of the citizens, etc., wicked, scandalous, and infamous words, representing men and women in obscene and indecent positions and attitudes," the court held that if the language was addressed to the public, in a public place, and the intent and manifest tendency of it was to debauch and corrupt the public morals, the offense was complete as a misdemeanor or common nuisance. *Barker v. Com.*, 19 Pa. 412.

So the words "God damn you" and "You are a God damned liar" have been held to come within the provisions of the Pennsylvania Statute of April, 1794. *Com. v. Hardy*, 1 Ashm. 410.

In a prosecution under sections 61-68 of 1 Rev. Stat. of New York, the court held that in the case of a single conviction more than three days' imprisonment could not be inflicted even though there were several distinct offenses but one single conviction. *Foland v. Johnson*, 16 Abb. Pr. 235.

IV. The indictment.

The indictment must charge the act as being done in the presence or hearing of some one, merely to aver that it is done "publicly" is not sufficient. *Goree v. State*, 71 Ala. 7.

In order to support a conviction, the indictment must charge the words to have been spoken "profanely." *Updegraph v. Com.*, 11 Serg. & R. 394.

It must aver every material constituent of the offense charged, time and venue only excepted, and any defect therein will not be obviated by sections 4785, 4793, of the Code. *Goree v. State*, *supra*; *Smith v. State*, 63 Ala. 55; *Noles v. State*, 24 Ala. 672.

The mere fact that the indictment charges that the acts were done, "to the common nuisance of all the good citizens of the state" will not be sufficient unless the acts amount in law to a nuisance. *State v. Jones*, 31 N. C. 39.

The averment of a common or public nuisance is necessary. *Robinson v. State* (Tenn.) Sept. Term, 1880, cited in *Gaines v. State*, 7 Lea, 410; *State v. Jones*, *supra*.

And the whole fact must be specially set forth with certainty in order that the court may see, judicially, that it rests on sufficient grounds. *State v. Jones*, *supra*.

Where the indictment charged that the defendant with force and arms did publicly curse and swear and take the name of Almighty God in vain, for a long time, to wit: for the space of two hours, to the common nuisance of all the citizens of the state, and against the peace and dignity of the state, it was held insufficient to support a conviction. *Ibid.*

The indictment must charge the utterance to have been in the presence of divers persons, and so proved in order to create a nuisance by profane swearing, the mere general allegation *ad commune nocumentum* being insufficient. *State v. Pepper*, 68 N. C. 250, 12 Am. Rep. 667.

An indictment which charged that the defend-

for offenses less heinous in their nature and less offensive to public morals and decency.

See *Respublica v. Teischer*, 1 U. S. 1 Dall. 335, 1 L. ed. 163; *Com. v. Taylor*, 5 Binn. 276; *Rex v. Hood*, Sayer, 161; *Com. v. Sharpless*, 2 Serg. & R. 91, 7 Am. Rep. 632; *Com. v. Spratt*, 14 Phila. 365; *Barker v. Com.* 19 Pa. 412.

Public swearing is a nuisance at common

law, but to be indictable it must be in a public place and an annoyance to the public.

State v. Jones, 31 N. C. 38.

Profane swearing in a public place and in the hearing of citizens, continued for five minutes, although only on a single occasion, is an indictable nuisance at common law.

State v. Christ, 65 N. C. 528, 39 Am. Rep. 713.

and did "profanely curse and swear, and take the name of Almighty God in vain," etc., "to the common nuisance" is not sufficient. *State v. Powell*, 70 N. C. 67.

All the facts and circumstances which go to make up the offense must be specifically charged. *State v. Brewington*, 84 N. C. 733.

The setting out of so much of the conversation or words uttered as clearly describes the language used is sufficient to support a conviction without the setting forth of the whole. *State v. Steele*, 3 Heisk. 135.

In *Walton v. State*, 64 Mich. 207, however, the court held that the profane language must be set out.

The averment that the words were uttered "in a public place" to the common nuisance of the citizens is sufficient. *Young v. State*, 10 Lea, 165; *State v. Graham*, 3 Sneed, 134; *State v. Steele*, *supra*; *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64.

So the words "in public and in the hearing of divers citizens," have been held a sufficient averment. *Bell v. State*, 1 Swan, 42; *Young v. State*, *supra*.

Ar. indictment in the usual form would be good, under which the offense must be made out by the proof. *Young v. State*, *supra*; *State v. Odum*, 2 Lea, 220.

Where the indictment charged the defendant with uttering a profane oath "in a public place, in the presence of divers good citizens, and to the common nuisance" it was held good. *Gaines v. State*, *supra*.

The mere omission of the allegation that the words were uttered in the presence of divers good citizens, will not invalidate an indictment otherwise good, the omissions being supplied by other averments. *Gaines v. State*, 7 Lea, 410, 40 Am. Rep. 64.

An indictment charging that the defendant did "publicly use profane and blasphemous and obscene language in the hearing of divers citizens so as to become a nuisance," setting out the words used, is good and will support a conviction. *Young v. State*, 10 Lea, 165.

Where the indictment charged that the defendant "did profanely curse," without setting forth the curses *verbatim et literaliter*, without objection at the trial, the court refused to disturb the conviction. *State v. Freeman*, 63 Vt. 496.

In *State v. Batliff*, 10 Ark. 530, where the defendant was charged with disturbing a religious congregation by profane swearing, the court held that had the indictment been for profanely swearing it would have been necessary to set out the words used charging them to have been uttered publicly, or else with the usual averments of time and place, to charge that he "publicly did profanely swear, etc., by taking the name of God in vain," etc.

Where the indictment charged the use of vulgar and indecent language within the hearing of children, in a loud and boisterous manner, willfully and unlawfully, contrary to section 415 of the California Penal Code, the court held that the language used need not be recited and also that the offense was complete whether used in the streets of an incorporated or other town. *Ex parte Foley*, 62 Cal. 303.

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In an action against a justice for assault and battery the justice pleaded that the plaintiff was fined for "profanely swearing three several oaths by taking the name of God in vain," the court held that the description of the offense was enough. *Odell v. Garnett*, 4 Blackf. 549.

The complaint which charges the act as being done to "the great damage and common nuisance of all the citizens of the commonwealth there inhabiting, being, and residing" is good. *Com. v. Harris*, 101 Mass. 29; *Com. v. Oaks*, 113 Mass. 8; *Com. v. Sweeney*, 181 Mass. 379.

Where the indictment charged the prisoner with uttering a libel in scandalous, profane, and blasphemous words, matters, and things of and concerning God, Jesus Christ, and the final judging of the world by God, and concerning the Holy Scriptures, in words following: "Universalists believe in a God which I do not; but believe that their God, with all his moral attributes (aside from nature itself) is nothing more than a mere chimeria of their own imagination," the court held that whether the words were used with such unlawful intent and purpose, was a question upon the whole indictment and all the circumstances, and after verdict, if no evidence was erroneously admitted or rejected, and no incorrect directions in matter of law were given, it was to be taken as proved, that the language used in the sense, and under the circumstances, and with the intent and purpose, laid in the indictment so as to bring the act within the statute. *Com. v. Kneeland*, 20 Mass. 206.

The word "deny" need not be used in the commission of the offense; any words equivalent in meaning, used with the same purpose and design, must be deemed to have the same legal effect. *Ibid*.

Where the indictment charged defendants with, *inter alia*, a "disturbance of divers citizens" by noises in the public streets against good morals, and the peace, the court held the offense was not properly set out, and that the act merely constituted a nuisance and ought to have been alleged as such, to the great damage and common nuisance, etc. *Com. v. Smith*, 6 Cush. 80; *Com. v. Boon*, 2 Gray, 74.

The Massachusetts statute marks out two modes of willful blasphemy and the court has held that a general averment alleging blasphemy in both these ways, the language amounting to a denial of God, His creation, etc., but not to a contumelious reproach, or on the contrary amounting to the latter but not the former, it is sufficient, on account of the substantive charge of willfully blaspheming. *Com. v. Kneeland*, 20 Pick. 206.

Where the defendant was indicted for profane swearing using the same oath thirty-three times in one day the court held that there need not be a separate charge and conviction upon each oath, one conviction was sufficient. *Johnson v. Barclay*, 16 N. J. L. 1.

Where objection was taken upon the ground that the information did not show that the words were spoken profanely, the court held that it was sufficient to show that if the words were so used or spoken in connection with other words in the ordinary course of argument or conversation, then the informant had committed perjury, profane oaths and rational conversation being different things

It is not necessary that the language used should be heard by a large portion of the community; it is sufficient if three or four persons were present and heard the words uttered.

Gore v. State, 71 Ala. 7.

The words used need not be set forth in the indictment.

Ex parte Foley, 62 Cal. 508; *State v. Ratliff*, 10 Ark. 580; *Barker v. Com. supra*.

not requiring judicial skill to distinguish the one from the other. *Ibid*.

Where the indictment charged the use of profane and vulgar language on a given and divers other days and times both before and since that day, in a certain public street and highway, and in the presence and hearing of divers persons then and there and on the said other days and times assembled, and with the repetition thereof, to the evil example and common nuisance of all good citizens, the court held it sufficient. *State v. Brewington*, 84 N. C. 788.

In Pennsylvania, in a prosecution under the Act of 1700 against blasphemy, the court has held that the mere laying of the substance of the words is not sufficient, they must be set forth themselves. *Updegraph v. Com.* 11 Serg. & R. 364.

Where the indictment charged the defendant with, *inter alia*, contriving and intending the morals as well of youth as of divers other citizens of this commonwealth to debauch and corrupt, and that he did openly and publicly with a loud voice in the public highways wicked, scandalous, and infamous words utter in the hearing of citizens, to the common nuisance of all good citizens, etc.—the court held it sufficient. *Com. v. Mohn*, 52 Pa. 243, 51 Am. Dec. 153.

When the indictment charged that the defendant did by reason of an unlawful assembly at a certain public place and then and there in the hearing of divers good citizens of the state then and there assembled, unlawfully and profanely and with a loud voice, curse, swear, and quarrel thereby breaking up a singing school, to the great damage and common nuisance of the good citizens of the state, and against the peace and dignity of the state, the court held the indictment not sustainable as a common nuisance as the offense must be such as to cause inconvenience and become so troublesome as to annoy the whole community, and not any specific persons. *State v. Baldwin*, 18 N. C. 186.

V. State statutes.

Profanity in the presence of a judge or justice is punishable in a summary way by fine, under section 1861 of the Digest of Statutes of Arkansas, ed. 1884, p. 426; section 103 of the Connecticut Statute; § 689, Gen. Stat. ed. 1888, p. 169; § 36, Code of Dakota; Delaware, Laws of 1893, § 14, p. 733; Kentucky, Stat. ed. 1888, § 8, p. 426; Public General Laws of Maryland, vol. 1, § 19, art. 27; N. J. Rev. Stat. ed. 1877, § 14, p. 1229; Tennessee Code, ed. 1884, §§ 2291, 2293; Vermont Rev. Laws, ed. 1880, § 4253.

Article 10, section 4081, of the Alabama Criminal Code provides for the punishment by fine and imprisonment with or without hard labor, of any person who enters, or goes sufficiently near a dwelling-house and in the presence or hearing of the family of the occupant or any member thereof; or of any person who uses abusive, insulting, or obscene language in the presence or hearing of any female.

By section 507 of the Revised Statutes of Arizona, page 713, it is a misdemeanor to willfully disturb or disquiet any religious assemblage by profane discourse or unnecessary noise.

And section 515 of the Arizona Revised Statutes, 22 L. R. A.

Messrs. John W. Reed and Harry R. Wilson, for appellees:

Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.

4 Bl. Com. 167.

page 714, makes it an offense punishable by fine or imprisonment to use obscene or vulgar language in the presence or hearing of any woman or child in any public place, or to use the same to a woman or child or to another in their presence.

By section 1880 of the Digest of the Statutes of Arkansas, page 426, ed. 1884, profanity is punishable by fine, and if in court without further proof of the crime.

Section 18415, of the Penal Code of California, (§ 415) Hittell's ed. page 1257, relates *inter alia* to persons maliciously and willfully disturbing the peace or quiet of any neighborhood, family, or person, by loud and unusual noise or by tumultuous or offensive conduct.

By section 1372, of the Criminal Code of Colorado, Mills' Anno. Stat., page 945, ed. 1881, any person disturbing public worship by reason of, *inter alia*, profane swearing or vulgar language, is guilty of a high misdemeanor punishable by fine.

And by section 3182, of the same the use of profane language by any commissioned officer in any company in any public place while on duty is a misdemeanor punishable by fine or imprisonment.

By section 1596 of the Connecticut General Statutes, ed. 1888, page 844, every person who blasphemes against God, either of the persons of the Holy Trinity, the Christian religion or the Holy Scriptures is liable to fine and imprisonment and to be bound over to his good behavior.

And under section 1596, the profane use of an oath, or the wicked cursing of another, is punishable by fine.

The Penal Code of the Dakotas, chapter 4, section 31, page 1141 of Levisse's Code of Dakota, defines blaspheming as consisting "in wantonly uttering or publishing words, casting contumelious reproach or profane ridicule upon God, Jesus Christ, the Holy Ghost, the Holy Scriptures, or the Christian religion.

By section 32 of the same if it appears beyond reasonable doubt that the words complained of were used in the course of serious discussion and with intent to make known or recommend opinions entertained by the accused, such words are not blasphemy.

Section 33 makes blasphemy a misdemeanor.

And section 34 defines profane swearing as consisting in any use of the name of God, or Jesus Christ or the Holy Ghost, either in imprecating divine vengeance upon the utterer, or any other person, or in light, trifling, or irreverent speech.

Section 35 makes the party guilty thereof punishable by fine.

If such act be committed in the presence and hearing of any justice of the peace, etc., in court, or under circumstances amounting to a violation of public decency, the party may be summarily dealt with. Section 36.

Blasphemy is a misdemeanor under the Laws of Delaware, section 1, chapter 181, page 952, ed. 1893, and punishable by fine and imprisonment in solitary confinement and in the discretion of the court by finding sureties for good behavior.

Any person of the age of discretion profanely cursing or swearing in any public street is punishable by fine under the Revised Statutes of Florida, § 2622, art. 10, title 2, ed. 1892, p. 823.

The nuisance should be described with certainty, according to the circumstances, and with the detail and fullness usual in indictments. Enough must be alleged to identify the act and to show guilt *prima facie*. Enough must appear to enable the court to see that an indictable nuisance is described; if the thing becomes a nuisance by force of special circumstances, these must be set forth.

16 Am. & Eng. Encyclop. Law, 962, *note*, and cases cited.

Under the Idaho Penal Code, title 10, section 6959, it is a misdemeanor to use any vulgar, profane, or indecent language within the presence or hearing of women or children in a loud and boisterous manner.

Under article 2, section 3, of the Constitution of Illinois of 1870, freedom of worship is guaranteed, but it is provided that this shall not excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

In Indiana, it is provided by section 1999 of Rev. Stat., vol. 1, ed. 1888, that whoever, being over fourteen years of age profanely curses or swears, avers, or imprecates by or in the name of God, Jesus Christ, or the Holy Ghost, is guilty of profanity, and finable upon conviction.

The Indiana Revised Code of 1881, page 194, prohibits profane swearing by or in the name of God. *Odell v. Garnett*, 4 Blackf. 549.

Where the defendant was charged with disturbing the quiet of the city of Topeka under section 22 of its Ordinance 861, by reason of loud, profane, and indecent language, the court held the offense came within the section which provides that "if any person shall disturb the quiet of the city" he is liable to fine. *Topeka v. Heitman*, 47 Kan. 739.

Profane cursing in any play, interlude, show, or exhibition is punishable by fine under section 7 of the General Statutes of Kentucky, ed. 1888, page 426. So also is profane cursing and swearing under section 8, each oath being a separate offense.

The Revised Statutes of Maine, title 11, section 15, page 905, ed. 1883, provides: "Whoever blasphemes the holy name of God by denying, cursing, or contumeliously reproaching God, His creation, government, final judgment of the world, Jesus Christ, the Holy Ghost, or the Holy Scriptures as contained in the canonical books of the Old or New Testament, or by exposing them to contempt and ridicule, shall be punished by imprisonment for not more than two years, or by fine not exceeding two hundred dollars.

And by section 16 of the same, whoever, being of years of discretion, profanely curses or swears, shall, on complaint within twenty days thereafter, be punished by fine of two dollars, and for a second offense five dollars.

By section 73 of title 4, of the same the use of indecent or profane language in railroad cars is a breach of the peace punishable by fine or imprisonment.

By section 18 of article 27 of the Public General Laws of Maryland, vol. 1: If any person, by writing or speaking, shall blaspheme or curse God, or shall write or utter any profane words of and concerning our Saviour Jesus Christ, or of and concerning the Trinity, or any of the persons thereof, he shall, on conviction, be fined or imprisoned, or both at the discretion of the court.

In Massachusetts, by section 19 of chapter 207, of the Public Statutes, page 1167, ed. of 1886, whoever willfully blasphemes the holy name of God by denying, cursing, or contumeliously reproaching God, His creation, government, or final judgment of the world, or by cursing or contumeliously reproaching Jesus Christ, or the Holy Ghost, or by

The court infers, that what is not charged in an indictment does not exist, and it is the business of the pleader to exclude these conclusions in favor of the defendant by proper averments.

Mears v. Com. 2 Grant, Cas. 385.

The third count in the indictment in this case is fatally defective:

1. Because the offense is not stated with that particularity required either as to place or circumstances.

cursing or contumeliously reproaching the holy word of God contained in the Holy Scriptures, or exposing them to contempt and ridicule, is punishable by imprisonment in the state prison or in the jail or by fine and also by being bound over for good behaviour.

And by section 20 whoever, having arrived at years of discretion, profanely curses or swears, is punishable by fine, if prosecuted within twenty days.

The Act of 1782 obviously intended to make a marked distinction between those acts which went to the denial of any God, and those affecting the Christian religion; the former being made unlawful and punishable willfully to blaspheme the holy name of God, by denying God, His creation, government, and final judgment of the world; whereas in the latter, it could only be by cursing or reproaching Jesus Christ, etc., and not by any denial. *Com. v. Kneeland*, 20 Pick. 208.

Under section 9236 of Howell's Annotated Statutes of Michigan, vol. 2, page 2250, any person who willfully blasphemes the holy name of God, by cursing, or contumeliously reproaching God, is punishable by imprisonment or fine.

And under section 9294, any person of the age of discretion who profanely curses or damns, or swears by the name of God, Jesus Christ, or the Holy Ghost is punishable on conviction before a justice of the peace by fine, the prosecution to be brought within five days.

By section 1219 of the Annotated Code of Mississippi, page 382, ed. 1892, any person profanely swearing or cursing in any public place in the presence of two or more persons is punishable by fine.

Section 20, chapter 12a, of the Nebraska Compiled Statutes, ed. 1891, page 119, gives power to the mayor and council to punish the use of obscene or profane language in the streets or other public places.

And under sections 39 and 43, chapter 13a, of the same, power is given to the council of cities of the first class to provide for the punishment of the like offenses.

Section 205 of the Criminal Code of the same provides for the punishment, by fine or imprisonment or both, for the utterance, speaking or use of any obscene or lascivious language or words in the presence or hearing of any female.

In New Hampshire, if any person shall openly deny the being of a God, or willfully blaspheme the name of God, Jesus Christ, or the Holy Ghost, or shall curse or reproach the word of God contained in the canonical books of the Old and New Testaments, he is punishable by fine, and sureties for good behavior. Pub. Stat. chap. 271, § 1, p. 725.

And under section 2 of the same profane cursing and swearing is punishable.

The Revised Statutes of New Jersey, ed. of 1877, page 1229, provide, section 6, for the punishment by fine of any person or persons profanely swearing and cursing.

The New York laws relating to profanity were repealed by the Session Laws of 1832. This fact would seem to be lost sight of in the last editions of the Revised Statutes by Birdseye (vol. 2, Birds-

Profane cursing or swearing, and taking the name of God in vain, is not sufficient in itself to constitute a nuisance.

Com. v. Railing, 118 Pa. 37; 2 Am. & Eng. Encyclop. Law, 424, note 2, and cases there cited; *State v. Baldwin*, 18 N. C. 195.

2. Because the conclusion "to the evil example and the common nuisance of the good citizens of the state of Pennsylvania, and contrary to the form of the act of assembly in such case made and provided, and against the

peace and dignity of the commonwealth of Pennsylvania," is insufficient.

Whart. Crim. L. 8th ed. §§ 1427, 1428; 16 Am. & Eng. Encyclop. Law, 969; *Com. v. Smith*, 6 Cush. 80; *Com. v. Boon*, 2 Gray, 74; *Com. v. Harris*, 101 Mass. 29.

An indictment for a public nuisance by uttering loud cries and exclamations in a public street, must allege that it was to the great damage and common nuisance of all the citizens of the commonwealth there being.

eye's Rev. Stat. p. 2358), and Throop (vol. 2, Throop's Rev. Stat. art. 6, p. 2223), the laws relating to profanity being set out by them in full. Session Laws of 1882, chap. 384, p. 544, between sections 371, 396; Silvernall's Penal Code, ed. 1893, p. 106, sects. 255-258; Donnan's Penal Code, ed. 1893, p. 109.

In Ohio, by section 7026 of the Revised Statutes, vol. 2, page 1732, the use by one over fourteen of obscene or licentious language or words in the presence of a female is punishable by fine or imprisonment or both, and under section 7031, any such person profanely cursing or swearing by the name of God, Jesus Christ, or the Holy Ghost is liable upon complaint within ten days to a fine.

The use of obscene or profane language in any public place to the disturbance or annoyance of any person or persons is a misdemeanor under section 1867 of Hill's Annotated Laws of Oregon.

In Pennsylvania, any person willfully, premeditatedly, and despitefully blaspheming or speaking loosely and profanely of Almighty God, Christ Jesus, the Holy Spirit, or the Scriptures of Truth, on conviction is punishable by fine and imprisonment or either at the court's discretion. *Brightly's Purd. Dig.* vol. 1, p. 324, § 45.

And section 1, page 1171, vol. 11, contains the like provisions, while section 2 relates to the punishment of profane swearing and cursing by the name of God, Jesus Christ, or the Holy Ghost.

In Rhode Island, blasphemy is punished by imprisonment or fine. *Pub. Stat.* § 13, p. 686.

And profane swearing and cursing is punished by fine. *Id.* § 14.

Under section 2291 of the Tennessee Code, ed. 1884, profane swearing in the hearing of a justice of the peace, or the conviction of such offense before a justice, is punishable by fine for every oath or curse.

And by section 2292, profanity in a public office is also punishable by fine.

And under section 2293, profanity in the presence of any court of record is also punishable by fine and imprisonment at the discretion of the court.

Section 4263, *Rev. Laws of Vermont*, ed. of 1880, page 816, provides that a person publicly denying the being and existence of God, or of the Supreme Being, or contumeliously reproaching His providence and government, shall be punished by fine.

And by section 4254 a person of years of discretion who profanely curses or swears is liable to a fine if prosecuted within twenty days.

And under section 4255 a person defaming a court of justice or the sentence thereof, or the magistrates, judges or justices of such court, as to an act or sentence therein passed, is punishable by fine.

Under section 3798 of the Virginia Code, ed. 1887, page 900, any person of years of discretion profanely cursing or swearing is punishable by fine.

In West Virginia any person of years of discretion who profanely curses or swears is liable to a fine. *Code*, chap. 149, § 15, ed. of 1891, page 920.

By section 4396 of the Annotated Statutes of Wisconsin, vol. 2, ed. of 1889, page 2226, any person who uses in reference to and in the presence of another, or in reference to and in the presence of

any member of his family, abusive or obscene language, intended or naturally tending to provoke an assault or breach of the peace is punishable by fine or imprisonment.

VI. Constitutionality of statutes.

Any offense which outrages the feelings of the community, as endangering the peace of the public, may be passed upon by the legislature and prohibited. *State v. Chandler*, 2 Harr. (Del.) 553.

The Delaware Act of February 8, 1826, relating to blasphemy and its punishment, has been held not to be contrary to the provisions of the constitution of that state or to that of the United States, relating to freedom of worship. *Ibid.*

It has been held that the Massachusetts statute is not repugnant to the second article of the Declaration of Rights in the constitution of that state which protects every one in the free use of his right and duty to worship God in any form he pleases so long as he does not disturb the peace or obstruct others, as the only intention of such statute is to punish a denial of God, made with a bad intent and in a manner calculated to give just offense. *Com. v. Kneeland*, 20 Pick. 208.

Neither is it in conflict with article 16 of the same relating to the liberty of the press, when applied to printed blasphemy. *Ibid.*

The object of the 38th article of the Constitution [art. 1, § 3] was not to withdraw religion in general, and with it the best sanction of moral and social obligations from all consideration and notice of the law. *Bell's Case*, 6 City Hall Rec. 38; *People v. Ruggles*, 8 Johns. 290, 5 Am. Dec. 335, *et supra*.

Though the constitution has discarded religious establishments, it does not forbid cognizance of those offenses against religion and morality which have no reference to such establishments, or to any particular form of government, but are punishable because they strike at the root of moral obligation, and weaken the security of the social ties. *Bell's Case*, *supra*.

Such article never was meant to break down the common-law barrier against licentious, wanton, and impious attacks upon Christianity itself. *Ibid.*; *People v. Ruggles*, *supra*.

VII. English decisions.

All blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part thereof to ridicule; all impostors in religion as falsely pretending to extraordinary commissions from God, and terrifying or abusing with false denunciations of judgments; and all open lewdness grossly scandalous,—inasmuch as they tend to subvert all religion or morality which are the foundations of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal in famous punishment as to the court in its discretion shall seem meet, according to the heinousness of the crime. 8 Burns, *Ecol. Law*, 215; 1 Hawk. P. C. 7.

The eternal principles of natural religion are part of the common law; the essential principles

Com. v. Oaks, 118 Mass. 9; *Com. v. Sweeney*, 131 Mass. 579.

3. Because said count is too vague, uncertain, and indefinite.

Barker v. Com., 19 Pa. 412; *Com. v. Mohr*, 52 Pa. 243, 91 Am. Dec. 153.

All that is charged in this count may be true, and the defendants may still be innocent.

Com. v. Slack, 19 Pick. 304; *Moore v. Com.*, 6 Met. 243, 89 Am. Dec. 724; *Barker v. Com.* *supra*.

Green, J., delivered the opinion of the court:

With an earnest desire to sustain this indictment, if possible, we find ourselves unable to do so. It cannot be sustained under the Crimes Act of 1860, § 80, prohibiting blasphemy, because it does not charge that offense, nor under the Act of 1794, because it is not framed upon that act, nor is any attempt made to bring it within the special proceedings under which the act is executed. It only remains to be considered whether it can be sustained as charging a common-law offense. It cannot be doubted that profane swearing and cursing, in a loud and boisterous tone of voice, and in the presence and hearing of citizens of the commonwealth passing and repassing on the public streets and highways of the commonwealth, to such an extent as to be a common nuisance to all citizens being present, and hearing the same, is an indictable offense at common law. But this indictment omits to charge all or any of

these facts and circumstances which are essential to constitute the offense as a common nuisance. It is true the indictment charges that the profane swearing and cursing, and taking the name of God in vain, alleged against the defendants, was "to the evil example and to the common nuisance of the good citizens of the state of Pennsylvania," but it does not aver the facts and circumstances which are necessary to make it a common nuisance. Profane swearing on the streets, not heard by anybody, of course, could not be a common nuisance; and, in fact, it should not only be heard by citizens, but the manner and occasion of the utterance should be of the offensive and annoying character which is necessary to make it a public and common nuisance, as distinguished from a mere private nuisance. The indictment, therefore, must contain an averment of facts sufficient, on its face, to make out the offense charged, within the legal meaning of the offense. In Wharton's American Criminal Law (4th ed. § 2362), it is said: "But an allegation in an indictment that certain facts charged were 'to the common nuisance of all the good citizens of the state' will not make it a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact." In *Barker v. Com.*, 19 Pa. 412, Lewis, J., said: "If the language be addressed to the public, in a public place, and the intent and manifest tendency of it be to debauch and corrupt the

of revealed religion are part of the common law; so that any person reviling, subverting, or ridiculing them may be prosecuted at common law. *Chamberlain v. Evans*, 2 Burns, Ecol. Law, 207; cited in *Updegraph v. Com.*, 11 Serg. & R. 401; *Furneaux's Letters to Sir Wm. Blackstone*, Appx. to Bl. Com.

Christianity is part of the common law. *Rex v. Woolston*, 2 Strange, 620, where defendant was indicted for his blasphemous discourses on the miracles of our Saviour. *Rex v. Hall*, 1 Strange, 416; *Annett's Case*, 1 W. Bl. 365.

The common-law being founded on religion. *Smith v. Sparrow*, 4 Bing. 84, 88.

A general attack upon Christianity is unlawful because Christianity is the established religion of the country. *Gathercole's Case*, 2 Lew. C. C. 237.

In *Gathercole's Case*, *supra*, it was held that a man might attack Judaism, or any sect of the Christian religion except the form established by law.

It is an indictable offense at common law to publish a blasphemous libel of and concerning the Old Testament. *Reg. v. Hetherington*, 5 Jur. 529.

Swearing was punishable by the spiritual court, before the acts which made them temporal offenses, and in which the jurisdiction of the spiritual court is saved. *Rex v. Curl*, 2 Strange, 789.

In *Atwood's Case*, Cro. Jac. 421, the court held that justices of the peace had no jurisdiction over scandalous words defamatory of religion.

Blasphemous words are not only an offense to God and religion, but a crime against the laws, state, and government, and therefore punishable; to say that religion is a cheat is to dissolve all those obligations whereby civil societies are preserved, and that Christianity is parcel of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. *Taylor's Case*, 1 Vent. 293, 3 Keb. 607, 621.

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Where rooms had been rented for the purpose of "(by teaching or advised speaking)" denying the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be divine authority, the court held the purposes illegal as being blasphemous, showing the character of Christ to be defective, his teaching misleading, and the Bible no more inspired than any other book. *Cowan v. Milbourn*, L. R. 2 Exch. 230.

In *Rex v. Waddington*, 1 Barn. & C. 26, it was held that a work containing statements that Jesus Christ was an impostor and a murderer in principle was a libel at common law which had never been affected by statute neither could it be while the Christian religion was the basis of the law.

Any publications which assail and asperse the truth of Christianity in an indecent and malicious spirit, in language calculated and intended to shock the feelings and outrage the belief of mankind, are blasphemous libels. *Reg. v. Bradlaugh*, 15 Cox. C. C. 217.

Indecent and offensive attacks on Christianity or the Scriptures or sacred persons or objects, calculated to outrage the feelings of the community as a general body, amount to blasphemy and are indictable at common law. *Reg. v. Ramsay*, 15 Cox. C. C. 281.

In *Reg. v. Bradlaugh*, *supra*, it was held that publications which discuss with gravity and decency, in an argumentative way, questions as to Christian doctrine or statements in the Hebrew Scriptures, and even questioning their truth, are not blasphemous so as to be the subject of criminal action.

So the mere denial of the truth of the Christian religion, or of the Scriptures, will not *per se* constitute blasphemy so as to render the defendant indictable. *Reg. v. Ramsay*, *supra*. E. W.

public morals, the offense is complete." In *Com. v. Mohn*, 52 Pa. 243, 91 Am. Dec. 153, we sustained an indictment charging that the defendant, "intending the morals . . . of citizens of this commonwealth to debauch and corrupt, openly and publicly, . . . in the public highways, wicked, scandalous, and infamous words did utter in the hearing of the citizens of this commonwealth, and to their manifest corruption and subversion, and to the common nuisance," etc. In 2 Am. & Eng. Encyclop. Law, p. 424, note 2, it is said: "Public swearing is a nuisance at common law, but, to be indictable, it must be in a public place, and an annoyance to

the public;" citing many cases. It is the publicity of the offense, and the place in which it is committed, that make it punishable as a common nuisance. Of course, there can be no publicity unless the profane language is uttered in the presence and within the hearing of the citizens present, and this is an essential and an indispensable fact, which must necessarily be charged in the indictment in order to make out a successful allegation of any offense. There is no such language in the third count of this indictment, and we must therefore pronounce it insufficient as a pleading.

Judgment affirmed.

ALABAMA SUPREME COURT.

A. B. DANTZLER, Admr., etc., of W. A. McKay, Deceased, *Appt.*,

v.

DE BARDELEBEN COAL & IRON CO.

(.....Ala.....)

1. An employe engaged in repairing an engine belonging to his employer, and the engineer whose duty it is to prevent the starting of the engine while the repairer is at work, are fellow servants.

2. Negligence in the exercise of superintendence intrusted to an employe within the meaning of Code, § 2590, subsec. 2, does not exist in the case of an engineer whose duty it is personally to operate the engine, although he usually has a helper, where, in the absence of the helper, by the negligence of the engineer in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine is killed, since the primary duty of the engineer is not that of superintendence, but that of a laborer.

(November 14, 1893.)

APPPEAL by plaintiff from a judgment of the City Court of Birmingham in favor of defendant in an action brought under Code 1896, § 2589, for damages for negligently causing the death of defendant's employe. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bowman & Harsh and Brickell, Sample & Gunter for appellant.
Mr. Walker Percy for appellee.

McClellan, J., delivered the opinion of the court:

This action is prosecuted by the personal representative of W. A. McKay, deceased, and sounds in damages for the death of plaintiff's intestate, which, it is insisted, resulted from the negligence of the De Bardeleben Coal & Iron Company. The first count of the complaint avers wrong and negligence on the part of the company itself, under section 2589 of the Code. The other counts are drawn

under section 2590 of the Code, and severally present causes of action under subsections 1-4, of that section.

The theory of plaintiff under the first count is that the defendant company was negligent in not providing and maintaining a safe place for McKay, one of its employes, and engaged in the discharge of his duties as such when he was killed, to work in. The evidence is without conflict to the effect that McKay was killed by the movement of the piston of a blowing engine. This engine was one of five located in the same room, and all in charge of an engineer named Gould. It became necessary to repair this engine, and to that end it was stopped. It is also shown that when such engine needed repairs, it was Gould's duty to effectually disconnect it from the steam supply, and then turn it over to the repairer, after which, and while the repairs were in progress, the engineer's further duty was to keep watch upon it, and prevent any interference with it by third parties, but beyond this he had no further concern with it until the repairs were completed, and the engine turned over to him by the repairers. When the engine had been stopped, disconnected from the steam supply, and turned over to the repairers, it was their duty to further secure its inaction either by inserting timbers in the spokes of the fly wheel, which would, to the extent of the strength of the timbers, prevent its revolution, and consequently all movement of the engine, or, by propping the piston rod with a heavy timber, which would prevent its descending (its movement is vertical), and, of consequence, all movement of the machine. These methods are about equally efficacious, and are each intended to guard against any accident by which a connection might be re-established between the boiler and the steam cylinder. In this instance the evidence is without conflict that Gould did all that was required of him in disconnecting the engine from the boiler, and that McKay, before attempting the repairs he was to make, propped the piston rod in the manner indicated.

Notwithstanding all this, however, motion was in some way imparted to the engine, the piston rod descended, crushing the beam of wood intended to support it, and crushed and killed McKay, who was inside of the air cyl-

NOTE.—The above case while decided with reference to an Employer's Liability Statute is of much wider application as defining the relation of superintendence or vice-principalship between employes.

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inder, or blowing tub above the steam cylinder, by drawing after it the iron head of the rod which fills the cylinder or tub. Confessedly this movement could have been imparted to the engine in only one way; that is, by reconnecting the engine with the boilers, and turning on the steam. This was done, the inferences are, either by the engineer, or through the interference of some third person. But for this being done, McKay's place of work was a perfectly safe one, and had been made so by the performance by Gould and McKay on their respective parts of the duties which their employment imposed upon them. The company, in other words, had required these employes to provide a safe place for one of them to work. They had complied with the requirement, and the place of safety had been provided. Certainly, to this point, no corporate negligence appears. That the company had discharged its full duty in this regard is demonstrated by the result reached in the actual existence of the conditions it was under an obligation to create. It was under a further duty to maintain the safety of the place while the work was being done. It, however, was not required to insure absolute safety. Its whole measure of duty was to use all reasonable means to that end which a careful and prudent man would resort to under like circumstances. It was not to be expected that the corporation, even were it capable of direct action, would be present in person, so to speak, for the purpose of looking to the maintenance of the safe conditions it had provided. All that was incumbent upon it was to have a proper agent or servant present for this purpose. It could do no more than this, and this it did in the person of Gould, who was charged with the duty of seeing that the safe conditions in respect of the engine be not interfered with by third persons. Gould being a competent person for this service, the company's full duty was performed in having him there to perform it; and any remission of performance on his part was the negligence, not of the employer, but of a fellow servant of McKay, for which the defendant is not responsible at common law in connection with section 2599 of the Code, and not liable at all, unless, under other counts of the complaint, the evidence brings the case within section 2590 of the Code,—the Employer's Liability Act. The trial court did not err, therefore, in giving the affirmative charge for the defendant, so far as the first count of the complaint is concerned.

It remains to be considered whether the case is brought by the evidence within, or rather whether there is any evidence tending to make a case under, section 2590 of the Code. It is manifest that plaintiff's intestate did not come to his death as a proximate result of having gone into and being in the blowing cylinder or tub. His position, but for supervening negligence or unaccountable accident, was a safe one; and hence there is no merit in the contention that he suffered death in consequence of going or being there by the direction of Boyd, to whose orders he was bound to conform, under subsection 4 of the Statute; and, moreover, had such con-

formance to Boyd's orders borne the relation of proximate cause to the casualty, there is no evidence whatever that Boyd was negligent in giving the order. These considerations show also the grounds of our conclusion that the case is not brought under subsection 4 of the Act; and it is not insisted that the injury resulted proximately from any defect in the ways, works, machinery, or plant of the defendant, within the intent and meaning of subsection 1. The chief contention of appellant is that the evidence tended to prove a case under subsection 2 of section 2590 of the Code, and that, therefore, the court erred in charging affirmatively for the defendant; and our further discussion of the case will be confined to the inquiry whether there is any evidence going to show that McKay's death was caused by reason of the negligence of any person in the service or employment of the master or employer, who had any superintendence intrusted to him, while in the exercise of such superintendence. It is conceded in the outset, for the argument, that the evidence did tend to show that Gould, the engineer, was negligent, either in himself setting the engine in motion, or in failing to prevent some third person setting the engine in motion. There can be no doubt that Gould and McKay were fellow servants of the defendant, or that the common master was not liable to the one for injuries resulting from the negligence of the other, unless that other was negligent while in the exercise of superintendence intrusted to him by the employer. Was any superintendence intrusted to him? We are aware that the eighth section of the English Employer's Liability Act, which contains a definition of the phrase, "person who has superintendence intrusted to him," is not embodied in our statute, which is taken from, or in most respects modeled after, the English statute; and we need not take issue with counsel that this is a pregnant omission, implying an intent on the part of the legislature to make the common master liable whenever the injury complained of by one servant is caused by any person in the service who has any superintendence intrusted to him, whether superintendence be his sole or principal duty or not, and whether or not he is ordinarily engaged in manual labor, provided only that the damifying negligence occurs while such person is in the exercise of whatever superintendence is in fact intrusted to him. Yet neither the incorporation of that part of section 8 to which we have referred into the English statute nor its omission from our own, neither its import in the one nor the implication involved in its omission from the other, did or can exert any influence upon the meaning of the word "superintendence." That word has the same significance in both statutes as had the definition of the expression, "person who has superintendence intrusted to him," never been incorporated in the one or omitted from the other. The definition is not of the word "superintendence" at all, but only of the amount or degree of superintendence which must be intrusted to a person to fill the terms of subsection 2, the abstract quality of superintendence being the same whether

it is intrusted to a person in sufficient degree to come within the statute or not. So that we must look elsewhere than to the English statute, or to the fact that the English definition of the phrase, "person who has," etc., has been omitted from our statute for a definition of "superintendence." We find this in Webster's Dictionary: "Superintend: To have or exercise the charge and oversight of; to oversee with the power of direction; to take care of with authority,—as, an officer superintends the building of a ship or the construction of a fort: 'God exercises a superintending care over all his creatures.'"

"Superintendence: . . . The act of superintending; care and oversight for the purpose of direction, and with authority to direct. Synonyms: Inspection; oversight; care; direction; control; guidance." And this in Worcester's Dictionary: "Superintend (L. *superintendo*; *super*, over, and *intendo*, to direct one's attention to; in, to, towards, and *tendo*, to stretch): To oversee; to overlook; to have the care and direction of." "Superintendence: . . . The act of superintending; oversight; superior care; direction; inspection." The following from the Century Dictionary: "Superintend: To have charge and direction of, as of a school; direct the course and oversee the details of (some work, as the construction of a building or movement, as of an army); regulate with authority; manage." And Roberts & Wallace, in their work on Duty and Liability of Employers, say: "The word 'superintendence' seems properly to imply the exercise of some authority or control over the person or thing subjected to oversight."

. . . Accordingly it may, it is thought, be safely assumed that the person for whose negligence an employer is liable under this subsection (2) must be one to whom he has delegated some of that authority or power of control which he would otherwise himself have exercised." Pages 260, 261. To leave out of view for the moment the fact that Gould, the engineer, had a helper or assistant in the manipulation of these engines, we have simply the case of a man engaged in the manual operation of the machines. With his own hands he started the engines, regulated their revolutions, and stopped them; and all this, even to the number of revolutions per minute, he did at the direction and under the control of persons superior to him in the common employment. His was not the duty of giving, but of obeying directions. He did not draw the attention of others to a thing to be done by them, but himself was required to do whatever was to be done. His care of the engines was not for the purpose of direction, and with authority to direct, but was a care to be effectuated by his own hands. He was not to guide and control others in their operation of the engines, but to control and regulate the engines by the laying on of his own hands. He was not to direct the course and oversee the details of the operation of the machines, but the course was marked out by superior authority, and the details were executed by his personal physical exertion. He had none of that authority or power of control which the em-

ployer would otherwise himself have exercised, but all authority in the premises properly belonging to the master was exercised upon him in directing his services as a manual laborer. To say that a man oversees, overlooks, directs, guides, controls, inspects, has a care of, superintends an act which he himself wholly performs, is a contortion of language not to be tolerated. These terms, indeed, are always resorted to, to indicate that the thing done was not manually done by the person spoken of, but at his bidding. Each of these synonyms, and the word "superintendence" itself, must be taken in this ordinary and usual significance here. "Superintendence," in the statute, whatever else it may mean, has no application at all to a person whose sole duty is to be performed by personal acts of manual labor, or any direct bringing to bear of the physical energies to the end in view. It has been said, and is doubtless true in a sense, that the superintendence contemplated by the statute "may be either over men or machinery, plant," etc., but, whether over the one or the other, it must still be superintendence, power of direction, superior care, and control, with authority, as distinguished from direct personal manipulation. And while there may possibly be superintendence of the operation of a machine or a number of machines by one person without intermediate human agency, such a case is most difficult of conception. We are inclined to believe that its possibility even does not exist, and to think that what is really intended by the declaration that there may be superintendence of machinery is that where one has authority to have machinery operated, to direct its operation, to overlook it, etc., and the means at hand in others to carry out his directions, he is superintendent both of the machine to be operated and of the men who are to manipulate it as he directs. This state of facts was brought forward in the argument upon which the declaration referred to was based (Roberts & W. Liability of Employers, p. 262), and we know of no case to the contrary. The case of *Kansas City, M. & B. R. Co. v. Burton* (Ala.) 12 So. Rep. 88, virtually adopts this view, and the case of *Annisston Pipe Works v. Dickey*, 93 Ala. 418, is in no sense opposed to it, since this question was not decided, or at all discussed, in that case; but, to the contrary, the existence of superintendency in Calahan, who really only had manual charge of a machine, was only assumed for the purpose of placing the defense on the ground of contributory negligence, of which there was no serious doubt on the evidence. Whether, however, there may possibly be a case of superintendency purely of machinery or not, it is most clear to us that Gould's position involved no such case, dissociated from consideration of the fact that he had a helper, whose duties are shown in the evidence. Whether he had any superintendence intrusted to him, in view of this consideration, is a question not necessary to be decided in this case. If any such superintendency existed in that connection it was not a general superintendency over the helper and the machines, not a general power of

having the machines operated as he directed by the hand of the helper, but only a special superintendence to direct the helper to assist him, Gould, in the manual labor of operating them. It being his duty to personally perform—not merely direct—this labor, and his right only to have the other man help him to perform it, his relation to the machinery being primarily that of a laborer, it cannot be said that he was in the exercise of any superintendence while he was discharging this primal duty of a manual laborer. His superintendence, if any he had, extended only to his actual direction of the helper, and ceased whenever he did any act in person and in the line of his duty as the engineer in charge of these machines; the case in this respect being radically different from those of *Osborne v. Jackson*, L. R. 11 Q. B. Div. 619, and *Kansas City, M. & B. R. Co. v. Burton* (Ala.) 12 So. Rep. 88, 94, in which the sole duty of the negligent person was that of superintendence, and he voluntarily co-operated in manual labor. The idea that it was not the legislative purpose to make the employer liable for the negligence of persons in charge of machinery, plant, and the like for the purpose of operating the same, unless the machinery is on or connected with railroads, is strengthened by a reference to subsection 5 of the Act, which allows a recovery when the injury is caused by the negligence of any person, etc., who has charge or control of any signal points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway. If

the contention of counsel be sound that there may be superintendence of machinery, plant, etc., purely, there was no necessity for the enactment of this clause, since the matters provided for in it are embraced in clause 2. The legislature supposed they were not, and therefore enacted subsection 5.

The evidence in this case is without conflict to the effect that when the engine moved or was set in motion Gould's helper was not even on the premises, and that if the engine was started by Gould, it was the direct, negligent act of a manual laborer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of subsection 2 of section 2590. The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted "while in the exercise of such superintendence." On the other hand, had the jury concluded that Gould did not start the engine, but that it was set in motion by some third person in consequence of his failure to prevent outside interference, the result must have been the same. On this hypothesis Gould was a mere watchman, for whose negligence the company was not responsible to his fellow servant, McKay. *Roberts & W. Liability of Employers*, 260. In no possible aspect of the evidence was the plaintiff entitled to recover. The affirmative charge for defendant was properly given.

Affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Kirk E. NIMS

v.

MOUNT HERMON BOYS' SCHOOL.

(.....Mass.....)

1. An educational corporation engaged in operating a public ferry, carrying passengers for hire, cannot escape liability for negligence in the management of the ferry on the ground that the business was *ultra vires*.
2. A corporation may be held to have adopted the acts of its agents in conducting a business *ultra vires*, where its managing officers, knowing the business has been done and that the income of the business has been received and the expenses of it paid by the treasurer, has adopted the action of the treasurer and elected to keep the money.

(November 20, 1893.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Franklin County made during the trial of an action brought to recover damages alleged to have been caused by de-

fendant's negligence, which resulted in the verdict in defendant's favor. *Sustained.*

The facts are stated in the opinion.

Mr. Dana Malone, for plaintiff:

A corporation is liable *civilliter* for all torts committed by its servants or agents by authority of the corporation express or implied; and it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal nor a vote of the corporation constituting the agency or authorizing the act.

Dener & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146; *Bulkeley v. Derby Fishing Co.* 2 Conn. 252, 7 Am. Dec. 271; *Allegheny City v. McClurken*, 14 Pa. 81.

The ferry was operated and maintained by the defendant.

Pub. Stat., chap. 55, § 1, requires that no person shall keep a ferry unless he first receives a license therefor from the county commissioners.

The records of the county commissioners show that the defendant presented a petition to

NOTE.—The denial by the above decision of the defense of *ultra vires* to a corporation in respect to business in which it has actually engaged is in accordance with the doctrine of other important cases of recent years departing from the stricter 22 L. R. A.

rule of some earlier cases. Of the later class, see *Leinlauf v. Lombard* (N. Y.) 20 L. R. A. 48.

As to the estoppel of a corporation to set up the plea of *ultra vires*, see *Miller v. American Mut. Acc. Ins. Co.* (Tenn.) 20 L. R. A. 765, and *nota*.

said commissioners, March 4, 1890, and having filed its bonds, with sureties, was duly licensed to keep said ferry for one year, to be known as "Mount Hermon Ferry."

2. Charles Deane, the ferryman, was employed to run the ferry, and was paid by the defendant.

3. The defendant paid for the repairs of the ferry and boats, and bought a new boat and paid for it from its funds.

4. The defendant took the proceeds of the ferry, paid to it by said Deane, and other amounts received for ferriage by said Nichols, their cashier.

5. The money received was duly entered on the books of the corporation kept by the cashier, also on the books of the treasurer.

6. The trustees must be presumed to know that the ferry was being run by the defendant.

The power of the trustees may be delegated to members of the board.

Green's Brice, *Ultra Vires*, 490; Cook, Stock & Stockholders, § 715; *Burlington v. Dennison*, 42 N. J. L. 165.

Subsequent ratification is equivalent to prior authority and renders the principal liable for acts of its agents.

Story, Ag. § 239; *Clement v. Jones*, 12 Mass. 60; *Conrad v. Abbott*, 182 Mass. 380; *Dempsey v. Chambers*, 18 L. R. A. 219, 154 Mass. 380.

The defendant has enjoyed the benefits received from the running of the ferry. There is no rule of law which permits them to retain the benefits and escape liability.

Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co. 83 Pa. 160; *Parish v. Wheeler*, 22 N. Y. 494; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

A corporation will be liable for an injury done by its servants if under like circumstances an individual would be responsible.

First Baptist Church in Schenectady v. Schenectady & T. R. Co. 5 Barb. 79; *Rhodes v. Cleveland*, 10 Ohio, 160, 86 Am. Dec. 83.

The rule that governs cases of tort is that the doctrine of *ultra vires* has no application. Corporations are liable the same as individuals.

Central R. & Bkg. Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008; *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 209, 16 L. ed. 75; *New York & N. H. R. Co. v. Schuyler*, 84 N. Y. 30; *First Nat. Bank of Carlisle, Pa. v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Gruber v. Washington & J. R. Co.* 92 N. C. 1; *Wood's Field, Priv. Corp.* § 480.

A corporation is liable for consequences of tortious acts done by its authority, though not within scope of its powers.

Cooley, *Torts*, 2d ed. § 119; *Bissell v. Michigan S. and N. I. R. Co's*, 23 N. Y. 258; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 187, 54 Am. Rep. 128; *Buffett v. Troy & B. R. Co.* 40 N. Y. 168.

The fact that acts were unauthorized by the charter is no defense to a wrongdoer.

Hutchinson v. Western & A. R. Co. 6 Helsk. 634; Green's Brice, *Ultra Vires*, 2d Am. ed. 364; *Maund v. Monmouthshire Canal Co.* 2 Dowl. N. S. 113; *Mill v. Hawker*, L. R. 9 Exch. 309.

The plea of *ultra vires* should not prevail. 23 L. R. A.

when it would not advance justice, but on the contrary would accomplish a legal wrong.

Leslie v. Lorillard, 1 L. R. A. 456, 110 N. Y. 519; *Leinkauf v. Lombard*, 20 L. R. A. 48, 187 N. Y. 417; *Stewart v. Harvard College*, 12 Allen, 58; *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

Messrs. Conant & Conant, for defendant:

There are two modes in which a corporation may expressly contract and act: first, by vote of its members; and second, by its duly authorized agents.

Angell & A. Priv. Corp. §§ 226, 276.

Being the mere creation of law, a corporation possesses only those properties which the charter of its creation confers upon it. These are such as are supposed best calculated to effect the object for which it was created.

Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 636, 4 L. ed. 659.

This defendant corporation has provided that its board of trustees shall speak and act for it. Its first by-law provides for a board of twenty-five trustees, whose duty is defined to be "to conduct all the affairs of the corporation . . . in such manner as they shall deem expedient."

Neither the records of the defendant corporation nor of its board of trustees, show any vote or action at any time, that in any way or manner, relates to said ferry or its management, or to a license to operate it, or to any bond, or that the said trustees or any one of them had taken any action in relation to said ferry, or had any knowledge thereof, except as appears in the bill of exceptions.

There does not appear to have been any agent of the defendant having any authority whatever in the matter of the ferry.

The enumeration of powers granted implies the exclusion of all others.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Davis v. Old Colony R. Co.* 131 Mass. 270, 41 Am. Rep. 221.

The defendant had no power under its charter to engage in the business of a common carrier of passengers for hire, either direct or implied; such business was *ultra vires* or acts the corporation was not authorized to do either by express or implied powers.

Thomas v. West Jersey R. Co. supra.

If the defendant's board of trustees had voted to buy and had bought, and to manage said ferry, and had attempted so to do, such acts would have been *ultra vires*, and the corporation not liable in this action.

It is not liable for a tort or negligence unless such act is done in the course of the business authorized by its charter and by an authorized agent.

Pearce v. Madison & I. and Peru & I. R. Co's, 62 U. S. 21 How. 441, 16 L. ed. 184; *McGregor v. Deal & D. R. Co.* 17 Jur. 21; *Colman v. Eastern Counties R. Co.* 10 Beav. 1; *East Anglian R. Co. v. Eastern Counties R. Co.* 11 C. B. 808.

Knowlton, J., delivered the opinion of the court:

The defendant is an educational corporation. The plaintiff seeks to recover damages for injuries received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges,

the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds: It says, in the first place, that if it maintained the ferry, and hired and paid the ferryman, the business was *ultra vires*, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferryboat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts, as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel, and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. *Moore v. Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 83; *Fogg v. Boston & L. R. Corp.* 148 Mass. 513; *Reed v. Home Sav. Bank*, 180 Mass. 443, 39 Am. Rep. 468; *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 209, 16 L. ed. 75; *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 19 L. ed. 1008; *First Nat. Bank of Carlisle, Pa. v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Gruber v. Washington & J. R. Co.* 92 N. C. 1; *Hussey v. Norfolk Southern R. Co.* 98 N. C. 84. If a corporation, by its officers or agents, unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferryboat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.

In *Bissell v. Michigan S. and N. I. R. Co's*, 22 N. Y. 258, the plaintiff founded his action on the negligence of the two defendants while jointly running cars on a railroad in a state to which the charter of neither of them extended, and it was conceded that the defendants were acting *ultra vires*. The plaintiff recovered, *Comstock, Ch. J.*, holding, in an elaborate opinion, that the corporations were liable under their contract, notwithstanding that the contract was *ultra vires*, and that if they could not be held under their contract they could not be held at all, inasmuch as the only negligence alleged was a failure to use the care which the contract

called for. *Selden, J.*, in an equally full and elaborate opinion, held that the contract for carriage was invalid, and that there could be no recovery under it, nor for negligence founded upon it, but it was his opinion that if the contract were set aside the defendants owed the plaintiff a duty founded on his relation to them as an occupant, with their permission, of a place in their car, and that the improper management of the car was a neglect of that duty, for which the plaintiff could recover. *Clerke, J.*, agreed with this view, and all but one of the other judges concurred in a decision for the plaintiff, without stating the ground on which they thought the decision should be placed. This case was followed in *Buffett v. Troy & B. R. Co.*, 40 N. Y. 168, in which it was held that a railroad corporation was liable for negligence of the driver of a stagecoach which it was running without a legal right to do a business of that kind; but the opinion does not show whether the decision is founded on the opinion of *Comstock, Ch. J.*, given in the former case, or on that of *Selden, J.* Like decisions have been made under similar facts in *Central R. & Bkg. Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 358; *New York, L. E. & W. R. Co. v. Haring*, 47 N. J. L. 137, 54 Am. Rep. 123, and *Hutchinson v. Western & A. R. Co.* 6 Heisk. 684.

The better doctrine seems to be that a contract made by a corporation in violation of its charter, or in excess of the powers granted to it either expressly or by implication, is invalid, considered merely as a contract, and, so long as it is entirely executory, will not be enforced. It is not only a violation of a private trust, viewed in reference to the stockholders, but it is against the policy of the law, which intends that corporations deriving their powers solely from the legislature shall not pass beyond the limits of the field of activity in which they are permitted by their charter to work. *Davis v. Old Colony R. Co.* 181 Mass. 258, 41 Am. Rep. 221; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57, 8 Am. Rep. 322; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 289, 6 Am. Rep. 227; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Leslie v. Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L. R. A. 48; *East Anglian R. Co. v. Eastern Counties R. Co.* 11 C. B. 808. On the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail, when to allow it would work injustice, and accomplish legal wrong. *Leslie v. Lorillard*, and *Linkauf v. Lombard*, *supra*. Many cases might be supposed in which it would be most unjust to hold that one who had received the benefits of such a

contract might retain them, and leave the other party without remedy, as he might do in a supposable case, where another had put himself at a disadvantage on the faith of a contract with him to commit a crime. Whether, in this commonwealth, a contract entered into by a corporation *ultra vires*, and partly performed, will ever be enforced on equitable grounds, we need not now decide. See *Slater Woolen Co. v. Lamb*, 148 Mass. 420; *Prescott Nat. Bank of Lowell v. Butler*, 157 Mass. 548; *National Pemberton Bank v. Porter*, 125 Mass. 333, 28 Am. Rep. 235; *Attleborough Nat. Bank v. Rogers*, 125 Mass. 339; *Freeman's Nat. Bank v. Savery*, 127 Mass. 75-77, 34 Am. Rep. 345; *Union Nat. Bank of St. Louis v. Matthews*, 98 U. S. 621, 25 L. ed. 189; *McCluer v. Manchester & L. Railroad*, 13 Gray, 124, 74 Am. Dec. 624; *National Bank of Genesee v. Whitney*, 103 U. S. 99, 26 L. ed. 443; *Parish v. Wheeler*, 22 N. Y. 494; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.* 83 Pa. 160; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656.

In the present case, we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless, some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant, while running the ferryboat, accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee; it owed him the duty to use proper care to carry him safely; and, whether an action could be maintained for a breach of the contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws, the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners under Pub. Stat., chap. 55, § 1, to keep the ferry; but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition to properly perform the duty of a ferryman, executed in behalf of the defendant by one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above

the mortgage existing upon it, and that he and the defendant's superintendent who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry, above his wages, to the defendant's cashier and paymaster. For the month of April, Deane was paid for his services by the defendant's paymaster, out of the defendant's funds. In June, 1890, a new ferryboat was constructed, under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York, monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees, and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title, "Ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it. There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received, and the expenses of it paid, by its treasurer, in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury, on all the evidence. If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, 18 L. R. A. 219, it was held, after much consideration, that ratification of

an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in

doing the act. We are of opinion that the case should have been submitted to the jury.
Exceptions sustained.

FLORIDA SUPREME COURT.

PENSACOLA & ATLANTIC R. CO.,

Appt.,
v.

William K. HYER *et al.*

(23 Fla. 539.)

"Where a railway company, having lawful authority so to do, crosses a public navigable stream or watercourse with its road, erecting in a proper manner the proper and necessary structures for such crossing, occupying therewith the space and no more than the space permitted to it, and so erects and uses such structures as that they shall not unnecessarily abridge or destroy the usefulness of such stream to the public as a navigable highway, using in a proper manner a movable drawbridge by which it crosses that part of such stream left open for the public navigation thereof, it is not liable for injuries resulting to vessels navigating such stream from coming in contact with obstructions in the open space or channel of water under such drawbridge when such obstructions are present without fault on such company's part. The open space left to be temporarily spanned from time to time by the railway's drawbridge is left not only to the free use but to the control and care of the public, and the railway company is under no more obligation to keep it free of obstructions present without its agency, than it is to care for any other part of the channel of such stream.

(December 23, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Escambia County in favor of defendants in an action brought to recover damages for injuries alleged to have been caused to plaintiff's steam tug by reason of obstructions allowed to accumulate under the water in the channel left by the draw of defendant's bridge. *Reversed.*

The facts sufficiently appear in the opinion. Mr. William A. Blount, for appellant:

The bridge is not *per se* a nuisance. The Pensacola & Atlantic Railroad Company defendant was by its charter authorized to construct a railroad "from a point on the Apalachicola river . . . westward to the waters of Escambia bay at the city of Pensacola, thence to the Alabama line by the most direct route."

The court will take judicial notice of the fact that Escambia bay must be crossed by a railroad extending by a direct route from the Apalachicola river to Pensacola and thence to the Alabama line. The act then which authorized the building of the road between these two points authorized the bridging of Escambia bay lying between them.

Hamilton v. Vicksburg, S. & P. R. Co. 119

*Headnotes by TAYLOR, J.

U. S. 280, 30 L. ed. 393; *Union Pac. R. Co. v. Hall*, 91 U. S. 350, 23 L. ed. 431; *People v. Rensselaer & S. R. Co.* 15 Wend. 130, 30 Am. Dec. 38; *Springfield v. Connecticut River R. Co.* 4 Cush. 64; *Mohawk Bridge Co. v. Utica & S. R. Co.* 6 Paige, 554, 3 L. ed. 1099.

The bridge then being built under legislative authority is not a nuisance.

Bellinger v. New York Central Railroad, 23 N. Y. 42; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 857; *Pound v. Turk*, 95 U. S. 459, 24 L. ed. 525; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 37 L. ed. 442.

Nor was the bridge constructed in an improper manner; there is no allegation that it was so constructed.

Authority to build the bridge carried with it authority to build it with no passage through it except a suitable draw.

Thompson v. Paterson & H. R. Railroad, 9 N. J. Eq. 559; *People v. Rensselaer & S. R. Co.* 15 Wend. 118, 30 Am. Dec. 38.

If any duty exists on the part of the defendant to see that the passage through the draw is kept safe for the navigation of vessels, it must arise from express provisions in the charter or from provisions necessarily implied. There are no express provisions.

There is but one implied condition attached to the grant of the right to build the bridge, which is that it shall not unnecessarily obstruct navigation.

Ward v. Louisville & N. R. Co. (Tenn.) 3 Am. & Eng. R. R. Cas. 506.

In the absence of a duty to keep the draw clear at all events—of a duty to insure against accidents—the ordinary rule of negligence applies, that the owner or controller of such a structure which has been properly built is liable for any defect in its condition only if he has been put upon notice of the condition either from direct information, or from the existence of circumstances which would indicate the existence of the condition, or from an imputed knowledge of natural causes which would produce such condition.

Conhocton Stone Road v. Buffalo, N. Y. & E. R. Co. 51 N. Y. 582; *Shearm. & Redf. Neg.* 148; *Walden v. Finch*, 70 Pa. 460; *Schell v. Second Nat. Bank of St. Paul*, 14 Minn. 43.

Mr. John C. Avery, for appellees:

If this court should find that it was in contemplation of the act that the Pensacola & Atlantic Railroad Company should build a bridge over the Escambia bay, then it was certainly contemplated that such bridge should be of such design and structure as would least impede navigation.

Inasmuch as the navigation of those extensive waters was, by the act of appellant, forced into so narrow a channel in order to enable it to

NOTE.—On the question of the liability of a railroad company to keep a navigable channel between the piers of a lawful drawbridge free from obstructions, the above case seems to be as is decided L. R. A.

declared by one of the counsel in the case, "practically one of first impression," although it has a precedent in the brief case of *Ward v. Louisville & N. R. Co.* (Tenn.) 3 Am. & Eng. R. R. Cas. 506.

cross the bay at a smaller expense, it is incumbent on appellant to see that the space of the draw is kept clear of obstructions.

Where vessels were invited in business with wharf owners to use their structures, it is incumbent upon owners to see that the use is without damage or danger.

Leonard v. Decker, 23 Fed. Rep. 741; *Smith v. Havemeyer*, 36 Fed. Rep. 927.

How much more reasonable is it to hold to the same and even stricter responsibility a company having and using the power to compel for its own purposes, and to save money, the commerce of a bay to abandon a broad and safe channel and submit to the use of a single and narrow space for transit to and fro.

Edgerton v. New York, 27 Fed. Rep. 281; *Etheridge v. Philadelphia*, 26 Fed. Rep. 43; *Post v. Lincoln*, 25 Fed. Rep. 885.

Taylor, J., delivered the opinion of the court:

The appellees as owners of the steam tug "E. E. Simpson," in an action in case, in the circuit court of Escambia county, recovered judgment against the appellant for the sum of \$244.58, and from this judgment the defendant below appeals.

The only error assigned is the ruling of the court below upon the defendant's demurrer to the plaintiffs' declaration, whereby the sufficiency of the declaration to warrant a recovery in law was questioned. The declaration is as follows: "Wm. K. Hyer and Albert Hyer, as partners under the firm name of Hyer Brothers, F. C. Brent, Isaac Rogers, and John J. Bowes, as owners of the steam tug named E. E. Simpson, the plaintiffs, by their attorney, John C. Avery, sue the Pensacola & Atlantic Railroad Company, a corporation, the defendant. For that, to wit, on the 6th day of March, 1888, to wit in the county and state aforesaid (Escambia county, Florida), the said plaintiffs then and there being the owners of a certain steam tug named E. E. Simpson, which they used in the business of towing vessels and timber in the waters of Pensacola bay and the tributaries thereof, and the said defendant being then and there engaged . . . under the authority of law in the business of transporting freight and passengers for hire over the line of railroad extending from the county aforesaid across the county of Santa Rosa, from east to west, the said defendant was then and there engaged in the said business and accomplishing the said transportation between the said counties by means of a certain bridge across the waters of Escambia bay, a navigable stream, and an arm of the said bay of Pensacola; the said bridge being laid upon piles driven into the soil forming the basin of the said bay, and so near together as to totally obstruct the navigation of the said Escambia bay, except at a point about the middle thereof where the defendant had and maintained a drawbridge, through which all vessels and other craft navigating the said Escambia bay were compelled to and did pass in proceeding from points north of said bridge to the city of Pensacola. And the plaintiffs in fact aver that on the day and date aforesaid, in the county aforesaid, while

their said boat was engaged in the navigation of the said bay, in the prosecution of her lawful business, she was compelled to and did pass through the said draw in the said bridge, which said draw it was the duty of the defendant to keep clear of obstructions so as to enable the same to be safely navigated by all vessels which might have navigated the said waters had said bridge not been erected at all by the defendant. And the said plaintiffs in fact aver that their said boat could and would have safely navigated the said waters had the said bridge not been built as aforesaid, but the defendant permitted the . . . space of the said draw through which said boat had to pass to become obstructed by snags, posts, logs and other obstacles below the surface of the water and invisible to persons in plaintiffs' said boat, in so much that when the plaintiffs' said boat undertook to pass through the same her propeller struck against the said obstructions and was broken, so that the plaintiffs were compelled to procure a new wheel, paying therefor the sum of \$254.88, its reasonable value. Yet the defendant fails to pay the same or any part thereof, to the plaintiffs' damage of \$1,000, and therefore, they sue," etc. The ground of the demurrer to this declaration was: "That it sets forth no breach of any obligation of the defendant towards the plaintiffs." It will be observed from this declaration that there is no allegation therein that the occupancy of the navigable water known as Escambia bay by the defendant railway company with its railway, piles, track, and bridge was in any wise unlawful or unauthorized; but, on the contrary, it expressly alleges that the defendant "was then and there engaged under the authority of law in the business of transporting freight and passengers for hire over the line of railroad extending from Escambia county across the county of Santa Rosa, from east to west, accomplishing the said transportation between the said counties by means of a certain bridge across the waters of Escambia bay," etc.

The declaration admitting, as it does, that the defendant has the lawful authority to occupy the waters of this bay with its road, the company cannot be held in fault in having it there, unless it be that in the erection or use of its authorized structures it has, in some unlawful manner, destroyed, or unnecessarily abridged or obstructed, its usefulness to the public as a navigable highway. Our next inquiry, then, from the declaration is, Does it charge upon the defendant any default in the manner in which it has exercised its authority to cross said bay; or in the structures or use of the structures erected by it to effect such crossing; or in the structural design, position, dimensions, or use of the drawbridge designed to subserve the double purpose of affording to the railway the means of crossing the stream, and, at the same time, serving to retain for such stream its usefulness as a highway? We find no complaint against the defendant in any of these respects; therefore we conclude that the defendant has not exercised and used its authority to occupy the stream in any unauthorized

manner, but that what it has done has been lawfully done. What, then, is the defendant's default that has wrought the damage complained of? We find it in the allegation that "the defendant permitted the space of the said draw through which said boat had to pass to become obstructed by snags, posts, logs, and other obstacles below the surface of the water and invisible to persons in plaintiffs' said boat, in so much that when the plaintiffs' said boat undertook to pass through the same her propeller struck against the said obstructions and was broken," etc. It will be observed that in this, the gravamen of the complaint, there is no charge that the alleged obstructions were present in the waters under the draw through any instrumentality of the defendant, or in consequence of any faultiness in its structures, but the charge is, that the defendant "permitted" the space under the draw to "become obstructed," thereby implying that the obstructions were present there, not through the active instrumentality of the defendant, but through other agencies, and that the defendant was in default in not removing them, and in passively permitting them to remain there. In other words, as is contended here, it is assumed by the plaintiffs that it is the defendants' duty at all times to keep the water highway passing through and under its draw-bridge free from all obstructions, no matter how they become present there. And the injury resulting to plaintiffs' boat from the defendant's neglect of this its alleged duty is the foundation for the suit. In this contention we cannot agree with the counsel for the appellees. The fact that the company, when authorized to construct its road across a navigable stream, is granted such authority upon the implied condition that it shall

cross it in such manner that it shall retain its usefulness as a public highway without unnecessary abridgment, and that the invention of the movable draw-ridge enables it to comply with this condition in its authority, necessarily carries with it the idea that the open space, simply spanned by its draw, is left, not for the company's use nor under its care or control but free and clear of any of its structures, as the public highway, for use by the public, subject to the same custody, control and care as any other part of the stream spanned. The company, except to span it with their movable draw, temporarily for the passage of its trains, has no more authority or control over such open space, than it has over any other part of such public stream not in contact with its works; and is not charged with the duty of keeping it free and clear of obstructions present without any instrumentality or fault on its part, and is under no more obligation to remove them from time to time, than it is under to keep any other part of the stream free from similar obstructions. Its whole duty is performed when it properly occupies with its necessary and proper structures the space, and no more than the space, permitted to it, and so uses its structures that they shall not unnecessarily abridge or impede the rights of the public. The open space left to be simply spanned by its draw is left, not only to the free use, but to the control and care of the public. From this conclusion it becomes apparent that the defendant's demurrer to the plaintiffs' declaration should have been sustained. *Ward v. Louisville & N. R. Co.* (Tenn.) 3 Am. & Eng. R. R. Cas. 506.

The judgment appealed from is reversed, with directions to sustain the defendant's demurrer to the declaration.

CALIFORNIA SUPREME COURT.

RE Will of Bridget GUILFOYLE, Deceased.

(96 Cal. 596.)

1. The name of the testator written at the beginning of a will is sufficiently

near his mark at the end to make the mark a valid signature within a statute requiring the name to be written near the mark, if the intention that the mark should represent the testator's name clearly appears.

2. A testator, knowing how but being unable because of physical weakness

*NOTE.—Signature by mark.
Signing wills.*

A will is not invalid on account of the testator signing the same with his mark. *Upchurch v. Upchurch*, 16 B. Mon. 102; *Dack v. Dack*, 19 Hun. 630; *Main v. Ryder*, 84 Pa. 217; *McNinch v. Charles*, 2 Rich. L. 229; *Re Dilke*, L. R. 3 Prob. & Div. 164, 43 L. J. P. 88, 30 L. T. N. S. 805, 22 Week. Rep. 456; *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 830; *Smith v. Dolby*, 4 Harr. (Del.) 350; *Robinson v. Brewster*, 140 Ill. 649; *Canatsey v. Canatsey*, 130 Ill. 397; *Re Field*, 3 Curt. Ecol. Rep. 752; *Clarke v. Clarke*, 2 Ir. C. L. Rep. 395; *Re Smith*, 61 Hun. 105.

Though not directly decided the same was held in the following cases: *Robins v. Coryell*, 27 Barb. 556; *Miles' Will*, 4 Dana. 1; *Mutual Ben. L. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Lemalne v. Staneley*, 1 Freem. 538; *Rash v. Purnell*, 2 Harr. (Del.) 448; *Butler v. Benson*, 1 Barb. 626.

In *Chaffee v. Baptist Missionary Convention*, 10 22 L. R. A.

Paige, 85, 4 L. ed. 896, 40 Am. Dec. 225, the court said: "It has been determined that the making of his mark by the testator is a sufficient signing." But this was not decided as the will signed by name and not by mark was refused probate for want of proof of proper acknowledgment, but the testatrix had previously signed documents by mark.

And a will may be signed by mark instead of name even if testator could write. *Baker v. Denning*, 3 Nev. & P. 228, 8 Ad. & El. 94, 1 W. W. & H. 148, 2 Jur. 775.

And may be signed by mark alone, the name of the testator not appearing at the mark. *Re Bryce*, 2 Curt. Ecol. Rep. 225. See also the main case, *RE GUILFOYLE*.

And may be signed by mark, under Mass. Rev. Stat., chap. 62, § 6, requiring that a will shall be signed by the testator, or by some one in his presence and by his express direction. *Nickerson v. Buck*, 12 Cush. 333.

to write his name, is within the meaning of a statute permitting a mark "when the person cannot write."

(December 1, 1892.)

APPEAL by proponent and the administratrix from orders of the Superior Court for the City and County of San Francisco, revoking the probate of the will of Bridget Gullfoyle, deceased, and the appointment of an administratrix. *Reversed.*

The facts sufficiently appear in the Commissioner's opinion.

And may be signed by mark although the testator may be blind. *Ray v. Hill*, 3 Strobb. L. 207, 49 Am. Dec. 647.

And may be signed by mark though only one witness saw the act of making the mark. *Sprague v. Luther*, 8 E. L. 232.

And this though the witnesses did not see him make it, if he acknowledges the will as required by the statute. *Shanks v. Christopher*, 3 A. K. Marsh. 144.

The presumption is that a testator signing a will by mark knew the contents of such will. *Doran v. Mullen*, 73 Ill. 342.

An imperfect signature to a will may be regarded as a mark. *Hartwell v. McMaster*, 4 Redf. 393.

And where a will is signed by the testator by mark that is the signature and not his name written near it. *Jackson v. Jackson*, 39 N. Y. 153; *Pool v. Bufum*, 3 Or. 438; *Re Will of Cornelius*, 14 Ark. 675.

The contrary is held in Missouri so that while a will may there be signed by mark, yet if the testator's name is written near the mark, such name will be held to be the signature and not the mark, and this name must be attested by the party who wrote it saying that he subscribed the testator's name at his request and such witness must sign his own name. *Simpson v. Simpson*, 27 Mo. 238; *St. Louis Hospital Asso. v. Williams*, 19 Mo. 609; *St. Louis Hospital Asso. v. Wegman*, 21 Mo. 17; *Northcutt v. Northcutt*, 20 Mo. 206.

In New York a will signed by name and mark where the name of the scrivener writing such name was not also signed, was sustained, as 2 Rev. Stat., 3d ed., 124, § 33, provides that such omission shall not invalidate. *Hollenbeck v. VanValkenburgh*, 5 How. Pr. 281.

A mark is superfluous if made after a will has been signed and acknowledged, where the name had been written for the testator by another. *Lechrest v. Edwards*, 4 Met. (Ky.) 163; *Rosser v. Franklin*, 6 Gratt. 1, 52 Am. Dec. 97.

And a will signed by mark was not invalid although the name written was the former maiden name of the testatrix. *Re Clarke*, 1 Swab. & T. 22, 27 L. J. P. 18, 4 Jur. N. S. 24.

Or where the scrivener wrote the wrong name at the testator's mark. *Bailey v. Bailey*, 35 Ala. 687.

And the same was held where the will was signed and executed by a mark by A who was wrongly described throughout the will as B. *Re Douce*, 2 Swab. & T. 593, 81 L. J. P. 172, 8 Jur. N. S. 723, 6 L. T. N. S. 789.

And the same was held where the wrong surname of a witness attesting by marks was written. *Re Ashmore*, 3 Curt. Eccl. Rep. 755.

And a will was sustained where the testator had his hand guided in making his mark. *Cozzens' Will*, 61 Pa. 196; *Higgins v. Carlton*, 23 Md. 115, 92 Am. Dec. 666; *Wilson v. Beddard*, 12 Sim. 23.

But a mark made by holding the testator's hand is invalid, when he did not so direct, as required by 23 L. R. A.

Mr. F. J. Castelhun for appellants.
Messrs. H. G. Platt and Oscar T. Shuck for respondents.

Vancielief, C., filed the following opinion:

Proceeding to revoke the probate of the will of the deceased. The bill of exceptions shows that the matter was submitted to the court on the following stipulation as to the facts:

"It is hereby stipulated and agreed that the application to revoke the will of the above-named deceased be, and the same is hereby, submitted upon the following statement of

Minn. Gen. Stat. 1878, chap. 47, § 5, allowing a will to be signed for the testator by his express direction. *Waite v. Frisbie*, 45 Minn. 361.

And the same was decided when the testator did not understand what was done, although at a subsequent day he said "it was just as he wanted it." *Dunlop v. Dunlop*, 10 Watts, 153.

A statement that "testatrix being illiterate has made her mark" is not sufficient under La. Code, § 1572, providing if testator "knows not how, or is not able to sign, express mention of his declaration, as also of the cause that hinders him from signing must be made in the act." *Re Carroll's Succession*, 28 La. Ann. 388.

A will signed by testatrix's mark was not sustained where the declaration that it was her will did not follow the signature as required by 2 N. Y. Rev. Stat. p. 63, § 40. *Heyer v. Burger*, Hoffm. Ch. 1, 6 L. ed. 1043.

And a will was invalid which was written on a card having the testator's mark in the middle of the writing and the initials of the witnesses on the back, as it was not signed at the foot or end as required by statute. *Margary v. Robinson*, L. R. 13 Prob. Div. 8, 56 L. J. P. 42, 35 Week. Rep. 350, 57 L. T. N. S. 261, 51 J. P. 407.

So it was formerly held in Pennsylvania under Pennsylvania Act 1833, requiring a will to be signed by the testator or by another by his express direction, a signature by the testator with his mark is not sufficient. *Assay v. Hoover*, 5 Pa. 21, 45 Am. Dec. 713; *Grabill v. Barr*, 5 Pa. 441, 47 Am. Dec. 418; *Cavett's App.* 8 Watts & S. 21, 42 Am. Dec. 232; *Snyder v. Bull*, 17 Pa. 60.

Assay v. Hoover, *supra*, overrules a dictum in *Stricker v. Groves*, 5 Whart. 397, that a mark would be sufficient.

And the Pennsylvania Act of 1848, rendering valid such wills and those made prior to that act, is unconstitutional as to wills made prior to the Act. *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Shinkle v. Crook*, 17 Pa. 159; *McCarty v. Hoffman*, 23 Pa. 507.

But a will made in Pennsylvania before 1848, to which was subscribed the name and mark of the testator, was held *prima facie* valid, where the witnesses on probate testify that they saw the testator sign the will, since the addition of a mark does not import that he did not sign his name. The court also says: "They may have considered the affixing of a mark as a signing of the will." *Davies v. Morris*, 17 Pa. 206.

The Act of 1833 is not discussed by the court.

The Pennsylvania courts, in construing Pennsylvania Act of 1833, have not followed the decisions of other states in recognising a will made by mark until a special statute was passed in 1848.

But when called upon to construe a statute of California similar to the Pennsylvania Act of 1833, which had not been construed in California, the court refused to adopt the construction placed on such act by its former decisions, and adopted that of other states. *Flannery's Will*, 24 Pa. 502.

And a prior will signed by mark is valid if the

facts, to wit: Said will is in pencil, and barely covers a single page of small note paper. It is in the words and figures following, to wit:

"August 29, 1891. I, Bridget Guilfoyle, leave \$500 (five hundred dollars) for masses at St. Patrick; also want a nice funeral, and all other expenses to be paid from what I leave, and the rest to my two nieces, Maria and Aggie Johnson, equally.

×

"Witnesses: Ellen O'Connor. Emma Endres. Mary Daly."

"The will was written by the witness Emma Endres, at the request of the deceased. After it was written, the witness Emma Endres read the will to the deceased in the presence of the

other subscribing witnesses. The deceased was then asked whether that was her will. The deceased answered that it was. She was then given a pen by the witness Emma Endres. The deceased knew how to write her name, but was physically too weak to do so. She made a cross at the end of the paper, and declared that such paper was her last will, and requested the said Emma Endres, Mary Daly and Ellen O'Connor to sign the same as witnesses thereto.

"Oscar T. Shuck, and

"H. G. Platt,

"Attorneys for the Contestants.

"F. J. Castelhun,

"Attorney for the Proponents."

testator did not die until the Act of 1848 took effect. Long v. Zook, 18 Pa. 400; Burford v. Burford, 29 Pa. 221.

Or if made after the Pennsylvania Act of 1848. Carson's App. 59 Pa. 498.

An acknowledgment by a testator, where the mark was not made in the presence of witnesses, is not a compliance with N. J. Rev. Laws, 7, requiring a will to be signed and published in the presence of three witnesses. Den v. Mitton, 12 N. J. L. 81.

The following cases hold that a will may be valid although signed by mark, but the question involved in the cases was the sufficiency of the evidence to establish its due execution. Engles v. Bruington, 4 Yeates, 346, 2 Am. Dec. 411; Re Simpson's Will, 2 Redf. 29; Re Kane's Will, 2 Connolly, 246; Re Dockstader's Will, 6 Dem. 106; Worden v. VanGieson, Id. 237; Re Reynolds, 4 Dem. 66; Re Phelps' Will, 1 Connolly, 463; Walsh's Will, 1 Tucker, 132; Re Maddock, L. R. 8 Prob. & Div. 169, 43 L. J. P. 29, 30 L. T. N. S. 606, 22 Week. Rep. 74; Morrill v. Douglass, L. R. 3 Prob. & Div. 1, 42 L. J. P. 10, 27 L. T. N. S. 591, 21 Week. Rep. 162; Re Allen, 2 Curt. Ecol. Rep. 361; Taney's Estate, Myrick's, Cal. Prob. Ct. Rep. 219; Edmonds v. Lower, 11 Jur. N. S. 911.

Attesting will by mark.

A will is not invalid because an attesting witness signs by mark. Wright v. Wright, 7 Bing. 457, note; Ford v. Ford, 7 Humph. 92; Montgomery v. Perkins, 3 Met. (Ky.) 448, 74 Am. Dec. 419; Den v. Mitton, 12 N. J. L. 81; Pridgen v. Pridgen, 35 N. C. 269; Addy v. Grix, 8 Ves. Jr. 504; Harrison v. Harrison, Id. 185; Doe v. Davis, 11 Jur. 182, 9 Q. B. 648; Needham v. Needham (Mass.) 8 Dane, Abr. 452.

The same was held in Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330, where the mark of such witness was identified by peculiarities and other circumstances corroborating.

See, as to identification of marks by peculiarities, Fogg v. Dennis, *infra*.

In Chase v. Kittredge, 11 Allen, 49, 87 Am. Dec. 694, and Jesse v. Parker, 6 Gratt. 57, 52 Am. Dec. 102, it was held that a will may be attested by a witness making his mark, although this question was not directly involved in those cases.

And in *Re White*, 2 Notes of Cases, 461, 7 Jur. 1045, it was held that he must make his mark or sign his name himself.

So a will may be attested by mark, where one attesting witness writes the name of the marking witness. Derry's Estate, Myrick's Cal. Prob. Ct. Rep. 202.

And it may be attested by mark where the testator wrote his own name, notwithstanding Ala. Code, § 1, provides that if the testator or grantor cannot write but subscribes by mark the attesting witnesses must write their names. Garrett v. Hedin (Ala.) June 7, 1893.

And a will attested by mark was not invalid 23 L. R. A.

where the scrivener did not sign his name as witness to the mark, although Ark. Code, § 6344, provides that a signature shall include mark when the person cannot write, his name being written near it, and witnessed by the person who writes his own name as a witness. Davis v. Semme, 51 Ark. 48, See *Ex parte Miller*, *infra*.

But the witness using a mark must have so intended it as a mark, and a dash made by the scrivener in a hurry where he failed to sign his name will not be a signature. *Re Enyon*, 21 Week. Rep. 556.

And a will may be established although both of the attesting witnesses sign by mark. Crowley v. Crowley, 80 Ill. 469.

The mark of an attesting witness need not have any peculiarity to enable him to identify it under Ga. Code, § 2415, providing that a witness may attest by mark if he can swear to the same. Thompson v. Davitte, 59 Ga. 472. See Fogg v. Dennis, *infra*.

A will was not invalid on account of one attesting witness signing by mark, although the other subscribing witness was dead when the will was attempted to be established. Morris v. Kniffin, 37 Barb. 636.

Attestation of a will by marks is invalid if the parties so attesting did not see testator's signature and did not know what they were attesting. Pearson v. Pearson, L. R. 2 Prob. & Div. 451, 40 L. J. P. 52, 24 L. T. N. S. 917, 19 Week. Rep. 1014.

A will was sustained where all the witnesses were dead, and two of them signed by marks. Doe v. Caperton, 9 Car. & P. 112.

But their marks must be identified in some way. Collins v. Nicola, 1 Harr. & J. 899.

Deeds, notes, and contracts signed or attested by mark.

A deed is not invalid on account of the grantor signing the same by his mark. Devereux v. McMahon, 12 L. R. A. 205, 108 N. C. 134; Sellers v. Sellers, 98 N. C. 13; Strong v. Brewer, 17 Ala. 706; Truman v. Lore, 14 Ohio St. 144; Lyons v. Holmes, 11 S. C. 429, 32 Am. Rep. 433.

The same was held in Carrier v. Hampton, 33 N. C. 307, although the question actually involved was the sufficiency of proof.

But it is questionable if a deed could be established if subscribed by grantor's mark under Mo. R. C. 1845, § 223, § 27, requiring the witnesses proving the same to state on oath that they well knew the signature of the party whose name is subscribed to the deed. Allen v. Moss, 27 Mo. 354.

And a deed was not invalid where one attesting witness recognized his signature, although he did not remember the other witnesses who attested by marks and who were dead. Collins v. Lemasters, 2 Ball. L. 141.

A deed that is defective because attested only by

From these facts the court concluded, "that said document is not subscribed at the end thereof by the testatrix herself, nor did any one in the presence of the testatrix, and by her direction, subscribe the name of the testatrix thereto;" and accordingly revoked its former orders admitting the document to probate and appointing an administratrix. From these orders revoking the probate and the appointment of an administratrix, the proponents and administratrix bring this appeal.

As to what amounts to a "signing" by a testator under the Statute of 29 Car. II., it is said, in Jarman on Wills (page 201): "It has been decided that a mark is sufficient and that, notwithstanding the testator is able to write,

and though his name does not appear on the face of the will." To the same effect is section 808 of Schouler on Wills, citing American cases. Section 14 of the Civil Code provides that "'signature' or 'subscription,' includes 'mark,' when the person cannot write, his name being written near it, and written by a person who writes his own name as a witness." In this case the whole body of the will, including the name of the testatrix, was written by Emma Endres, who signed as a witness. If the mark can be regarded as subscription by the testatrix, the execution of the will was in perfect accordance with section 1376 of the Civil Code.

It is contended, however, by counsel for re-

the marks of the witnesses respectively will be upheld as a valid contract to convey. Sparks v. Woodstock Iron & Steel Co. 37 Ala. 294. See also Carrier v. Hampton, *supra*.

A statute providing "that the word 'signature' or 'subscription' includes mark when the person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness," does not exclude other proof if not so attested. *Ex parte Miller*, 49 Ark. 18. See Davis v. Semmes, 51 Ark. 48.

But under this statute a mark is not a sufficient signature to a deed which has not been both acknowledged and filed where the person writing the grantor's name has not subscribed his own name. Watson v. Billings, 38 Ark. 278.

This construction was held in *Ex parte Miller, supra*, to mean that such signature is not to be taken as *prima facie* genuine without other proof.

And such a statute does not mean that a party cannot bind himself by mark signature to a note without such attestation. Brown v. McClanahan, 9 Bax. 347; Vanover v. Murphy, 12 Ky. L. Rep. 738.

The same is held in regard to a chattel mortgage. Alabama Warehouse Co. v. Lewis, 56 Ala. 516; Breene v. McCrary, 52 Ala. 154; Bickley v. Keenan, 66 Ala. 295; Jones v. Hough, 77 Ala. 437.

It was held under this statute that an indorsement on a note by mark which was not attested was not a signature. Flowers v. Bitting, 45 Ala. 448.

But this was overruled in Wimberly v. Dallas, 52 Ala. 196, holding that a signature by mark to a note unattested was a valid signature unless its execution was denied under oath.

If a note signed by a mark is declared upon and the signature is not denied under oath as required by a rule of court, it will be upheld as a genuine signature. Willoughby v. Moulton, 47 N. H. 205.

A note was held not valid where the payee signed the name of the obligor to the same which purports to be signed by the obligor's mark. Carlisle v. Campbell, 76 Ala. 247.

But in Johnson v. Davis, 95 Ala. 208, this is claimed to have been so decided on the ground that the payee made the mark also, although it does not clearly appear in the opinion, and the latter case holds that a mortgage and note where the name of the grantor and obligor was written by the payee but signed by mark by the obligor and properly attested were valid.

So a bill of exchange payable to the drawer, indorsed by her by mark, her name being in the handwriting of plaintiff, an indorsee, was sustained where the mark was identified by peculiarities. George v. Surrey, Mood. & M. 518. See also Fogg v. Dennis, *infra*.

A note may be signed by the obligor with his mark and will be valid. Hilborn v. Alford, 22 Cal. 22 L. R. A.

483; Williams v. Riches, 77 Wis. 569; Whitney v. Clary, 145 Mass. 156.

The following cases also hold that a note may be signed by mark, but the question involved in the cases was the sufficiency of the proof. Whitelocke v. Musgrove, 1 Cromp. & M. 511, 8 Tyrw. 541; Ballinger v. Davis, 29 Iowa, 512; Wolff v. Mackrell, (Pa.) Nov. 7, 1887; Robinson v. Robinson, 20 S. C. 567; Bussey v. Whitaker, 2 Nott & McC. 374; Lever v. Lever, 1 Hill, Eq. 62; Paisley v. Snipe, 2 Brev. 200; Jones v. Jones, 12 Rich. L. 116.

And a note signed by mark may be valid even if the maker's name is not written there. Zimmerman v. Sale, 3 Rich. L. 76.

And it need not be witnessed under Ind. Stat., 3 Gavin & Hord, 388, providing that where the signature of a person is required the proper handwriting or his mark shall be intended. Shank v. Butsch, 28 Ind. 19.

And a note signed was also held valid where the attesting witness was in the adjoining room when the note was read to the signer by the scrivener within the hearing of the witness. Whitney v. Clary, *supra*.

And such signature by mark may be identified by peculiarities. Fogg v. Dennis, 8 Hump. 47; Pearcy v. Dicker, 13 Jur. 997; George v. Surrey, Mood. & M. 516; Gervais v. Baird, 2 Brev. 37; Shiver v. Johnson, Id. 397; Nellus v. Brickell, 2 N. C. 19. See also Jackson v. Van Dusen, 5 Johns. 144, 4 Am. Dec. 330; Thompson v. Davitte, 59 Ga. 472.

The case of Reap v. Featherstone, 4 Luzerne Legal Reg. Pa. 4, which we have not been able to examine, is said in Brightly's Pennsylvania digest to hold that a mark is a sufficient signature, but must be proved if disputed.

A contract also may be signed by the party to be charged, with his mark. Foye v. Patch, 183 Mass. 105; Zacharie v. Franklin, 37 U. S. 12 Pet. 151, 9 L. ed. 1035; Madison v. Zabriskie, 11 La. 251; Watts v. Kilburn, 7 Ga. 356.

So a recognizance may be signed by surety by mark. Vincennes Nat. Bank v. Cockrum, 64 Ind. 229.

And the same is true of a bail bond. Hammons v. State, 59 Ala. 164, 31 Am. Rep. 18.

And of an appeal bond. State v. Byrd, 96 N. C. 624.

So an officer's return may be signed by mark. Cox v. Montford, 66 Ga. 62.

And so may a power of attorney that is acknowledged. Eichelberger v. Sifford, 37 Md. 380.

In Louisiana the ordinary mark of a party places the evidence of the instrument on a footing with all private instruments in writing. Tagliacoe v. Molinari, 9 La. 512.

And an affidavit made in America signed by mark, where the notary stated that it was read to deponent, was sustained although the English practice is to set forth in the jurat that the attesting witness saw the mark made. Savage v. Hutchinson, 24 L. J. Ch. 232.

spondents that the name of the testatrix, which appears in the body of the will is not "near" the mark, and therefore that the use of the mark to represent her name was not authorized. The only conceivable object of requiring the name to be written "near" the mark, is to show what name the mark is intended to represent. In this case it clearly appears that the mark was intended to represent the name of the testatrix. It is therefore near enough to her name, as written in the body of the will, to satisfy the requirement of section 14 of the Civil Code.

It is further contended that the mark was unauthorized, because the testatrix knew how to write, though she was physically unable to do so; and, from an extract from the opinion of the learned judge who decided the case, copied into respondents' brief, it would appear that the decision rested upon this ground. The extract is as follows: "In the case at bar it is especially proper to enforce the strict letter of the law, as it appears that the proposed paper was written and witnessed and marked as and for the act of a woman who could write, but who was too ill to even write her name. Wills executed under such conditions

are presumably the wills of persons other than the one then actually dying." If the presumption mentioned should be indulged in any case, it surely cannot apply to this case, since there is no allegation of fraud, and no question that the testatrix was of sound and disposing mind at the time she made her mark and declared the instrument to be her will. Persons who know how to write may become physically incapable of writing their names by reason of rheumatism, or paralysis of the hands, and other causes besides general physical debility, though of sound mind; and it seems unreasonable that the legislature intended to exclude all such persons from the privilege of subscribing a will or other instrument by a mark. The language of the Code is, "when the person cannot write." This fairly includes all persons who are unable to write from any cause, even though they know how to write. I think the orders appealed from should be reversed.

We concur: **Belcher, C.; Foote, C.**

Per Curiam:

For the reasons given in the foregoing opinion the orders appealed from are reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NEWARK PASSENGER R. CO., *Pff*
in Err.,

v.

Fannie BLOCH.

(.....N. J.....)

(December 5, 1893.)

ERROR to the Supreme Court to review a judgment affirming a judgment of the Essex County Circuit in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed*

Statement by **Magie, J.:**

Fanny Bloch, the defendant in error, brought an action of tort against the Newark Passenger Railway Company, the plaintiff in error, in the Essex circuit, to recover damages for an injury received from a car of the company running in a public street. After the evidence was all in, counsel for the railway company requested the judge to direct a verdict in its favor. The request was refused, and exception was taken. Other exceptions were taken to the charge, and to refusals to charge as requested. After judgment in favor of defendant in error, the cause was removed by writ of error to the supreme court, and error was assigned on the exceptions. The judgment was there affirmed.

Mr. A. Q. Keasbey, for plaintiff in error:

The testimony shows that plaintiff was injured because she ran hastily across the street diagonally looking backward when warned, and plunging directly upon the car, before it could possibly be stopped. Therefore, the court erred in refusing to direct the jury to render a verdict for the defendant, on the ground that the whole evidence showed contributory

***1. When a trial judge is requested to nonsuit or direct a verdict in the trial of an action to enforce a liability for negligence, his duty is to determine whether facts have been established by evidence from which negligence may be reasonably inferred. If the real facts are in substantial dispute the case cannot be taken from the jury.**

***2. The rule requiring one exercising his lawful rights, in the place where the exercise of lawful rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances, is the measure of duty for one who crosses a public highway on foot. He must use his powers of observation to discover approaching vehicles, and his judgment how and when to cross without collision, but his observation need not extend beyond the distance within which vehicles moving at lawful speed would endanger him. If obstacles temporarily intervene to prevent observation, he should wait until the required observation can be made.**

***3. Street-cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety.**

*Headnotes by **MAGIE, J.**

NOTE.—The above is in view of the wonderful extension of electric car routes, a very important case on the lawful speed of electric cars as well as on the negligence of a person who is struck by

such cars. On the latter question, see also *Carson v. Federal Street & P. V. R. Co. (Pa.)* 15 L. R. A. 219; *Ehrisman v. East Harrisburg City Pass. R. Co. (Pa.)* 17 L. R. A. 448.

negligence on the part of the plaintiff and no negligence on the part of the defendant.

Although the defendant was guilty of gross negligence, whereby the plaintiff was injured, yet, if the plaintiff was guilty of any negligence or want of care which contributed to the injury he cannot recover.

Drake v. Mount, 38 N. J. L. 441; *Pennsylvania R. Co. v. Righter*, 42 N. J. L. 180.

That one may walk upon a sidewalk and, relying on its continuity being unbroken for its whole width, may, without being guilty of negligence, permit his attention to be diverted from the pavement in front of him, is undoubtedly settled law. But such a rule is inapplicable to a pedestrian crossing a street used for the passage of vehicles drawn by horses. He is bound to look in the direction in which he is moving and to observe approaching vehicles.

Sheets v. Connolly Street R. Co. 54 N. J. L. 518.

The rule of law, with respect to steam railroads, is not based upon the exclusive character of the right of way enjoyed by a steam railroad, but upon the fact that the public convenience requires that the trains should run at a high rate of speed, and that public safety requires that people crossing the tracks should take care to avoid collisions.

Pennsylvania R. Co. v. Righter, *supra*.

The horse car has as good a right to the use of its tracks as the steam car has to the use of the railroad at a street crossing. Its use is, to a certain extent, exclusive. It has the right of way of necessity, because it cannot turn off the track.

Camden Horse R. Co. v. Citizens Coach Co. 28 N. J. Eq. 145; *Johnson v. Hudson River R. Co.* 6 Duer, 683, 20 N. Y. 65, 75 Am. Dec. 375; *Thomp. Neg.* § 397; *Whart. Neg.* 820; 2 *Shearm. & Redf. Neg.* § 462.

If the injury was occasioned in any degree by the conduct of the plaintiff herself in crossing in an incautious and improper manner, defendant will be entitled to the verdict.

Hawkins v. Cooper, 8 Car. & P. 478; *Woolf v. Beard*, Id. 373; *Owen v. Hudson River R. Co.* 3 Bosw. 374, 7 Bosw. 329; *Mangam v. Brooklyn City R. Co.* 86 Barb. 280; *Liddy v. St. Louis R. Co.* 40 Mo. 506; *Fenton v. Second Ave. R. Co.* 126 N. Y. 625; *Carson v. Federal Street & P. V. R. Co.* 15 L. R. A. 257, 147 Pa. 219; *Marland v. Pittsburg & L. E. R. Co.* 123 Pa. 487; *Pennsylvania R. Co. v. Bell*, 123 Pa. 58; *Ash v. Wilmington & N. R. Co.* 148 Pa. 133; *Myers v. Baltimore & O. R. Co.* 150 Pa. 386; *Pyne v. Broadway & S. A. R. Co.* 46 N. Y. S. R. 662; *Moebius v. Herrmann*, 108 N. Y. 349; *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 443, 150 Pa. 180; *Wheeler v. Philadelphia Traction Co.* 150 Pa. 187; *Creamer v. West End Street R. Co.* 16 L. R. A. 490, 156 Mass. 320.

Whatever distinction may be drawn between the steam road and the electric railway traversing the streets of a city under present conditions, with respect to the duty of pedestrians crossing their tracks, it must be held that some degree of care is necessary, and it cannot be sound law to hold that in the one case a person crossing must stop, look, and listen for a train that is visible or audible, and in the other

to refuse to charge a jury that any duty of caution whatever is required and to charge that if he steps in front of a rapidly moving car approaching in plain sight without seeing it until it is upon him and is injured, the culpable negligence of the driver may be inferred.

The negligence of a minor not a mere child will defeat recovery as in the case of adults.

Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 83 Am. Rep. 413; *Atlas Engine Works v. Randall*, 100 Ind. 298, 50 Am. Rep. 798; *Burke v. Broadway & S. A. R. Co.* 49 Barb. 529.

A street railway company is not liable for injuries to a child who its motorman sees standing five feet away from the track, and who suddenly breaks loose from its companions and runs across the track, where the motorman uses all the means then at his command to stop the car.

Paducah Street R. Co. v. Adkins, 14 Ky. L. Rep. 425.

A street railway company is not liable for the death of a person who on a clear night stops behind a cable car going in one direction in front of another going in the opposite direction, having a bright headlight and visible for a long distance, although it was proceeding at a high speed and the gripman having seen such person standing at the side of the track engaged in conversation has turned his head away.

Scott v. Third Ave. R. Co. 41 N. Y. S. R. 152.

The gripman on a cable street-car is not bound to anticipate that children on the sidewalk will run suddenly towards the track; nor is it absolutely his duty to stop the car at once if he sees a boy running towards the track, but he may exercise his judgment to determine whether the boy will see the car and stop; and if he acts as a reasonable and prudent gripman ought, and makes every effort he can to avoid the injury, the company will not be liable for injuries to such boy.

Mt. Adams & E. P. R. Co. v. Cavagna, 6 Ohio C. C. 606, 8 U. S. Gen. Dig. 1892, p. 2028, par. 73. See also *Pyne v. Broadway & S. A. R. Co.* 46 N. Y. S. R. 662; *Driscoll v. Market Street Cable R. Co.* 97 Cal. 558.

Mr. Edward Q. Keasbey, also for plaintiff in error:

Messrs. Louis Hood and Samuel Kalsch, for defendant in error:

An ordinary railway has a proprietary right in its track. It owns its roadbed, which it acquires by process of condemnation. Its tracks cannot be used by ordinary vehicles. The only right which the public has, is the right to cross the tracks at the street crossings. It operates its road with a power not easily controlled. A railroad company has the exclusive use of its tracks and roadbed. The legislature prescribes what duties a railway company owes at street crossings.

See Rev. 1877, p. 910, pl. 6, 11, p. 920, § 67; *Citizens Coach Co. v. Camden Horse R. Co.* 33 N. J. Eq. 274, 36 Am. Rep. 542.

A street railway has no proprietary right in its roadbed. Their tracks are used in common by their cars and the traveling public. Its use of the public highway is merely in aid of the identical use for which the street was cre

ated, and not a new and independent one; and for this reason an abutting owner to a street railway is not entitled to damages.

Lynam v. Union R. Co. 114 Mass. 83; *Shea v. St. Paul City R. Co.* (Minn.) July 7, 1892; *Ehrisman v. East Harrisburg City Pass. R. Co.* 17 L. R. A. 448, 150 Pa. 180; *Citizens Coach Co. v. Camden Horse R. Co. supra.*

Defendants were authorized to exercise their rights, not to the exclusion of the public, but having regard to the rights of the public in the public streets.

Citizens Coach Co. v. Camden Horse R. Co. supra.

Street-cars are in the main governed by the same rules as other vehicles on the street, with such modifications as grow out of the necessities of the situation. Where the cars are propelled by electricity, the duty resting upon the street railroad is not modified. Their motormen must be on the alert, not only at street crossings but everywhere upon the tracks, to see that citizens are not run down and injured.

Shea v. St. Paul City R. Co. supra; *McClain v. Brooklyn City R. Co.* 118 N. Y. 459; *Gallagher v. Coney Island & B. R. Co.* 24 N. Y. S. R. 746; *North Hudson R. Co. v. Isley*, 49 N. J. L. 468; *Ehrisman v. East Harrisburg City R. Co.* 17 L. R. A. 448, 150 Pa. 180; *Chicago West. Div. R. Co. v. Ingraham*, 83 Ill. App. 351.

On the other hand, the traveler must use due care to keep out of the way of the street-car. In crossing the street of a crowded city he is not bound to wait until all the vehicles are out of the street before he attempts to cross, for if such a rule prevailed he would be compelled during the whole of his life to stay on one side of the street. He must fairly act in a reasonable manner respecting the right of a street railway. He is bound to use reasonable care under the circumstances and do what a prudent man under the circumstances would do.

McClain v. Brooklyn City R. Co. supra; *Fenton v. Second Ave. R. Co.* 126 N. Y. 625; *Fleckenstein v. Dry Dock, E. B. & B. R. Co.* 105 N. Y. 655; *North Hudson R. Co. v. Isley, supra;* *Shea v. St. Paul City R. Co. supra;* *Shapleigh v. Wyman*, 184 Mass. 118; *Bowser v. Wellington*, 126 Mass. 391; *Creamer v. West End Street R. Co.* 16 L. R. A. 490, 156 Mass. 820; *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126, 127 Ill. 9; *Moebus v. Herrmann*, 108 N. Y. 854.

Assuming, for the sake of argument, that it is the duty of a person crossing a highway upon which street cars are operated to look and listen—for in this case the plaintiff did look and listen—may the plaintiff cross even if there be an approaching car? It is patent, in view of the condition which a much traveled highway presents, that one may cross.

Fenton v. Second Ave. R. Co. supra; *Wells v. Brooklyn City R. Co.* 58 Hun. 899.

It is the rule in steam railways that when a railroad company has created extra danger it is bound to use extra precautions; and if the track is put in a position where trains, when close to their transit over a public street or road cannot be seen, that is an extra danger calling for more than ordinary cautionary signals.

22 L. R. A.

New York, L. E. & W. R. Co. v. Randel, 47 N. J. L. 144.

Where street-car tracks are in close proximity, to run a car or train of cars in one direction at rapid speed, and without signal or warning, over a sidewalk crossing, while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, as in this case, the view of the approaching train is obstructed by the standing cars from which the person injured has just alighted, is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinance, and it cannot be said, as matter of law, that such conduct is not negligence.

Chicago City R. Co. v. Robinson, 4 L. R. A. 126, 127 Ill. 9.

Plaintiff had a right to rely also upon the defendant's running its cars at a safe rate of speed and to give some warning or signal on approaching a crossing.

Orange & N. H. R. Co. v. Ward, 47 N. J. L. 563.

The rule of law in regard to the negligence of an adult and the rule of law in regard to that of an infant of tender years is quite different.

Washington & G. R. Co. v. Gladmon, 89 U. S. 15 Wall. 401, 21 L. ed. 114; *Stoua City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Dowd v. Chicopee*, 116 Mass. 93. See also *Lynch v. Smith*, 104 Mass. 52, 6 Am. Rep. 188; *Elkins v. Boston & A. R. Co.* 115 Mass. 190; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Beckham v. Hillier*, 47 N. J. L. 14; *Smith v. Irwin*, 51 N. J. L. 508; *Haycroft v. Lake Shore & M. S. R. Co.* 64 N. Y. 636; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 337; *Daley v. Norwich & W. R. Co.* 28 Conn. 591; *Robinson v. Cone*, 22 Vt. 218, 54 Am. Dec. 67; *Duffy v. Missouri Pac. R. Co.* 19 Mo. App. 380; *Byrne v. New York Cent. & H. R. R. Co.* 88 N. Y. 620; *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261; *Edliff v. Wabash, St. L. & P. R. Co.* 64 Mich. 196.

The law does not exact from an infant, fifteen years of age, the same degree of care and prudence in the presence of danger as is exacted from adults.

Swift v. Staten Island R. T. R. Co. 123 N. Y. 645; *Wright v. Detroit, G. H. & M. R. Co.* 77 Mich. 123.

Magie, J., delivered the opinion of the court:

In support of the assignment of errors founded on the exception to the refusal of the trial judge to direct a verdict for plaintiff in error, it is insisted that the evidence (all of which is contained in the bill of exceptions) showed that there was no negligence on its part producing the injury for which the action was brought, but that there was negligence on the part of the defendant in error producing, or contributing to produce, her injury. In reviewing a judgment founded on a verdict directed by the trial judge after the whole evidence was in, this court declared that a jury should only be controlled in its verdict by a peremptory instruction when the testimony is of such a

conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict in opposition thereto, or, as the learned chancellor who delivered the opinion said: "To put it more forcibly and more accurately, if the evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled." *Crue v. Caldwell*, 52 N. J. L. 215. This rule must furnish the test of the propriety of refusing a peremptory direction to find a verdict. It has been questioned elsewhere whether, in actions to enforce a liability arising from negligence, the trial judge can withdraw from the jury, by nonsuit or direction for a verdict, the question of negligence, which is a mixed question of law and fact. In this state the power of the trial judge to nonsuit has been exercised and approved for many years in a long line of cases too familiar to need to be referred to. The power to direct a verdict is identical with, and rests upon the same foundation as, the power to nonsuit. When in such cases the trial judge is requested to nonsuit or to direct a verdict, his duty is, as was well expressed by Lord Chancellor Cairns in *Metropolitan R. Co. v. Jackson*, L. R. 8 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to a jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to say whether from those facts negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred therefrom by the jury. It follows that, if the real facts have not been established by the evidence but remain in substantial dispute, the trial judge must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. *Moebus v. Becker*, 46 N. J. L. 41; *Delaware, L. & W. R. Co. v. Shelton*, 55 N. J. L. 342. When this request was made, it was obviously impossible for the trial judge to say what facts had been established. The evidence was contradictory to a degree unusual even in cases of this sort. It was impossible of reconciliation, and the real facts could only be determined by the jury settling the credit to be given to witnesses, and weighing and comparing their variant testimony. Under such circumstances it would have been error to withdraw the case from the jury.

The argument in behalf of the plaintiff in error is next addressed to an exception taken to the ruling of the trial judge upon a request to charge. To make the request intelligible, it should be stated that the evidence of defendant in error in respect to the mode in which she received her injury was that she was struck and run over by a car of plaintiff in error, propelled by electricity, and running on the west-bound or north

street-car track in Springfield avenue, in Newark; that, when struck, she was crossing the avenue from south to north on a crosswalk at the intersection of Prince street with the avenue; that an east-bound car running on the south street-car track had stopped upon the crossing, and she had waited until it passed, when she went on, "looking both sides;" that, not seeing any west-bound car, she stepped on that track, and was immediately struck and run over. It appeared by the evidence of witnesses called by her that the east-bound car stopped at the crossing and went on, and the west-bound car passed it, running at great speed, and without giving signals; one witness estimated the speed at fifteen miles an hour. The request in question was as follows: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another was coming; and if she neglected that duty she was guilty of contributory negligence, and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed,—the track being straight, and the car visible far enough to avoid it at any possible speed." The judge declined to charge in that respect otherwise than he had charged, and this exception was taken. The request is open to criticism as asserting a fact respecting the distance at which a car was visible, which was in dispute. But it may be considered, however, as raising the question of the duty of the injured person under the circumstances above set out, and whether the request correctly states that duty.

It is first contended that the question of duty in this case is affected by the fact that defendant in error was crossing a highway along which cars propelled by electricity constantly ran. It is argued that the duty to take precaution against danger varies with the degree of peril; that the lawful use of a highway by such cars has, by reason of their running at greater speed, created additional danger to others using the highway; and that their duty in respect to such danger has thus been enhanced and enlarged. It is even insisted that the duty of persons traversing highways on which such cars run is like that imposed on persons passing along a highway where it is crossed at grade by a railroad operated by steam power. It is not pretended, and the case does not show, that plaintiff in error has acquired by legislative grant any right to run its cars in the highway at any rate of speed. Such a grant to use a rate of speed in highways which would be destructive of its customary use by others, and incompatible therewith, would not be within legislative competency, except on compensation made to the owners of the land traversed by the highway. Public highways have been acquired by dedication or condemnation for the use of the public in passing and repassing. Up to very recent times the public have used the rights of passing and repassing on highways, on foot or on

horseback, or in vehicles drawn by horses or other animals. When authority was granted to lay rails on highways, and to run thereon cars drawn by horses for the carriage of passengers, it was long questioned whether such a use of the highway did not impose an additional burden upon the land, and whether such a grant could be made without compensation. It was finally settled by the weight of authority that the use of the highway by such cars was only a modification of the original use to which it had been devoted, and that no additional burden was imposed by such grant. That doctrine was adopted in this state. *Citizens Coach Co. v. Camden Horse R. Co.*, 83 N. J. Eq. 267, 36 Am. Rep. 542. But it must be conceded that a grant of a right to use the highway in a mode incompatible with its customary use by the public would impose an additional burden, and could not be made without compensation. The public has acquired such rights in the use of highways as the owners of the lands traversed thereby have yielded or been deprived of, and it may not be restricted in the enjoyment of such rights by a use of the highway inconsistent and incompatible therewith, at least without legislative grant. Whether the public rights thus acquired may be thus diminished or destroyed by legislative grant when no compensation is made to landowners is not a question involved in this case, and no opinion is intended to be expressed thereon. As has been stated, no legislative grant in this case is shown. The contention of plaintiff in error rather takes this shape: It asserts that its cars, propelled by electricity, are capable of being run at greater speed than other vehicles in the highway, and that the public convenience demands, for passengers carried in such cars, what is called "rapid transit;" and it draws the inference that its cars may therefore be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the notion which carried to its logical conclusion, would permit this company, and other companies running cars in public highways propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law, to require. The right to use the highways by such cars is not paramount to the rights of others in the customary use thereof. It must be used in a manner consistent with such rights of others. Such a paramount right as is contended for could not, in my judgment, be granted without compensation, and it surely cannot be acquired from a vague notion of a public demand for rapid transit. There is no just analogy between the right of a street railway running such cars longitudinally along the highway and the right of a railroad company running its trains across a highway at grade. The latter company acquires by condemnation a right to run its tracks over the lands covered by the highway, and so burdens it

with an additional easement. By legislative grant it uses the easement so acquired in the passage of trains run at great speed, and to a certain extent the public easement of passage is, at such crossings, modified. No grant for the acquisition and use of such additional easement has been made to the street railways, and in the absence of such grant no right to run cars at excessive rates of speed exists. Their only right in this respect is to run at such rate as will not interfere with the customary use of the highway by others of the public with safety.

Let us now consider whether the request under consideration correctly states the duty of defendant in error under the circumstances supposed. The duty devolving on one using a highway for passage on foot varies with circumstances which are infinitely various. It may be of one degree when the highway is a quiet country road, and of another degree when it is the crowded street of a great city. It may differ at different hours of the day, with respect to different vehicles and the differing rates of speed at which they are moving, and by reason of different opportunities of observation. It is impossible, in my judgment, to classify these variant circumstances, and to lay down a precise rule as to the degree of care required in each class. In dealing with cases of this sort we must recur to the general rule which requires one, in exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, to use such precaution and care for his safety as a reasonably prudent man would use under the circumstances. From this rule it may be said, in general, that one who passes on foot along a sidewalk or footpath of a highway must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid collision. In crossing the roadway a foot passenger must likewise use his powers of observation to discover approaching vehicles, and a like judgment when and how to cross without collision. In the latter case, doubtless, the degree of care required exceeds that required in the former case, not because the right of the foot passenger and the right of the driver of a vehicle differ, but because of the circumstances. The vehicle usually travels at a greater speed; it cannot be so quickly stopped or diverted from its course. A street-car cannot deviate from its track, while the passer on foot may quickly stop, turn aside, or even retrace his steps. So it may also be generally said that, if obstacles temporarily intervene to prevent observation, reasonable prudence would dictate delay until such observation as is requisite has been made.

But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such a rule of duty were adopted and practiced in a crowded city, the crossing of many streets would be barred to pedestrians for a great

part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety. Under this rule the defendant in error should doubtless have waited until she could have observed any westbound car which, traveling at customary and reasonably safe speed, might imperil her in crossing; but she was not bound to delay until she could have seen any car on that track at any distance, coming with excessive and dangerous speed. The charge was ample and correct on this subject, and the instruction asked for was properly refused.

The trial judge was further requested to charge that any one approaching a crossing must take notice of it, and exercise a reasonable measure of care to avoid contact with the moving car; and "if, by looking, the plaintiff could have seen and so avoided an approaching car, she cannot recover." The request was not refused, but the trial judge said that he had "charged substantially according to his understanding of the law on that subject." An exception was then taken to the charge so far as it did not embrace "that secondary proposition." Such an exception does not draw into review an omission in the charge. If counsel conceived that a pertinent proposition of law had been omitted, he should have specifically requested the desired instruction, and excepted to a refusal. If the proposition in question had been requested and refused, I think there would have been no error. It is a proposi-

tion applicable to the crossing of the highway by the lines of a steam railroad. It is inapplicable to the crossing of a street railway, the cars on which must not exceed such speed as will permit the lawful, customary use of the highway by others with reasonable safety. Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision; but, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing.

Other requests to charge, the judge declined to give otherwise than already given. The charge correctly stated the law in the particulars covered by these requests, and there was no error in declining to repeat, in other language, the doctrines already laid down as law.

The remaining exceptions are to portions of the charge which, it is urged, tended to improperly affect the jury. But the charge imposed on the jury, in the plainest terms, the duty of deciding the disputed questions of fact, and settling the inferences to be drawn therefrom. When that is done, comments, or even expressions of opinion, by the judge upon the evidence, are not open to exception. *Engle v. State*, 50 N. J. L. 272, and cases cited. I may add that, if the rule were different, the language of the charge is not, in my opinion, open to any criticism of this sort.

No error being found, *the judgment below should be affirmed.*

NORTH CAROLINA SUPREME COURT.

L. D. LOWE and Wife, *Appts.*,
v.
James HARRIS.

(112 N. C. 472.)

1. A statute allowing parole testimony to identify land insufficiently described in a contract is not retrospective.

2. A receipt which was void for uncertainty as a contract for land cannot be made valid by subsequent statute allowing parole testimony to identify the land.

(*Burvell and Clark, JJ., dissent.*)

(May 5, 1893.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Wilkes County in

NOTE.—*Constitutionality of statute legalizing an invalid private contract.*

This note will attempt to collect the authorities upon the power of a legislature to make enforceable an attempted contract which for any cause the parties failed to make enforceable by their own action.

Under Federal Constitution.

So far as the federal courts have passed upon the question they seem to agree that there is nothing in the Federal Constitution to prohibit a state legislature from making a contract enforceable which otherwise would not be so. And the cause of the difficulty seems to be immaterial. For the same rule has been applied in cases where the contract was void because against the policy of the state and where it was simply unenforceable be-
23 L. R. A.

cause not having the formal requisites prescribed by statute.

It has been held that the Constitution of the United States does not prohibit the passing of retrospective laws, or of laws divesting antecedent vested rights of property. *Watson v. Mercer*, 33 U. S. 8 Pet. 88, 8 L. ed. 876.

Consequently the attempt has been most frequently made to defeat the statute on the ground that it impaired the obligation of a contract.

In *Satterlee v. Matthewson*, 27 U. S. 2 Pet. 880, 7 L. ed. 468, affirming 16 Serg. & R. 169, a lease had been entered into in Pennsylvania of land claimed under a Connecticut title, which, according to the decisions of the courts of Pennsylvania, was void. The tenant subsequently acquired a title under a grant from the state of Pennsylvania and the legislature then passed an act validating the contract of lease. This act was attacked on the ground

favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

The defense to the action was that defendant purchased the lands described in the complaint from Mrs. A. P. Calloway, the mother of the *feme* plaintiff, and went into possession under his contract, cleared the land and made improvements thereon. He paid all of the purchase money except \$6 and received the following receipt: "Wilkesboro, N. C., April 19th, 1880. James Harris has paid me twenty dollars on his land. Owes me six more on it. A. P. Calloway."

Defendant was an ignorant colored man and relied on the honesty of Mrs. Calloway to perfect his title. Mrs. Calloway had only a life estate in the land and both she and the *feme* plaintiff, her daughter, encouraged defendant to make payments on the land, and when he objected to paying more without his deed both told him to have no fears but go on and pay, and as soon as the payments were completed he should have the deed. Subsequently the *feme* plaintiff bought a sixty-eight-acre tract of land from Mrs. Calloway and from the other remainderman, which tract included the land previously sold to defendant. At the time defendant bought the land, the price paid was its full value.

Further facts appear in the opinion.

Mr. L. D. Lowe, for appellants:

His honor erred in allowing the defendant to set up a parol contract for the sale of land, and allowing him to introduce the receipt in question.

Murdock v. Anderson, 57 N. C. 77; *Mallory v. Mallory*, 45 N. C. 80; *Plummer v. Owens*, Id. 254; *Allen v. Chambers*, 89 N. C. 125.

This case is almost identical with the case of *Fortesque v. Crawford*, 105 N. C. 29, and in this case it was held: "There is no land described in this receipt, and the receipt being vague and indefinite, parol testimony was insufficient to fit the location to the description."

See also *Holler v. Richards*, 103 N. C. 545; *Browning v. Berry*, 10 L. R. A. 736, 107 N. C. 231.

His honor erred in holding that the Statute, N. C. Laws 1891, chap. 465, § 1, covered this case, for the reason that this alleged parol contract, if made at all, was entered into about the year 1880, nearly or quite eleven years before this statute was passed, and this suit was commenced more than a year before this act took effect.

Leak v. Gay, 107 N. C. 468; *Edwards v. Kearzey*, 79 N. C. 664.

Mr. W. W. Barber for appellee.

Avery, J., delivered the opinion of the court:

The extreme limit of liberality in sanctioning the admission of parol proof to explain ambiguous descriptions in deeds and contracts for the sale and conveyance of land was attained in *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267, where the premises were described as "my house and lot in the town of Jefferson," and the plaintiff was permitted to show that the grantor had but one house and lot within the boundaries of that place.

that it was an unjust exercise of legislative power; was retrospective; was an exercise by the legislature of a judicial function and created a contract where none previously existed, as well as impaired the obligation of a contract. The Supreme Court of the United States said: "It is not easy to perceive how a law which gives validity to a void contract can be said to impair the obligation of that contract," and held that the act was not void on that ground. It furthermore held that the law could not be condemned under the Constitution of the United States as being retrospective or as divesting vested rights.

A statute validating the contracts of an institution, which has without authority engaged in the banking business, does not impair the obligation of a contract. *Milne v. Huber*, 3 McLean, 212.

An act validating loans made contrary to the policy of a state by a foreign corporation does not impair the obligation of a contract. *Gross v. United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 796.

A statute providing that deeds of conveyance made by married women shall not be void because of a defective acknowledgment thereof does not impair the obligation of any contract, and it cannot be pronounced void under the Constitution of the United States. *Watson v. Mercer*, 33 U. S. 8 Pet. 88, 8 L. ed. 876.

Curing a mere formal defect in the acknowledgment of a married woman's release of dower does not impair the obligation of a contract. *Raverty v. Fridge*, 3 McLean, 230; *Doe v. Nelson*, 3 McLean, 383.

In *Carpenter v. Dexter*, 75 U. S. 8 Wall. 513, 19 L. ed. 426, a statute validating acknowledgments to past deeds taken by officers who at the time had no authority was upheld, apparently without question as to its constitutionality.
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The state courts have not always followed the doctrine of the federal courts to its full extent.

Thus in *Pearce v. Patton*, 7 B. Mon. 162, 45 Am. Dec. 61, in which it was attempted to make applicable to the acknowledgment by a married woman of a deed attempting to convey her separate property a curative statute, the court held that the deed relied on as passing her title was a nullity as to her and her heirs, and intimates that the statute impaired the obligation of the contracts of conveyance under which she held title and that it impaired a vested right in her heirs and was void, and refused to follow the doctrine of the United States Court, both on the question of impairing obligation of contracts and also as to the definition of *ex post facto* laws.

But the doctrine that the validating of a contract does not impair its obligation has been accepted in a majority of the cases in state courts even to the extent of holding that a state law which makes valid a void contract does not impair the obligation of a contract within the meaning of the Constitution of the United States. *Welch v. Wadsworth*, 80 Conn. 149, 79 Am. Dec. 339.

Consequently resort has been had to the provisions of the state constitutions in most of the questions in which an enforcement of such a contract has been resisted, and the state decisions are not fully in accord even when the constitutional provisions are similar.

Retroactive laws and vested rights.

In attacking validating statutes most reliance has been placed on the claim that the laws are retroactive and that they impair vested rights. If the state constitution in terms prohibits retroactive laws much legislation will fail which would otherwise be valid.

If retrospective laws are prohibited by the state

In discussing that case, and distinguishing it from *Murdock v. Anderson*, 57 N. C. 77, Judge Battle, delivering the opinion of the court, took the ground that in connection with the designation of the town in which the lot was located, given in the deeds passed upon in both of them (in the one case Hillsboro, and in the other Jefferson), the description had been made more definite by use of the personal pronoun "my," so as to open the way for proof that the grantor had but one lot in that village, which he meant to refer to as the place of his residence. The contract under consideration is in the following words: "Wilkesboro, N. C., Apr. 19, 1880. James Harris has paid the twenty dollars on his land. Owes me six more on it." As the location of the land is not fixed, directly or inferentially, within the state of North Carolina or within the United States, the receipt is still more vague than either of the instruments discussed by Judge Battle, and it may be assumed that no one will venture to maintain that it was not void for uncertainty before the passage of the Act of 1891. Indeed, the case of *Fortieque v. Crawford*, 105 N. C. 29, is authority for holding that no right, title, or interest in any land passed to the defendant upon its signature or delivery to him, since the receipt relied on by the defendant was almost identical with that under consideration. The policy of the law in existence before that statute was enacted was to remove as far as possible the temptation to perjury by permitting parol proof to be used in aid of a defective description only where

it pointed by its terms to some extrinsic evidence for explanation of its ambiguous meaning. *Allen v. Chambers*, 89 N. C. 125; *Mussey v. Belisle*, 24 N. C. 170; *Leigh v. Crump*, 86 N. C. 299.

The principle stated is fully conceded in *Perry v. Scott*, 109 N. C. 374, where, though the distinction drawn by Judge Battle between cases where the personal pronoun constitutes or does not form a part of the description is disapproved, the necessity for indicating the locality by some means is clearly recognized. The receipt being utterly ineffectual to transfer any interest whatever to the defendant in 1880, when it was delivered to him, both the legal and equitable estate in the land remained vested in Mrs. A. P. Calloway for life, with remainder in fee in her children. The legislature unquestionably had and has the power to modify or repeal the whole of the statute of frauds in so far as it applies to future contracts for the sale of land, but its authority to give the repealing statute a retroactive operation is as certainly restricted by the fundamental rule that no law will be allowed to so operate as to disturb or destroy rights already vested. Did the legislature intend that the Act of 1891 (chap. 465) should be construed to operate retrospectively, and, if so, is the law, in so far as it relates to pre-existing rights, unconstitutional? No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner, has ever been held a constitutional exercise of legislative power in

constitution, the deed of a person of unsound mind cannot be ratified by subsequent legislation. *Routson v. Wolf*, 35 Mo. 174.

But in *Webb v. Den*, 68 U. S. 17 How. 578, 15 L. ed. 36, a statute, enacting that whenever a deed has been registered twenty years or more it shall be presumed to be upon lawful authority no matter what may have been the form of acknowledgment, the effect of which was to admit ancient deeds in evidence as proof of title, although they were defectively acknowledged, was held not to be a retroactive law under the constitution of Tennessee, which the legislature was forbidden to pass.

Different views have been taken upon the question how far such legislation impaired vested rights.

In speaking of a state law validating a sale made under a power of attorney which was at the time ineffectual, the court says "to the objection that such laws violate vested rights of property, it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract of conveyance to the injury of the other party. Even where no remedy could be had in the courts, the vested right is usually unattended with the slightest equity." *Bandall v. Krieger*, 90 U. S. 23 Wall. 137, 23 L. ed. 124.

When an act of the legislature goes no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal remedy or in consequence of some ingredient in the contract forbidden by law, it is only a question of policy and not one of constitutional power. *United States Mortg. Co. v. Gross*, 93 Ill. 483.

A statute validating a married woman's power of 22 L. R. A.

attorney, under which her real estate was sold, does not as against her impair the obligation of a contract or divest a vested right. *Dentzel v. Waldie*, 30 Cal. 138.

When a purchaser has paid for lands and the prior owner is under a moral obligation to convey, the legislature may cure a defective conveyance by retroactive legislation as against such owner, his heirs and widow, but such legislation cannot affect the title of a subsequent bona fide purchaser. *Newman v. Samuels*, 17 Iowa, 523.

The Constitutions of Ohio, 1851, art. 2, § 23, and Kansas, 1855, art. 4, § 20, authorized laws to enable courts to carry out the manifest intention of parties by curing defects, arising out of want of conformity with the requirements of a statute.

And this provision was held to authorize the insertion in a deed of the name of a married woman which was omitted by mistake. *Goshorn v. Purcell*, 11 Ohio St. 641.

If the intention of husband and wife is to convey the entirety of land owned by them as tenants in common, and the deed is made to convey only his interest and her dower rights therein, it may be reformed. *Smith v. Turpin*, 20 Ohio St. 478.

The power to correct and cure a "deed or other conveyance of husband and wife" on account of any error, defect, or omission therein is coextensive with the defect and with the powers the parties themselves possessed. Whatever they could have done and intended to do, the court can do, and whatever mistakes they or the officer have made whereby the intention of the contracting parties has been defeated, may be cured. It is the power to cure and not the power to make deeds. *Dengenhart v. Cracraft*, 36 Ohio St. 549.

The legislature has power to confirm conveyances defectively executed. *Dulany v. Tilghman*, 6 Gill & J. 461.

any state of the Union. *Cooley*, Const. Lim. *165; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 658, 7 L. ed. 558; *Satterlee v. Mathewson*, 27 U. S. 2 Pet. 380, 7 L. ed. 458; *Hoke v. Henderson*, 15 N. C. 4, 25 Am. Dec. 677; *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 89; *Caldier v. Bull*, 8 U. S. 8 Dall. 394, 1 L. ed. 651; *Dash v. Van Kleeck*, 7 Johns. 507, 5 Am. Dec. 291; U. S. Const. art. 1, § 10; N. C. Const. art. 1, § 17; *Butler v. Pennsylvania*, 51 U. S. 10 How. 410, 13 L. ed. 478; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 187, 3 L. ed. 178; *Stanmire v. Taylor*, 48 N. C. 207, 214; *King v. Hunter*, 65 N. C. 603, 6 Am. Rep. 754; *Wesson v. Johnson*, 66 N. C. 189; 1 Kent, Com. 455; *Stanmire v. Powell*, 35 N. C. 812.

Even in England, where there are no written constitutions, a statute will not commonly be construed to divest vested rights, and, when giving it a retrospective effect may lead to that result, it is allowed to operate prospectively only. *Moore v. Phillips*, 7 Mees. & W. 536; *Couch v. Jeffries*, 4 Burr. 2462.

The radical difference between the rules of construction prevailing in the two countries grows out of the fact that the courts in England are forced to concede the supreme and unlimited power of parliament, while in the United States legislatures are bound to observe, and the courts to enforce, the restrictions imposed upon all the co-ordinate branches of the government by the federal and state constitutions. Philosophical writers upon law generally in all countries, however, deny the power of the legislature to pass

statutes that impair a right acquired under the law in force at the time of its enactment, and insist that the right to repeal existing laws does not carry with it the power to take away property, the title to which vested under and is protected by them. But the legislature of North Carolina is restrained by article 1, § 10, of the Constitution of the United States, and article 1, § 17, of the Constitution of North Carolina, not only from passing any law that will divest title to land out of one person and vest it in another (except where it is taken for public purposes, after giving just compensation to the owner), but from enforcing any statute which would enable one person to evade or avoid the binding force of his contracts with another, whether executed or executory. *Robinson v. Barfield*, 6 N. C. 419; *Butler v. Com. supra*; *Baltimore & S. R. Co. v. Nesbit*, 51 U. S. 10 How. 395, 13 L. ed. 469; *Fletcher v. Peck, supra*; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43, 3 L. ed. 650; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 519, 4 L. ed. 629.

The first case in which the constitutional inhibition against the passage of a law impairing the obligation of a contract came before the Supreme Court of the United States for construction was *Fletcher v. Peck, supra*. The legislature of the state of Georgia had, by an Act passed in 1795, granted land to Grinn and others, and the defendant Peck was a purchaser for a valuable consideration, holding through several mesne conveyances under the patentees named in the act. In

A distinction has been made between unauthorized or null conveyances and those which were merely irregular.

Thus it has been held that if a married woman has no power to convey land, an attempted conveyance cannot be ratified by a subsequent statute. *Laue v. Soulard*, 15 Ill. 123.

If the attempted deed by the married woman is a nullity it cannot be cured, as where the statute requires her to convey her property by her husband joining with her in the conveyance and the husband fails to join in the deed, there is no deed and there can therefore be nothing to cure. *Miller v. Hine*, 13 Ohio St. 565.

But this distinction is not universally followed for in Pennsylvania it has been held that an unauthorized conveyance by a married woman of her separate estate may be confirmed. *Jones' App.* 57 Pa. 369.

It is competent for the legislature to render illegality of consideration no defense to an action on any contract. *Hill v. Smith*, 1 Morris (Iowa) 70.

A statute prohibiting the defense to a suit on a contract that it was made on Sunday, unless the defendant restores whatever of value he received under the contract, is not, as applied to prior contracts, unconstitutional as divesting vested rights. *Berry v. Clary*, 77 Me. 482.

The statutory defense to a stock-jobbing contract may be taken away by subsequent repeal of the statute. *Washburn v. Franklin*, 35 Barb. 569.

A contract with a corporation which is invalid because the corporation has not paid to the state the required percentage of its dividends, which failure has resulted in the forfeiture of the corporate franchises, may be rendered enforceable by a subsequent statute. *Bleakney v. Farmers & M. Bank*, 17 Serg. & R. 64, 17 Am. Dec. 636.

A bond invalid when executed because not bearing the proper stamp may be rendered valid by a subsequent law repealing the requirement for the stamp. *State v. Norwood*, 12 Md. 186.

In some cases it is held that the repeal of a law rendering a contract void will not validate it. *Mays v. Williams*, 27 Ala. 267. Such cases, however, do not go far enough to properly come within the scope of this note.

Due process of law.

It has been held that a subscription to the stock of a corporation which is invalid when made because the requisite percentage was not paid at the time cannot be validated by a subsequent statute dispensing with such requirement, because it would be taking property without due process of law. *New York & O. M. R. Co. v. Van Horn*, 57 N. Y. 473.

But it has also been held that the right to avoid a contract because of noncompliance with a statutory requirement cannot be considered as property, and therefore a statute permitting the affixing at any time of a stamp to a contract, the validity of which depended upon the existence of a stamp, does not deprive one of his property without due process of law. *Gibson v. Hibbard*, 13 Mich. 214.

Application of the rules to acknowledgments.

Since a deed not properly acknowledged may be as ineffectual as a source of title as though the contract of sale was itself invalid, legislation curing the defects may perhaps be considered with that validating defective contracts. In general the same rules have been applied to both classes of defects.

A deed ineffective because of the failure of the notary to affix his official seal to the acknowledgment may be cured by the legislature. *Maxey v. Wise*, 25 Ind. 1.

In *Logan v. Williams*, 76 Ill. 175, without discussing the constitutionality of the act, it was held

1796 the same body enacted a statute repealing the Act of 1795, and declaring it and all grants issued under its provisions null and void, on the ground that its passage was procured by undue influence and corruption. The court held that the Act of 1796 could not be construed to divest the title out of the defendant Peck and invest it in the state, and rested its rulings not only upon the clause of the constitution mentioned, but also upon more general principles arising out of the organic law of all of the states. The court said upon this subject: "To the legislature all legislative power is granted; but the question whether the Act of 1796, transferring the property of an individual to the public, be in the nature of a legislative power, is well worthy of serious reflection." This was the earliest intimation that, if the prohibition had been omitted in the Federal Constitution, the legislature of the state would have had no power to revoke its own grant without the consent of innocent persons holding under it. It has since been held in the appellate courts of the states generally that a law which provides for the transfer of the interest of an individual in land to another person or to the state, except for public purposes, and upon just compensation, is void, because it is in conflict with the provisions of the organic law that the three co-ordinate branches of the government should be kept forever separate and distinct, and that no person should be deprived of his property but by the law of the land. *Stanmire v. Taylor*, *Hoke v. Henderson*, *King v. Hunter*, and

Wesson v. Johnson, *supra*. It is true that the legislature may alter the remedy if its efficacy is not impaired, or take it away if one that is not calculated to diminish the value of the debt be provided in place of it. *Long v. Walker*, 105 N. C. 90, and the authorities there cited. The rules of evidence may be changed by legislative enactment, too; but if, by giving a retrospective operation to a statute passed for that purpose, it would divest any right of property that had already accrued, it should be construed to operate prospectively only, if at all. *Sedgw. Stat. & Const. L. p. 195*. 1 Kent, Com. 455, says: "A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles and consequently inoperative and void." After a legacy had been bequeathed to a married woman, and when, under the law then in force, the husband had a right to it, subject to certain contingencies, the legislature of New York passed an act declaring that the real and personal property of any female then married should be her sole and separate property. The appellate court said: "The application of this statute to this case would be a violation of the constitution of this state, which declares that no person shall be deprived of life, liberty, or property without due process of law." *Westcott v. Gregg*, 12 N. Y. 202, 62 Am. Dec. 160. While acknowledging the right of the lawmaking power to pass remedial laws, and especially statutes of limitation operating prospectively, the supreme court of Pennsyl-

that an act to validate acknowledgments taken by an officer who had no authority to take them would have the effect of rendering the acknowledgment valid.

And generally it is held that a defective acknowledgment to a deed may be validated by a legislative act, if vested rights of third parties are not thereby impaired. *Green v. Abraham*, 43 Ark. 420; *Ferguson v. Williams*, 68 Iowa, 717; *Barton v. Morris*, 15 Ohio, 406; *Stevens v. Martin*, 18 Pa. 101; *Skellinger v. Smith*, 1 Wash. Terr. 370.

Some of the courts are, however, inclined to treat curative legislation in this class of cases not as validating the contract but as more nearly affecting the evidence of title.

It has been said that since the bargainor's title is inchoately divested by the execution of the deed, and the acknowledgment of the execution is simply necessary to entitle it to registration, statutes validating imperfect acknowledgments are not unconstitutional though retroactive, because they did not affect rights but only evidence of facts. *Montgomery v. Hobson*, Meigs, 437.

In discussing the question of the effect of a statute curing the defective acknowledgment of a deed, the supreme court of Iowa said: "Deeds defectively acknowledged, or even without an acknowledgment, are good between the parties to them. The acknowledgment in the manner required by law is essential to admit them to record and make them notice to third persons. If defectively acknowledged and third persons have actual notice of their existence, they are bound by them." *Brinton v. Seever*, 12 Iowa, 389.

A legislature has power in the absence of any inhibiting constitutional limitation and except as against prior vested rights to cure, by retroactive legislation, defective acknowledgments of deeds in all cases where the purpose of the acknowledgment

is the admission of the instrument acknowledged to record or its use in evidence. *Summer v. Mitchell*, 14 L. R. A. 815, 29 Fla. 179.

There has been some tendency to make a distinction between deeds of married women and those of other persons.

In *Grove v. Todd*, 41 Md. 683, 20 Am. Rep. 76, a man and wife had executed a deed of his property which was acknowledged before an officer having no authority to take the acknowledgment. Subsequently an act was passed validating defective acknowledgments and the court in discussing the application of such act to the deed in question said that "since the husband might at common law make a deed without an acknowledgment, the curative act would operate against him and his heirs, but that since a wife cannot make a deed except in a particular mode not complied with in this case, her attempted deed was no more than a blank piece of paper, and that upon the death of her husband her right to dower became vested and could not be divested by a subsequent act attempting to validate the acknowledgment.

An acknowledgment by a married woman to a deed of her husband's property, which fails to state that she releases her dower right in the property when the statute requires such a statement, cannot be cured by a subsequent statute, because her dower right is a vested right and can only be divested by her own act in the mode prescribed by the law, or by doing some act which the law has declared shall be attended with a forfeiture of the right. *Russell v. Rumsey*, 36 Ill. 362.

But a majority of the cases seem to hold that if there is nothing more than a defective acknowledgment it may be cured.

Some early Ohio cases held that the legislature cannot enact a law which shall pass the land of a married woman by an instrument not binding on

vanias said: "It would be contrary to the spirit of legislation in Pennsylvania from the date of its charter to the statute in question to deprive a man of his land instantaneously under the pretense of limiting the period within which he should bring his action." *Eukin v. Raub*, 12 Serg. & R. 340. In *Greenough v. Greenough*, 11 Pa. 494, 51 Am. Dec. 567, Chief Justice Gibson discussed a statute which changed the rules of evidence by providing that every last will and testament made and not finally adjudicated prior to the passage of the act, to which the testator had made his mark or directed his name to be written, should be deemed valid, and admitted to probate on proof of the fact. The learned judge said that the law was "destitute of retroactive force, not only because it was an act of judicial power, but because it contravened the constitutional provision that no man should 'be deprived of life, liberty, or property except by the law of the land.'" Our statute is one providing for a different mode of establishing a deed or contract which may infuse life into a contract void at the option of the party to be charged, just as that act proposed to make operative a void will.

In this state it has been settled that the legislature is not empowered to pass an act that provides for depriving a person of his property in an unexpired term of office even by a general law or amendment to the constitution prescribing a different mode of elec-

tion, or by creating a new office, and turning over the emoluments and perquisites belonging to the officer during the residue of his term to the incumbent of the newly created place, because an officer has a vested right in his office for the term prescribed by law. *Hoke v. Henderson*, and *King v. Hunter*, *supra*. In *Den v. Foy*, 5 N. C. 87, this court held that, where escheated land had vested in the trustees of the university, the legislature was restrained by the clause of the Constitution (art. 1, § 17) which declared that no person ought to be deprived of property but by the law of the land from passing an act to take away from that institution the escheated land donated to it by a former statute. In *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500, and in *Wesson v. Johnson*, 66 N. C. 189, it was held that where the land was acquired by the husband, and the marriage was contracted before the passage of the Act of 1868, restoring to married women their common-law right of dower, that statute would not be construed to operate retroactively, because to give such effect to it would interfere with the vested right of the husband to alien without the consent of the wife, and to pass an estate in the land free from incumbrance of an inchoate dower right. So that this court has, in these cases also, distinctly held that no law can be so construed as to take property from one person, except for public use, and after making just compensation, and give it to another, or to incumber the property of one person by

her at the time of its execution. *Good v. Zercher*, 12 Ohio, 384; *Silliman v. Cummins*, 13 Ohio, 116. But these cases were overruled in *Chesnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387.

And now it is held that a defective acknowledgment of a married woman may be cured. *Dengenhart v. Cracraft*, 36 Ohio St. 549.

The omission of an officer to certify the separate examination of the wife may be cured. *Kilbourn v. Furry*, 26 Ohio St. 163.

A statute validating the acknowledgment of deeds of married women is not void as divesting vested rights. *Johnson v. Richardson*, 44 Ark. 385.

The failure to state in the certificate of acknowledgment that the contents of the deed were made known to the grantor, a married woman, may be lawfully cured. *Barnet v. Barnet*, 15 Serg. & R. 72, 16 Am. Dec. 516; *Tate v. Stooltzfoos*, 13 Serg. & R. 36, 16 Am. Dec. 546.

The certificate of acknowledgment to the deed of a married woman may properly be amended so as to give validity to it. *Stroud v. McDaniel*, 12 Lea. 617.

An imperfect acknowledgment by a married woman may be ratified. *Matthewson v. Spencer*, 8 Sneed, 513; *Rainey v. Gordon*, 6 Humph. 345.

Though the statute must be complied with in order to pass title to a married woman's separate property, it does not necessarily follow that an instrument willingly executed by her and actually acknowledged as required by law is absolutely void simply because of the officer's failure to make the proper certificate, which the facts authorized and which the law required him to make, and a statute may properly authorize the correction of the certificate. *Johnson v. Taylor*, 60 Tex. 380.

Application of the rules to contracts unenforceable because usurious.

In *Ewell v. Daggs*, 108 U. S. 142, 27 L. ed. 682, the court, discussing the effect upon prior contracts of 22 L. R. A.

a law forbidding the defense of usury, states that such laws have been upheld as against all objections as depriving parties of vested rights or impairing the obligation of contracts; that the privilege of resisting payment belonged to the remedy and formed no element in the rights inhering in the contract; and that the right which the curative or repealing act takes away is the right in the party to avoid his contract,—a naked legal right which it is usually unjust to insist upon and which no constitutional provision was ever designed to protect.

A statute taking away the defense of usury will not be declared invalid either on the ground that it makes contracts good that were before illegal, or on the ground that it impairs vested rights. *Woodruff v. Scruggs*, 27 Ark. 23, 11 Am. Rep. 777.

A statute prohibiting setting up the defense of usury is not unconstitutional. *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663.

And the weight of authority is that in the absence of a constitutional provision prohibiting the passage of retrospective laws, a contract, void for usury, may be validated. *Savings Bank of New Haven v. Bates*, 8 Conn. 506; *Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Allen*, 23 Conn. 97; *Welch v. Wadsworth*, 30 Conn. 149, 79 Am. Dec. 239; *Andrews v. Russell*, 7 Blackf. 474; *Hays v. Walker*, Id. 540; *Grimes v. Doe*, 8 Blackf. 371; *Wood v. Kennedy*, 19 Ind. 63; *Perrin v. Lyman*, 23 Ind. 16; *Baughner v. Nelson*, 9 Gill, 289, 62 Am. Dec. 604; *Wilson v. Hardesty*, 1 Md. Ch. 66; *Curtis v. Leavitt*, 15 N. Y. 9.

Some of the usury laws have not avoided the contract but have simply declared a forfeiture. In respect to such a law it has been held that a law permitting the recovery of the legal rate of interest upon a contract entered into, when a law declaring a forfeiture of three times the interest reserved in case of usury takes away no vested right, for the law recognizes no such right in

giving another such right or interest in it as will interfere with his pre-existing power to alien. *Hughes v. Hodges*, 102 N. C. 236. In *Leak v. Gay*, 107 N. C. 478, it was said that "when the effect of a law is to divest the vested right of property, except for the use of the public, and then only after providing for payment of its value, it will be declared void." In the case of *Stanmire v. Taylor*, 48 N. C. 207, it appeared that the legislature had passed an act purporting to give validity to a certain grant theretofore issued, but which had been declared void by the court in *Stanmire v. Powell*, 85 N. C. 312. The act was passed by the General Assembly in October, 1852 (after this court, in June previous, had declared the grant relied on by the plaintiff in the then pending suit to be void), and provided that the grant should be thereby validated and declared "good and effectual to pass all the right of the state in and to the said land, any law to the contrary notwithstanding." The defendant held under a subsequent valid grant from the state. Chief Justice Nash, delivering the opinion of the court, said: "If the Act of 1852 [declaring plaintiff's grant valid] was intended to give life to the void grant under which the plaintiff claims the premises, by giving a construction to it, the act was a judicial one, which it was not in the power of the legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plain-

tiff, then it violates the contract it made with the defendant Taylor, and is void."

It is contended, however, that the legislature has the power to pass remedial acts, and especially is authorized to so alter the rules of evidence as to afford relief to litigants. But the limit to such authority is transcended, said Judge Seawell, when a law is enacted which in its enforcement has the effect of depriving "one individual of his property without his consent and without compensation, and transferring it to another." *Robinson v. Barfield*, *supra*. The principle governing this controversy was as clearly stated by Judge Daniel, in an opinion delivered in the same case, when he said that "the transfer of property from one individual, who is the owner, to another individual, is a judicial, not a legislative, act. When the legislature presumes to touch private property for any other than public purposes, and then only in case of necessity, and upon rendering full compensation, it will behoove the judiciary to check its eccentric course by refusing to give any effect to such acts."

We think that where a deed or contract purporting to convey passes an equitable interest in land, it is not upon its face void, and the legislature has the power to enact remedial laws regulating the probate and registration of such instruments, though the incidental effect may be to admit to registration a deed or contract which could not pre-

penalties, and it does not violate the obligation of a contract. *Parmelee v. Lawrence*, 43 Ill. 381.

There are, however, decisions on the other side of this question. In Florida a statute invalidating usurious contracts was repealed, and the court in discussing the effect of the repealing statute on prior contracts said: "Would we not by applying the principle contended for give the repealing law an *ex post facto* operation and really impair the obligation of contracts? Is not the exoneration by virtue of the law governing the contract at the time it was entered into a right vested by the law of the land and can it now be divested by posterior legislation,—and the contract was not enforced although there was nothing in that case to show that there was anything more than a simple repeal of the statute, with no intention on the part of the legislature to validate prior contracts. *Mitchell v. Doggett*, 1 Fla. 356.

If a statute makes void a contract in which usury is reserved, the contract cannot be validated by a subsequent statute. *Morton v. Rutherford*, 18 Wis. 290.

A contract entered into while a law is in force, which provides that if usury is reserved only the amount actually loaned may be recovered back, cannot be made enforceable for the full amount of both principal and interest by the passage of a subsequent statute. *Gilliland v. Phillips*, 1 S. C. N. S. 152.

And the course of dealings between the parties may have vested a right which cannot be subsequently taken away.

When a settlement is made of the amount due under a usurious contract, and the right to recover back the amount of overpayment because of usury has become fixed, the right cannot be taken away by subsequent legislation. *Williar v. Baltimore Butchers Loan & A. Assn.*, 45 Md. 545.

Contract with judicial power.

A private act that certain deeds of married
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women shall be deemed and taken to be effectual in law is void, as interfering with the powers of the judiciary. *Robinson v. Barfield*, 6 N. C. 390.

An act attempting to validate defective acknowledgments to deeds of married women is invalid as attempting to break down the dividing wall between the legislative and judicial departments of government in declaring not only what the law is but what it has been; as depriving the citizen of property without due process of law; and as divesting vested rights. *Alabama L. Ins. & T. Co. v. Boykin*, 38 Ala. 510.

Rights of third persons cannot be impaired.

Acts curing defective acknowledgments cannot interfere with the rights of third persons vested at the time of their passage. *McGehee v. McKenzie*, 43 Ark. 153.

Rights of third persons which have actually vested cannot be cut off by a statute curing defective acknowledgments in a deed. *Brinton v. Seever*, 12 Iowa, 389.

The deed of a married woman holding property under a will which limits it to her separate use and to her heirs, and expressly states that she shall have no power to sell, cannot be confirmed by subsequent legislation so as to cut off the rights of her children. *Shonk v. Brown*, 61 Pa. 327.

A conveyance cannot be validated so as to cut off the subsequently acquired rights of third parties. *Meighen v. Strong*, 6 Minn. 177, 80 Am. Dec. 441; *Thompson v. Morgan*, 6 Minn. 232.

But it has been held that a curative act throws on the subsequent purchaser the burden of showing that he purchased bona fide and without notice. *Fogg v. Holcomb*, 64 Iowa, 621.

And in *Journey v. Gibson*, 56 Pa. 57, it is decided that a defectively acknowledged mortgage which is placed on record may be made effectual so as to cut off the rights of third persons acquired after the record by a statute passed subsequently to the acquisition of such rights.
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viously be proven, and to enable the person claiming under it to use it in establishing his title. It has been suggested, however, that the legislature has the power to give efficacy retrospectively to contracts like that under consideration, which have been so often declared void for uncertainty, because it has also been held that they were void at the election of the person to be bound thereby (just as in the case where the agreement is merely verbal), and that, being voidable, the legislature had the power to impart vitality to them. But we do not think that the line of demarcation which indicates the limit of legislative authority can be made to depend upon the question whether the agreement is void or voidable. The deed of a married woman is void; that of an infant void at his option on arriving at maturity; and the leading authorities concur in sustaining the general proposition that the contracts of infants are voidable only; yet it will not be contended that a statute allowing all conveyances theretofore made by infants to be registered, and declaring them effectual to pass the land described in them, would be held constitutional, so as to divest title out of such infants without their consent. How can such a statute be distinguished from one which operates to divest title out of a party against his will because he has signed a paper or entered into a verbal agreement which the law declares, just as in the case of an infant, has passed no interest, legal or equitable, in the land which purports to be the subject of the agreement? An unregistered deed, executed with all of the formalities prescribed by law, conveys an equity which would descend to the heirs of the grantee. A law which gives efficacy to the probate of such a deed merely provides for transferring the legal estate by certain proof to the person who had previously been the real owner in equity. It transfers the legal estate to such equitable owner, as did the statute of uses, but it does not disturb the vested beneficial right. If, in that case, the deed were ineffectual upon its face to pass any interest, legal or equitable, no remedial statute could impart efficacy to it. *Robinson v. Barfield, supra*. It would seem, therefore, more accurate to declare that the power to enact remedial statutes giving effect to contracts for the sale and conveyances of land extends only to those cases where the grantee or other person deriving benefit from their enforcement had, previous to the passage of the law, an equitable right, and not to cases where the policy of the law or the express provision of a statute had prevented the transmission of any interest whatever by the instrument or agreement relied on. Contracts are made with a view to the legislative authority to provide for proving in the readiest manner that the parties actually entered into them, but the parties are not deemed to have acted in reasonable contemplation of such an alteration in the law as to change its policy, and thereby transfer both the legal and equitable estate in land without the consent of the owner. As the case involves an important principle, it may not be improper to cite numerous additional authorities from the ap-

pellate courts of many of the states, in which an effort has been made to fix and determine the limit to the authority to pass remedial laws.

In *Alter's App.*, 67 Pa. 341, 5 Am. Rep. 438, the supreme court of Pennsylvania declared it incompetent for the legislature to empower the courts to correct a mistake in a testator's will which rendered it inoperative, and thereby deprive his heirs-at-law of property that had descended to them. In another case it was held by the court of Nevada that, where a testator left no heirs, the legislature had power to waive the right of the state to take his property as an escheat by validating a will in favor of his devisees, but could not have divested the title of his heirs-at-law if any had been known. *Re Sticknoth*, 7 Nev. 229. In *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718, that eminent jurist Chief Justice Dixon, in discussing an act to validate a contract, void when executed, for want of power in the city authorities of Milwaukee, said: "A contract void for want of capacity in one or both of the contracting parties to enter into it is as no contract; and to admit that the legislature, of its own choice, and against the wishes of either or both of the contracting parties, can give it life and vigor, is to admit that it is within the scope of legislative authority to divest settled rights of property, and to take the property of one individual or corporation and transfer it to another." It should be noted that the deed in that case was void at the election of the city. See also *Mills v. Charleston*, 29 Wis. 413, 9 Am. Rep. 578. Where a conveyance is void for want of power in the grantor to convey the estate that it purports to pass, it cannot be validated by statute. *Shonk v. Brown*, 61 Pa. 327. It has been held that a lease void under the statute cannot be validated by the receipt of rent. *Sedgw. & W. Trial of Title to Lands*, 379, and *notes*. When the subsequent ratification by the contracting party cannot give validity to an agreement to rent because it is void under this same statute of frauds it is difficult to understand how the legislature, despite the protest of the parties to a deed and their privies, can, by altering the rules of evidence, restore it to life. In *Underwood v. Lilly*, 10 Serg. & R. 99, the supreme court of Pennsylvania said "that the retrospective operation of laws would be supported when they impair no contract or disturb no vested right, but only vary remedies, cure defects in proceedings otherwise fair, which do not vary existing obligations contrary to their situation when entered into and when prosecuted." The supreme court of New Hampshire held that the legislature had no power, as against parties not assenting, to validate a fraudulent sale of corporate property. *White Mountains R. R. v. White Mountains (N. H.) R. R.* 50 N. H. 50.

To declare by statute, in terms that Mrs. Calloway intended to convey when she actually aliened nothing, would be a legislative usurpation of judicial power; and to change the general remedy applicable to pre-existing contracts so as to pass an estate now, when no equitable right vested in Harris at the

time of the execution of the paper, even if it be accomplished by modifying the rules of evidence, would be to disturb a vested right by transferring the land without compensation to the owner from whom it is taken after it had been aliened to a purchaser for value. *Norman v. Heist*, 5 Watts & S. 171, 40 Am. Dec. 493. There is a general presumption against the retroactive operation of statutes, and they will, in cases like that at bar, where it will impair vested rights to apply them to past transactions, be construed to affect rights accruing after their enactment. Endlich, *Interpretation of Statutes*, §§ 271-274; *Richardson v. Cook*, 37 Vt. 599, 88 Am. Dec. 622.

Where deeds are executed by virtue of a judicial decree, and are voidable only, not void, by reason of some irregularity growing out of a failure to follow the mode of procedure prescribed by law in the conduct of the action or proceeding, it is clearly competent to cure such defects by remedial legislation; and where the action or proceeding has been instituted and prosecuted in good faith, it is not only eminently just, but it serves the important end of preserving the public confidence in the stability of judgments of the courts, to resort to the lawmaking power for such relief. Hence the curative acts, affecting irregularities in special proceedings, have been upheld by the courts, as they cannot be collaterally impeached, and are voidable only in the absence of such remedial acts at the instance of a party to them; not void. *Edwards v. Moore*, 99 N. C. 1; *Ward v. Lowndes*, 96 N. C. 387; *Bell v. King*, 70 N. C. 330; *Herring v. Outlaw*, Id. 334. In such cases the curative statute divests no vested right, because the theory of the decisions upon the subject has always been that an estate vests under the decree, subject, however, to be avoided in the absence of legislation on notice of a party to the proceeding, or to be validated and made conclusive on the parties by a proper statute. *Moore v. Gidney*, 75 N. C. 34. Such proceedings differ widely from contracts of infants, or such as are not enforceable under the statute of frauds. In the one instance a prima facie title passes, though it is defeasible; in the other the contract is unlawful in its incipency,—passes nothing. The one is valid until it is avoided; the other is void until it is validated. Parties are supposed to contract with reference to the power of the lawmakers to withdraw the mere right to avoid, but not in contemplation of the enactment of a statute which would operate as a compulsory ratification, and divest a vested interest without the consent of him who holds it. It is like the distinction between destroying a mere right or possibility, which must have been expected when it was created, and the taking of an interest in land without compensation. *Bass v. Roanoke Nav. & W. P. Co.*, 111 N. C. 439, 19 L. R. A. 247. Thus the distinction between this line of cases and those in which the right of recovery depends upon giving effect to a deed or contract that has once been on its face absolutely void, or voidable at the election of the party to be bound, because executed contrary to the

prohibition of a statute or not in the only mode declared by it to be sufficient, or in violation of a rule declared by public policy. In *Condry v. Cheshire*, 88 N. C. 375, it was held that a void judgment could be attacked without any direct proceeding to vacate it. *Doyle v. Brown*, 72 N. C. 393; *Stallings v. Gully*, 48 N. C. 344.

The statutes that provide for supplying lost records are also within the scope of legislative authority, because they only give to certain persons the means of setting up and establishing valid titles, and the parties who actually aliened and passed title to them cannot complain because all right has already been divested out of them, and they are presumed to have conveyed with reference to the legislative power to provide for restoring the evidence of what had been actually accomplished, not simply attempted, in the face of a statute declaring the attempt in advance ineffectual. *Adle v. Sherwood*, 3 Whart. 484. As we have already stated, after a deed has been executed, if it be valid upon its face, the grantee takes an equitable estate under it, till by force of registration (which is our modern substitute for livery of seisin) the legal estate vests in him. He being the owner in equity, it is no interference with vested rights to provide by law a more convenient mode of proving the execution, or to ratify a probate that is informal, or was taken by an officer not empowered to do so, but who mistook his power. *Freeman v. Person*, 106 N. C. 251; *White v. Connelly*, 105 N. C. 65; *Young v. Jackson*, 92 N. C. 144; *Tatom v. White*, 95 N. C. 453. The probate is but an *ex parte* ascertainment, by authority of law, that the instrument registered is authentic (*Young v. Jackson*, *supra*), and does not conclude the parties to it as to its legal effect. It is competent for the legislature to cure a defective probate where the instrument has already been recorded, as it is to prescribe the mode of proving in future; and parties contract with a view to the possible, if not probable, exercise of this power. The legislature is empowered, unquestionably, to pass a law extending the statute of limitation, or making the time shorter, if a reasonable time is given for the commencement of an action before the bar takes effect. *Strickland v. Draughan*, 91 N. C. 103. The principle announced in this case is not inconsistent with the doctrine (laid down in *Eakin v. Raub*, *supra*) that a man cannot be deprived of his land "instantaneously under the pretense of limiting the period in which he should bring his action." Neither can he be instantaneously robbed of his property, the possession of which he is about to recover in the courts, under the guise of modifying the rules of evidence. So the principle decided in *Alexander v. McDowell County Comrs.*, 70 N. C. 208, has no bearing upon this case. Where one holds what purports to be a contract made on behalf of the state by an agent, but which is in reality void for want of authority in the agent to bind the state, the legislature has the power to assume the obligation, just as it could have provided for payment of the claim if no agreement had been entered into. "Municipal corporations

are mere agencies of the state, through which the sovereign acts in matters of social concern." *Boas v. Roanoke Nav. & W. P. R. Co.*, *supra*; Sutherland, Stat. Constr. § 488. The right to limit involves the power to dispense with limitations. *Ibid.* But the legislature cannot take the property of one man and give it to another, though an attempt may be made to transfer it by a judicial proceeding,—as by a sheriff's sale. *Id.* § 484, and *note*.

Where a party prays an appeal to an appellate court, the judgment of the court below is thereby vacated, subject to the condition that he shall perfect his appeal either under any law existing when he appeals, or that may be enacted before his cause is heard in the appellate court; and a curative act which gives him a status in the higher court is considered to have been in contemplation of the parties at all times, and divests no title, but simply provides the means of fairly ascertaining the rights of the litigants.

Walker v. Scott, 104 N. C. 481. Judge Cooley says (Const. Lim. 371), in treating of irregularities that may be cured by statute: "And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is competent to make the same immaterial by subsequent law." But where the defect which the act seeks to remedy affects the jurisdiction of the court, it is in violation of fundamental principles to give it a retrospective effect. *Ibid.* The learned judge must not be understood as maintaining that the legislature has the power to pass any retroactive remedial law that it would have been within the scope of its authority to have enacted for future operation. Under such a principle no man's property would be secure against the judicial authority of the lawmaking department of the government. If the receipt was void for uncertainty as a contract, and the defendant acquired no legal or equitable right that could then be enforced, the general assembly had no more authority, even under the guise of changing the rule of evidence or providing a new remedy, to transfer the life estate of Mrs. A. P. Calloway, and the remainder in fee of her daughters to the defendant by a general than by a special act naming the parties, and setting forth their relation to each other. Such special acts have been declared by this court to be in contravention of the organic law, not only as attempts to divest vested individual rights, but as infringements on the part of the legislature upon the power of the judicial branch of the government. *Stannire v. Taylor*, *supra*. We conclude, therefore, that the legislature did not intend that the statute should apply to pre-existing contracts, but only to those entered into after its passage. In permitting the defendant to explain what land was referred to we think there was error for which a new trial should be granted.

New trial.

Shepherd, Ch. J., concurring:

Under the view I have taken it is unnecessary to determine whether the statute in question should be construed as prospective

only in its operation, as I am very clearly of the opinion that it did not have the effect of changing the existing law in reference to descriptions contained in deeds or contracts for the conveyance or sale of land. The statute provides that "in all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper writing offered as evidence of title or right of possession; and if the jury is satisfied that the land in question is the identical land intended to be conveyed, . . . then the said paper writing shall be deemed and taken to be sufficient in law to pass such title . . . as it purports to pass," etc. Section 1, chap. 465, Acts 1891. Whatever may have been the intention of the legislature, it is, I think, very evident that the foregoing language does not change in the slightest degree the existing law upon the subject to which it refers. It is but a plain and concise exposition of the rules of the common law, and, if the legislature intended to abrogate these rules, in whole or in part, it should have expressed such intention in the clearest and most unmistakable manner. Statutes which "innovate upon the common-law rules of evidence," or which "provide for proceedings unknown to or contrary to the common law, are construed strictly [and] the courts cannot properly give force to them beyond what is expressed by their words, or is necessarily implied from what is expressed." Sutherland, Stat. Constr. § 400. The same author also declares it to be a cardinal principle of judicial interpretation that, "where a statute uses a word which is well known and has a definite sense at common law or in the written law, without defining it, it will be restricted to that sense, unless it appears that it was not so intended." And he further states that "rules of interpretation and construction are derived from the common law, and, since that law constitutes the foundation, and primarily the body and soul, of our jurisprudence, every statutory enactment is construed with reference to its cognate principles." Sections 253-289. Keeping in mind these well-settled principles, let us inquire whether there is anything in the statute which sustains the defendant's contention that it was the purpose of the legislature that the word "description," as therein employed, should be so construed as to practically repeal the statute of frauds, and thus destroy in a great measure the stability of titles to the landed property of the state. We should be loath to attribute to the lawmakers a purpose to place our state in a position of such exceptional and unenviable prominence, and I am quite sure that their real object in passing the statute may be explained upon other and more reasonable grounds, to which I shall hereafter refer. The statute provides that parol testimony shall be admissible for the purpose of fitting the land to the description contained in the deed, and the question is whether the word "description" is to be taken in its ordinary and legal signification—that is, a description which has a legal susceptibility of being aided by testimony so as to

identify the land—or whether it means a description which in law is no description whatever, and is sometimes called an “insufficient description.” I am really unable to conceive of any principle upon which the latter proposition can be supported, unless it be that the legislature must have intended something different from the common law, and that it is our duty to discover it, and, by a process known as “judicial legislation,” insert it into the statute. This involves not merely the difficulty of departing from the generally accepted meaning of the terms of a statute, but also an absolute contradiction of such terms, resulting in a complete change, in many instances, in the rights of property. In other words, instead of reading the statute “that parol testimony may be received for the purpose of fitting the land to such a description as is recognized as legally sufficient,” we are to substitute the words, “such a description as is so vague and indefinite as to have been heretofore held to be legally insufficient,” or one which, in the language of *Judge Pearson* in a case similar to this (*Murdock v. Anderson*, 57 N. C. 78), is “no description at all.” I cannot see how a word in a statute having such a plain legal signification can, in the absence of something in the context requiring it, be stricken out, and other words of an entirely different signification inserted in its place. The failure of the legislature to accomplish what it is argued it attempted to do affords no warrant to the court to supply the supposed omission. Even if the language were not altogether free from ambiguity, we should hesitate to place upon it the construction insisted upon, for it is a universally accepted rule that “a construction which must necessarily occasion great public and private mischief must never be preferred to a construction which will occasion neither, or not in so great a degree, unless the terms of the instrument absolutely require such preference.” *Sutherland, Stat. Constr.* 823. If the statute means that testimony may be introduced to the jury in all cases where the description has heretofore been held void by reason of vagueness, it would be exceedingly difficult for any court to determine what is a sufficient “insufficient description” which should be submitted to the jury. It would seem from the construction insisted upon that, if there is a mere semblance of a description, however indefinite it may be, its legal sufficiency is to be determined by the jury; for if they find that the parties intended to convey a certain piece of land, the description shall, by reason of such finding, be deemed in law sufficient to pass the title. It is impossible to estimate the confusion which would result from such a substantial reversal of the functions of the court and the jury. I suppose that any attempt at a description would be sufficient to put the jury in full control of the matter without any interference on the part of the court. Thus, if I have ten stores on Fayetteville street in the city of Raleigh, and convey to A. “a store on Fayetteville street in the city of Raleigh,” this will be sufficient to go to the jury, and they may determine which of the ten stores was intended to be conveyed.

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This, of course, would be an abrogation of the statute of frauds. Could the legislature have intended this? But to go still further. If I should afterwards sell to B. one of the stores, specifically describing it, what is to prevent A. from identifying it as the one sold to him under his vague and imperfect description? Under the statute there can be no equitable principle asserted for the protection of B., as it contains no saving in favor of third persons, but expressly provides that in all cases the evidence shall be received, and, if the property can be identified by the jury, then the description shall be deemed in law sufficient. If the description is thus made sufficient by the finding of the jury, it must be sufficient for all purposes. That this construction is not the true one is entirely clear by a reference to the second section of the act, which provides “that no deed . . . shall be declared void for vagueness in the description by reason of the use of the word ‘adjoining’ instead of the words ‘bounded by,’ etc. The provision was intended to meet a suggestion that there was a distinction between the words ‘bounded by’ and ‘adjoining’ as affecting the legal sufficiency of a description, and was rendered unnecessary by a subsequent declaration of the court in *Perry v. Scott*, 109 N. C. 374.

It recognizes that there is such a thing as a description which may be declared void by the court for “vagueness,” and enacts that in certain instances it shall not be so declared void. Now, it is asked with absolute confidence, why was it necessary to provide for the cases mentioned in this section, if what had been suggested to be an “insufficient description” for “vagueness” was provided for in the first section, which is the one we have under consideration? Very clearly there would have been no necessity for such legislation if the present contract and the similar one in *Fortesque v. Crawford*, 105 N. C. 29, were covered by the first section under the construction contended for. I think that it was the purpose of the legislature to meet the suggestion referred to, and this is certainly all that was effected by the terms of the statute. I do not impute to the legislature a purpose to enact such a law as to produce the evils which would result from the construction insisted upon, and I am of the opinion that the real object of the statute was such as I have indicated. The common law, then, not having been changed in respect to this contract, and it being void under the decision in *Fortesque Case*, *supra*, I concur in the ruling that there should be a new trial.

Burwell, J., dissenting:

The following issue was submitted to the jury without objection on the part of the plaintiff: “Is the land of which the defendant is now in possession, and which is sued for in this action, the identical land which is referred to in the paper writing set up in the answer, and alleged to have been executed to defendant by A. P. Caloway?” Defendant offered this writing in evidence, and plaintiff objected “on the ground that it was too indefinite in describing any land.” His motion overruled the objection, and admitted the

evidence, and the plaintiff excepted. The writing referred to is as follows: "Wilkesboro, N. C., Apr. 19, 1880. James Harris has paid me twenty dollars on his land. Owes me six more on it. A. P. Calloway." I assume that the contention of the plaintiffs was that parol evidence was not admissible to locate the land to which the defendant alleged this receipt referred, and show that it was the same land which plaintiffs were seeking to recover of him in this action, she also claiming under A. P. Calloway. Her objection should have been to the parol testimony when it was offered. The writing was clearly admissible in evidence. Its legal effect was a matter to be determined after it was introduced. But for the Act of 1891 (chap. 465, § 1), the case of *Fortesque v. Crawford*, 105 N. C. 29, would be decisive of this controversy, for there, as here, the only words in the receipt descriptive of the land are "his land," and some other words that show that what was there styled "his [the defendant's] land" was, prior to the alleged sale, the land of the person signing the receipt.

The act referred to seems to have been enacted to meet and avoid the hardship of such cases as that cited above and this one now before us. Whether that legislation is wise or unwise is not for us to say. We should give to it all proper effect. We have here a memorandum in writing, which, under the law as it stood before the Act of 1891, would not have availed the defendant, because it was not then permissible to show by parol evidence that the land therein designated by the vendor as "his land" was the land in controversy, and for that reason alone. The expression is very vague and indefinite, but it is a "description." In *Bread v. Munger*, 88 N. C. 297, "his 100 acres of land" is called an "insufficient description." In *Fortesque v. Crawford*, *supra* (the receipt being similar to the one here under consideration), this court said of the defendant's offer of parol testimony that he was endeavoring "to help out the insufficiency of the description." If, then, there was a written memorandum available, and sufficient of itself for defendant's protection in his possession, when the action was begun, if the description had not been insufficient and imperfect, that imperfection and insufficiency could be remedied by the

verdict of the jury founded upon the writing, and parol testimony which the act had made competent "to identify the land, and fit it to the description contained in the paper writing" offered as "evidence of the right of possession." There was no error, I think, in his honor's allowing defendant to put the writing in evidence, and the introduction of parol evidence to identify the land. The statute is, in my opinion, applicable to all actions to be tried in the courts, no matter when the contract was made. It does not contravene any provision of the constitution, for it affects a remedy, and not the rights of any citizen. "Laws which change the rules of evidence relate to the remedy only" (*Tabor v. Ward*, 88 N. C. 291); and such laws are not unconstitutional, though retroactive (*Hinton v. Hinton*, 61 N. C. 410; *Wilkerson v. Buchanan*, 88 N. C. 296; *Phillips v. Cameron*, 48 N. C. 390). The act now under discussion, if applied to this case, will disturb no vested right of Mrs. Calloway or her vendee with notice. It will merely prevent the perpetration of a wrong by giving to the defendant a preventive for that wrong by changing the rule of evidence so as to allow him, in defense of his possession of his home, to submit to the jury parol testimony that was not admissible when the alleged contract was made. The contract was not void, but only voidable at the option and upon the proper plea of the alleged contractor. *Loughran v. Giles*, 110 N. C. 425, and cases there cited. The act does not assume to make that a contract which was not one, but merely declares that the jury may determine what the contract was, and to that end may hear and consider certain parol evidence. This will disturb no vested rights, nor deprive any one of what is his own. It may be that it is better for the commonwealth that a few should have the privilege of doing what all men feel to be wrong,—taking from honest purchasers land sold to them by defective descriptions,—than that some should be tempted to swear falsely. Of that we say nothing. All such legislation as that under consideration involves a question of policy, and not of constitutional power. *Coeley*, Const. Lim. 6th ed. p. 460.

Clark, J.: I concur in the above dissenting opinion.

MINNESOTA SUPREME COURT.

MINNEAPOLIS, ST. PAUL & SAULT
STE. MARIE R. CO.

v.

HOME INSURANCE CO.

(.....Minn.....)

*1. The policy issued by defendant to

*Headnotes by MITCHELL, J.

NOTE.—The above case seems to be one of first impression in respect to the exclusion of the liability of a carrier on a collateral contract to insure from the protection of insurance against liability as carrier and warehouseman, and is an important precedent in this particular.

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plaintiff on the property of shippers construed as an insurance for the benefit of plaintiff only to the extent of its liability as carrier and warehouseman.

2. In an action on the policy the bills of lading fixing the liability of the plaintiff to the shippers as carrier and warehouseman are the measure of defendant's liability to the plaintiff, and cannot be varied by parol evi-

That liability on a contract to procure insurance constitutes an insurable interest is held in *Western & A. Pipe Lines v. Home Ins. Co.*, 145 Pa. 846, but there was no decision as to whether or not such interest was that of a warehouseman.

dence. In an action to enforce rights dependent on a written contract, although the suit be between strangers to the instrument, or between a stranger and one of the parties to the contract, the rule against varying a written instrument applies. A liability incurred by the plaintiff on a collateral contract to procure insurance on the property of shippers is not a liability as carrier or warehouseman, within the meaning of the policy.

(November 18, 1893.)

CROSS-APPEALS from orders of the District Court for Hennepin County entered in an action brought to recover the amount alleged to be due on a policy of fire insurance, the plaintiff appealing from an order reducing the amount of recovery allowed by the jury, and the defendant appealing from an order denying its motion for a new trial after verdict in favor of plaintiff. *Reversed on defendant's appeal.*

The facts sufficiently appear in the opinion.

Messrs. A. H. Bright and Kitchel, Cohen & Shaw, for plaintiff:

The contract as established by the parol evidence was a contract under the common-law liability of carriers to carry the grain to Gladstone, and thence deliver it through its elevator upon the vessel of the next water carrier at Gladstone; it was not an agreement to insure but an agreement at common law to deliver to the next connecting carrier.

The insurance taken by the carrier was primarily for its own protection. The carrier, in effect, re-insured the risk which the law imposed upon it by virtue of the agreement.

Lawrence v. Winona & St. P. R. Co. 15 Minn. 390, 2 Am. Rep. 130.

The oral evidence was properly received.

The rule that parol evidence is inadmissible to vary the terms of a written instrument is applied only in suits between the parties to the instruments, or their privies, and not to suits where the issue is between one of the parties to the instrument and a third person.

Van Eman v. Stanchfield, 10 Minn. 255; *Sanborn v. Sturtevant*, 17 Minn. 200; *National Car & Locomotive Builder v. Cyclone Steam Snow Plow Co.* 49 Minn. 125; *Buxton v. Beal*, 49 Minn. 230; *Clerihew v. West Side Bank*, 50 Minn. 538; *Reynolds v. Magness*, 24 N. C. 26; *Lee v. Adsit*, 37 N. Y. 78; *McMaster v. Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.* 88 N. Y. 591. See also *Greenl. Ev.* § 279; *Whart. Ev.* § 928.

The evidence was admissible as showing that the bill of lading was in fact never accepted as the contract between the parties.

The shipping receipts bound the carrier to the common-law liability of the common carrier.

At common-law a common carrier is an insurer of the goods entrusted to him and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy.

Christenson v. American Exp. Co. 15 Minn. 270, 2 Am. Rep. 122.

The evidence was sufficient to warrant the reformation of the bill of lading as between the shippers and the railway company.

Buxton v. Beal, *supra*.

If the railway company be held liable for the

grain in the elevator as a common carrier, then in the absence of proof as to the origin of the fire, defendant was liable for the grain destroyed in the elevator.

Shriver v. Sioux City & St. P. R. Co. 24 Minn. 506, 31 Am. Rep. 858; *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539; *Hull v. Chicago, St. P. M. & O. R. Co.* 5 L. R. A. 587, 41 Minn. 510; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 192.

Messrs. S. E. Hall, H. S. Durand, and Cole, McVey & Cheshire for defendant.

Mitchell, J., delivered the opinion of the court:

By the policy in suit the defendant insured the plaintiff "on flour, corn, grain, seeds, provisions, and other merchandise, excluding petroleum or its products; it being understood and agreed that the insurance under this head is to cover the liability of the insured as carriers and warehousemen, as well as their own property, . . . while contained in their elevator situated at Gladstone, Mich." It is too plain to admit of argument that, as to the property of others entrusted to its custody, this was not an insurance for the benefit of the shippers, but for the benefit of the plaintiff exclusively, and only to the extent of its own interest. It is well settled that, if the carrier would insure for the benefit of the owners of the property, this must appear from the use of apt terms in the policy to that effect. There is not a word in this policy that indicates any intent to insure any other interest than that of the plaintiff to the extent of its liability as carrier and warehouseman. It necessarily follows that to entitle plaintiff to recover it was incumbent on it to prove that it was liable as carrier or warehouseman to the owners for the loss of the grain destroyed by fire in its elevator at Gladstone. Recognizing this fact, the plaintiff alleged in its complaint agreements between itself and the several shippers that it would procure at its own expense policies of insurance on their grain against loss by fire while in this elevator. Upon the trial the plaintiff itself introduced the bills of lading issued by it to the several shippers, by the terms of which it was expressly provided that plaintiff should not be liable for any loss of or damage to the property by fire not caused by its negligence or that of its agents. It may be here stated that the grain was consigned to Buffalo, and was destroyed by fire while in the elevator at Gladstone, awaiting delivery by plaintiff to the next succeeding line of carriers. The plaintiff was then permitted, against the objection and exception of the defendant, to introduce parol evidence of an agreement between itself and the shippers, made at or prior to the shipment of the grain, and prior to the execution of the bills of lading referred to, that it would procure insurance on the grain as alleged in the complaint. Even if this evidence was otherwise competent, it was inadmissible for the reason that it did not tend to prove any liability of plaintiff as carrier or warehouseman, which was all against which the defendant had insured it. But to this point we shall refer hereafter.

One ground on which counsel seek to sustain the admissibility of this oral evidence is that the rule against varying a written contract by parol applies only to controversies between parties to the instrument and their privies, and not to controversies between strangers to the contract, or between one of the parties to the instrument and a stranger to it. The rule is as stated, with this limitation, however: that the right in the latter class of cases to vary a written contract by parol is limited to rights independent of the instrument. As to rights which originate in the relation established by the written contract, or are founded upon it, the rule against varying it by parol applies. *Browne, Parol Ev. § 28; Sayre v. Burdick, 47 Minn. 367; Wodock v. Robinson, 148 Pa. 508.* In the present case plaintiff is claiming under this policy rights wholly dependent upon its liability to the shippers of the grain. That liability is at once both the basis and the measure of defendant's liability; and it would be most unreasonable that it should be allowed, as against defendant, to establish that liability by proof of oral promises to the shippers which the latter could not prove against it. If the bill of lading is conclusive between the shippers and the plaintiff, it must be equally so, in this case, between the plaintiff and the defendant. Counsel further claims that this parol evidence was also admissible as showing that the bills of lading were in fact never accepted as the contract between the parties; in other words, as we understand counsel, they propose to throw aside the bills of lading as never having become operative, ignore the express oral agreement to insure, and then rest their case upon an alleged oral contract of carriage, in which there were no exceptions to the common-law liability of carriers. With all due respect to counsel, it seems to us that this contention is entirely baseless. The complaint was framed, and the case tried throughout, upon the theory that the liability of plaintiff to the shippers grew out of the express agreement of the former to insure the grain, and the record contains nothing even suggestive of the present contention of counsel. The evidence furnishes no support to this contention. The undisputed facts are that the manner in which the business was done was that, immediately upon loading a car, a short bill, or, as it is called, a "shipping receipt," was issued to the owner, and, when a sufficient number of cars had been loaded to constitute a "shipment," the shipper surrendered these receipts to the plaintiff, and received in their place a regular or large bill of lading, of the form already described, to which was attached a list of all the cars in the shipment. These bills of lading the shippers attached to the drafts drawn on the consignees. This had been the customary and uniform manner of doing business between the parties for years. These large bills of lading had always been accepted and used by the shippers without objection. This conclusively proves that the owners perfectly understood, when shipping the grain, that these large bills of lading, and neither their preliminary talk nor the small "shipping receipts," were to be the

final repository and sole evidence of the contract between themselves and the plaintiff. In the absence of fraud or mistake, of which there is no claim, the bills of lading must be conclusively presumed to be the final and complete expression of the engagements of the parties: certainly, at least, of the obligations and liabilities of the plaintiff as carrier or warehouseman in the transportation of the property. Whether, as between the shippers and the plaintiff, the former could show by parol, as a collateral agreement, an undertaking to procure insurance on the grain, it is unnecessary to consider, for under such an agreement the liability of the plaintiff would not be as carrier or warehouseman, against which alone the defendant insured. The undertaking of the defendant to insure the plaintiff against its liability as carrier and warehouseman can have but one meaning, viz. the liability growing out of the relation of carrier and warehouseman as such. It was never intended to cover liabilities which the plaintiff might incur by virtue of special contracts as to matters entirely outside of their common-law liability as carriers and warehousemen. It is no part of the duty of common carriers to procure insurance on property intrusted to their custody for the benefit of the owners. Had this plaintiff, in order to secure the business of these shippers, guaranteed them a certain profit on their grain, or the receipt of a certain price for it after its arrival at Buffalo, there would have been as much reason for claiming that the liability thus incurred was covered by this policy as that incurred by the agreement to procure insurance on it. Counsel are not correct in saying that the liability incurred by the agreement to procure insurance is nothing more than the unqualified common-law liability of a carrier. Suppose, for example, the plaintiff had, in the exercise of ordinary diligence, secured policies of insurance on this grain, and some of the insurance companies had become insolvent. The plaintiff would not have been liable on its contract to procure insurance, but it might have been liable as carrier. Again, suppose plaintiff had failed to procure insurance, and the grain had been destroyed from some cause for which a common carrier is not liable, it would nevertheless have been liable for its failure to perform its contract to procure insurance. But further discussion is unnecessary. The policy was never intended to cover liabilities which the plaintiff might incur regarding the property by special contracts entirely outside of and foreign to its common-law duties as carrier or warehouseman. It may be added that there is no claim that the loss was caused by the negligence of the plaintiff, and hence not within the operation of the stipulation in the policy exempting it from liability for loss by fire. Under no view of the case can the plaintiff recover.

On defendant's appeal the order appealed from is reversed.

On plaintiff's appeal that part of the order appealed from is affirmed.

Motion for re-argument denied December 20, 1898.

ILLINOIS SUPREME COURT.

James A. SMITH *et al.*, *Appts.*,
v.H. H. McDOWELL, State's Atty., *ex rel.* M.
H. HALL *et al.*

(148 Ill. 51.)

1. Error in sustaining exceptions to portions of an answer is immaterial, if the averments excluded could not have changed the result.
2. An ordinance attempting to vacate a street or portion thereof for the sole purpose of allowing a private person to occupy a portion for an area and stairways in connection with the basement of a building is *ultra vires* and void, where the only statutory authority is a general power to lay out, improve, and vacate streets.
3. An obstruction of a street for the length of 85 feet and the width of 5 feet by a stone wall enclosing an areaway to a basement is a purpresture which is a public nuisance *per se*, beyond the power of municipal authorities to license without express authority.
4. The inconvenience of the public, or the sufficiency of the remainder of the street for public uses, is immaterial on the question of abating a purpresture in a street in proceedings by the public.
5. An injunction to prevent the continuance or creation of a nuisance by obstructing a highway may be granted at the suit of the proper officers.

(October 23, 1893.)

APPEAL by defendants from a decree of the Circuit Court for Livingston County enjoining defendants from the alleged construction and maintenance of a purpresture in a public highway. *Affirmed.*

Statement by Shope, J.:

This was a bill in chancery, filed by H. H. McDowell, state's attorney in and for Livingston county, this state, on the relation of M. H. Hall and William Cowling, citizens and electors of the village of Chatsworth, in said county, on their own behalf, as well as the general public, to restrain the construction of a purpresture, consisting of an areaway and stairs therein, in one of the principal streets of said village. The bill alleges, in substance, that on June 8, 1859, the then proprietors of certain described lands surveyed and platted the same into lots, blocks, streets, alleys, and public grounds, as the town of Chatsworth; that said town afterward became incorporated under the general law, as a village; that by virtue of said plat, and the terms of dedication in the acknowledgment thereto, and the recording thereof, all the said streets, etc., became

dedicated to the use of the public, and have ever since been so used; "that in said village is a public street, named 'Fourth Street' " on said plat; that the president and board of trustees of said village "have undertaken, by ordinance, to dispose of" a portion of said street "for private purposes and uses;" and an ordinance of the village is set out, as follows: "An ordinance to vacate part of Fourth street in the village of Chatsworth. Be it ordained by the president and board of trustees of the village of Chatsworth, that to enable the owners of lot nine, (9,) in block twenty-two, (22,) in the original town (now village) of Chatsworth, to erect and maintain a brick building on said lot nine, (9,) with an area and entrance way to the basement of such building in said Fourth street, on the west side of such building, the part of said Fourth street in said village of Chatsworth beginning at the southwest corner of said lot nine, (9,) and running thence west five (5) feet in said Fourth street, thence north in said Fourth street eighty-five (85) feet, thence east five (5) feet, to the east line of said Fourth street, and thence south eighty-five (85) feet to the place of beginning be, and the same is hereby, vacated. Approved September 8, 1891. James A. Smith, President. Attest: John Taggart, Village Clerk."

It is further alleged, in substance, that said lot 9, of which said Smith is the owner, is located on the corner of Fourth and Locust streets, principal thoroughfares in said village, and that the sole purpose and object of said ordinance was to give to said Smith the 5 by 85 feet vacated, for an area and stairways, in connection with the basement of his building being erected on said lot, and that to permit the construction of such area and stairways in said street will create a purpresture therein, and a permanent obstruction thereof; that it will be a public nuisance, and permanently deprive the public of that portion of the street, so given to Smith, over which the public has hitherto traveled upon a sidewalk along said lot. The bill makes said James A. Smith and the village parties defendant; prays that the ordinance be declared void, and that said Smith has acquired no right thereunder, and, if any excavation or area has already been made, that same be declared a nuisance, and abated accordingly; prays injunction restraining said Smith from excavating in said street, and from constructing and maintaining said area and stairways, and from using said street for such private purpose, and that the injunction be made perpetual.

A temporary injunction issued. Answer was filed, admitting all the material allegations of the bill, but averring new matters, to which exceptions were filed and sustained,

NOTE.—The relative rights of individuals and the public in highways concerning which there is a continuing development of the law, and which are of constantly increasing importance, are presented in the above case with a clear showing of the public trust existing in streets. See a somewhat different L. R. A.

ent illustration of the same doctrine in the denial of the power to lease any portion of a street to hucksters by the decision in *Schopp v. St. Louis* (Mo.) 20 L. R. A. 733. See also the case of *New Haven v. New Haven & D. R. Co.* (Conn.) 18 L. R. A. 253.

and by consent the parties proceeded to a hearing upon the bill and the remaining portions of the answer to which exceptions had not been filed and sustained. This practically treated the allegations of the bill as true. The court below entered decree in favor of complainant, finding the ordinance void, and awarding a perpetual injunction. The defendants prosecute this appeal.

Messrs. Strawn & Norton for appellants.
Mr. N. J. Pillsbury, for appellee:

By virtue of the statutory dedication of the streets and alleys and its acceptance by the village, it became seised in fee of the streets and alleys for the use of the public as expressed in the dedication (Rev. Stat. 1845, § 21, p. 175), and they must be held for such use and purpose and for no other whatever.

The city may improve and control them and adopt all needful rules and regulations for their management and use but she cannot alien or otherwise dispose of them.

Alton v. Illinois Transp. Co. 12 Ill. 88, 52 Am. Dec. 479; *Carter v. Chicago*, 57 Ill. 285; *Sherlock v. Winnetka*, 59 Ill. 889; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Quincy v. Jones*, 76 Ill. 281, 20 Am. Rep. 243; *Chicago v. Wright*, 69 Ill. 827; *Kreigh v. Chicago*, 86 Ill. 410; *Stack v. East St. Louis*, 85 Ill. 877, 28 Am. Rep. 619; *Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Lee v. Mound Station*, 118 Ill. 312; *Ligare v. Chicago*, 139 Ill. 46; *Elliott, Roads & Streets*, p. 478; *Com. v. King*, 18 Met. 115.

Any permanent obstruction to the free use of a public way is a nuisance at common law and made an indictable offense by our Criminal Code, § 277, Rev. Stat. 1874, chap. 88, where it is declared to be a public nuisance "to obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, etc."

If the village can legally vacate five feet in width of a street for private use it can in like manner give twenty feet for the same purpose. Such obstructions being a public nuisance there is no authority in a municipality to license the erection thereof.

Dill. Mun. Corp. §§ 816, 821, and notes; Wood, Nuisance, p. 831, §§ 74, 250, 254; *Pfau v. Reynolds*, 53 Ill. 212.

A deed from a city will not justify a pre-emption.

Stetson v. Faxon, 19 Pick. 147, 81 Am. Dec. 128.

Neither can a city for its own use obstruct public streets as by building a watertank therein.

Morrison v. Hinkson, supra; *Princeville v. Auten*, 77 Ill. 325.

Nor can the legislature authorize the taking of lands dedicated to public use, for private purposes.

Jacksonville v. Jacksonville R. Co. supra; *Price v. Thompson*, 48 Mo. 861; *Warren v. Lyons City*, 22 Iowa, 357.

At all events those who claim such power to exist must show it by the clear letter of the statute.

Kreigh v. Chicago and *Ligare v. Chicago*, supra; *State v. Cincinnati Gas Light & Coke Co.* 18 Ohio St. 262.
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And the general powers conferred upon cities over streets does not authorize them to vacate them for private use or to allow encroachments to be placed permanently thereon.

Dill. Mun. Corp. § 521; *Princeville v. Auten*, *Stack v. East St. Louis*, *Carter v. Chicago* and *Ligare v. Chicago*, supra; *Elliott, Roads & Streets*, p. 18; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155; *Com. v. King*, 18 Met. 115; *Hyde v. Middlesex County*, 3 Gray, 267; *Com. v. Blaisdell*, 107 Mass. 234; *State v. Berdett*, 78 Ind. 185, 38 Am. Rep. 117; *Pettis v. Johnson*, 56 Ind. 189; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286; *Indianapolis v. Miller*, 27 Ind. 394.

It is the duty of the town authorities to keep the streets clear and unobstructed, and no person has the right to take and hold possession of any part of the streets for any private purpose.

Emerson v. Babcock, 66 Iowa, 257, 55 Am. Rep. 273; *Reimer's App.* 100 Pa. 182, 45 Am. Rep. 878; *Farrell v. New York*, 5 N. Y. Supp. 672.

These powers conferred in general terms upon the municipality are to be limited to the objects and purposes alone for which they are created and subsist.

A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers, and courts in determining the meaning of a statute are not confined to its words, but may regard its purpose, consider it in connection with other statutes *in pari materia* and in view of the conditions existing.

Anderson v. Chicago, B. & Q. R. Co. 117 Ill. 26; *Gormley v. Uthe*, 116 Ill. 645.

The very essence of the right to use the margin of a street and the right of the city to license depends upon the question whether it be for temporary use only and arise upon a necessity and the use itself must be in a reasonable manner. For if such use is prolonged for an unreasonable time, or if it is of such a nature as to unnecessarily or unduly interfere with the right of the public to pass and repass it will constitute a nuisance.

Elliott, Roads & Streets, pp. 480, 481, and authorities cited.

The general public is not required when it sees its rights invaded and the trust declared for its use prevented to wait and see if the trustee will not at some time in the future correct the wrong and revoke its illegal acts.

As the village did all it could to assist Smith and still stands by and upholds him, it is not reasonable to suppose that it would prosecute, so the village can be made defendant.

Jackson v. Norris, 72 Ill. 364.

It is unquestionably a part of the common-law duty of the attorney-general to institute proceedings by information in chancery to restrain and abate public nuisances and pre-emptures.

Hunt v. Chicago & D. R. Co. 20 Ill. App. 282; *Jackson v. Norris*, supra.

It is the doctrine of the horn-books of the law of equity jurisprudence that equity does take jurisdiction in this class of cases.

Story, Eq. Jur. § 924; *Wood, Nuisance*, §§ 777, 786; *Kerr, Inj.* § 290; *Biapham, Eq.* § 400; *Joyce, Inj.* § 1809.

This power has been exercised in numberless cases.

Pennsylvania v. Wheeling & B. Bridge Co. 54 U. S. 13 How. 518, 14 L. ed. 249; *Craig v. People*, 47 Ill. 487; *People v. St. Louis*, 10 Ill. 373; *Green v. Oakes*, 17 Ill. 249; *Minke v. Hopeman*, 87 Ill. 450, 29 Am. Rep. 63; *Earl v. De Hart*, 13 N. J. Eq. 280, 72 Am. Dec. 395; *East India Co. v. Vincent*, 2 Atk. 83; *Van Bergen v. Van Bergen*, 2 Johns. Ch. 272, 1 L. ed. 875; *Hammond v. Fuller*, 1 Paige, 197, 2 L. ed. 614; *Schwoeerer v. Boylston Market Assn.* 99 Mass. 285; *Reimer's App. supra*; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 881.

Shope, J., delivered the opinion of the court:

The important question presented by this record is whether, under the statute, giving municipal corporations control of the streets and alleys within the municipality, power exists in the corporate authorities to vacate a street, or a portion of a street, for the benefit and use of a private person. It is charged, and the answer practically admits, and indeed the ordinance on its face purports, that the attempted vacation of a strip, 5 feet wide and 85 feet long, off of the side of the street, was for the single purpose of permitting its use by appellant Smith, president of the board of trustees of the village, as an areaway, connected with the basement of his proposed building. The doctrine is sought to be invoked that the motives of the trustees of the village in the passage of the ordinance cannot be judicially inquired into. That position is at once conceded. Whether their motives were honest or otherwise in voting for the ordinance is not a subject of inquiry. But the purpose accomplished by the ordinance—the object attained—may always be considered, indeed must be, in determining the validity of the ordinance. If the purpose effected by the ordinance is within the power of the city council, their act will be valid. The question to be determined is one of power in the municipality, in the determination of which the legal effect of the action of the municipality becomes the controlling matter for consideration. In *Ligare v. Chicago*, 139 Ill. 46, it was held that the effect—the result of the action of the city council—was the exclusion of the general public from a portion of the public street, opened and sought to be opened; and the power of the city to so exclude the public was denied. No such purpose was expressed in the ordinance, but, that being the effect of what was done, the court looked to the result, and, that result requiring the exercise of power not conferred upon or existing in the municipality, the ordinances were declared void. The answer avers that, under and by virtue of the ordinance in this case, Smith had taken possession of the *locus in quo*, and excavated for and erected a stone area wall, enclosing the strip of the street proposed to be vacated. The purpose sought to be attained, and actually accomplished, if the ordinance is valid, is not left in doubt. This strip of ground was to be delivered over to Smith, for his

private use, and the control of the municipality over the same, as a part of the public street of the village, extinguished.

Before proceeding further, it will be proper to notice the contention that the court erred in sustaining exceptions to portions of the answer. The practice in chancery in this state in respect of exceptions to answers, which are mere pleadings (the verification having been waived in the bill), has been so repeatedly determined that no discussion will be necessary. *Fulton County Supra. v. Mississippi & W. R. Co.* 21 Ill. 838; *Brown v. Scottish American Mortg. Co.* 110 Ill. 235; *Miz v. People*, 116 Ill. 265. Conceding, in view of these authorities, that the court erred in this respect, it is manifest that defendants were not prejudiced thereby. A careful examination of the answer will fail to disclose a single averment of fact to which exception was sustained which, if retained and proved in the most ample manner, would have changed the result. Thus, proof of the fact that it was agreed between the village and Smith that he should enclose the areaway with a substantial iron railing, and extend the sidewalk around it, and the like facts, would in no wise affect the question of whether a purpresture was created in the street, or the power of the village authorities to vacate that portion of the street for the private use contemplated.

It is contended—First, that the power of the village authorities to vacate streets is plenary, and that, they having, in the exercise of their legislative discretion, vacated the strip of ground mentioned, their action is not the subject of judicial review; and, secondly, if the vacating ordinance be invalid, it is nevertheless a license to Smith to occupy that portion of the street, and such occupancy by him is not therefore a nuisance. It is insisted that as the statute (Rev. Stat. chap. 24, § 62, cl. 7), grants power to municipalities, organized under the general incorporation act, "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same," the power to vacate is absolute, to be exercised in the discretion of the municipal authorities. We cannot concur in this view. By the platting of the village, the streets, in their entire width and length, were dedicated to the use of the public as streets. The village thereby became seised in fee of the streets and alleys, for the use of the local and general public, holding them in trust for such uses and purposes, and none other. *Alton v. Illinois Transp. Co.* 12 Ill. 38, 52 Am. Dec. 479; *Carter v. Chicago*, 57 Ill. 285; *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Kreigh v. Chicago*, 86 Ill. 410; *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Lee v. Mound Station*, 118 Ill. 312.

These municipal corporations are instrumentalities of the state, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they

can exercise such powers only as are expressly granted or are necessarily implied from the powers expressly conferred. The legislature, representing the great body of the people of the state, when no private right is invaded or trust violated (*Jacksonville v. Jacksonville R. Co. supra*), may repeal the law creating them, or exercise such control in respect of the streets, alleys, and public grounds within the municipalities of the state as it shall deem for the interest of the people of the state. Dill. Mun. Corp. § 541; *Chicago v. Rumsey*, 87 Ill. 355; *People v. Walsh*, 96 Ill. 253, 86 Am. Rep. 135; *Chicago v. Union Bldg. Assn.* 102 Ill. 397, 40 Am. Rep. 598; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170, 10 L. R. A. 215. It does not follow, however, as seems to be supposed, that, by the use of the general words "and vacate the same," the absolute power of the legislature was intended to be conferred upon the municipal authorities. The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds. The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. In *Allton v. Illinois Transp. Co., supra*, we said, in treating the subject there under consideration: "Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them. At most, she but holds them in trust for the benefit of the general public." In *Quincy v. Jones, supra*, after quoting with approval the foregoing language, it is said: "It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use as streets, . . . as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets which might in any way interfere with the duty of preparing them for public use." And in *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, in considering the power of the municipality to grant rights in the public streets of the city, it was said: "It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets . . . must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes." In *Glasgow v. St. Louis*, 87 Mo. 678, under power "to establish, open, vacate, al-

ter, widen, extend, pave, or otherwise improve all streets," etc., it was held that an ordinance to vacate a portion of one of the streets of the city for the use of private parties was *ultra vires*. See, also, *Reimer's App.* 100 Pa. 182, 45 Am. Rep. 373; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 103, 32 Am. Rep. 286; *State v. Berdette*, 73 Ind. 185, 88 Am. Rep. 117; *Belcher Sugar Ref. Co. v. St. Louis Grain Elevator Co.* 82 Mo. 127; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 486. And we held that the city cannot acquire land by condemning the same for a street when the real purpose is to devote it to a private use. *Ligare v. Chicago, supra*. In *Belcher Sugar Ref. Co. Case, supra*, the court held that the corporation could not condemn property for a public use, to be appropriated to a private use. It in no wise affects the principle involved whether the street was acquired by dedication or condemnation. *Glasgow v. St. Louis, supra*. The municipal corporation holding and controlling its streets in trust, for the use of the general public, without power of converting them to any other use, it follows necessarily that the right to "vacate the same," is to be exercised only when the municipal authorities, in the exercise of their discretion, determine the street is no longer required for the public use or convenience. And the case of *Meyer v. Teutopolis*, 131 Ill. 552, is, when properly understood, not in conflict with the views here expressed. See *Ligare v. Chicago, supra*. It is not necessary to here discuss or determine whether the courts will in any case interfere to prevent the abuse of municipal discretion in the respect mentioned, for the reason that it is not sought to restrain the exercise of such discretion, but to prevent the perversion of their power, to the promotion of private interests, in violation of the trust upon which the streets are held. *Carter v. Chicago, supra*. In this case there is no pretense that the public interests required the vacation of any part of the street, or that any public interest, local or general, would be subserved by the proposed vacation. The ordinance, professedly and in terms, proposed to destroy the public right and use, for the sole purpose of enabling a private person to occupy a portion of the street, with a permanent structure, appurtenant to his building abutting upon the street. This the municipal authorities are not empowered to do, and their action was *ultra vires* and void.

The other contention, even if the ordinance could be regarded as a license to Smith to permanently occupy a portion of the street, is equally untenable. As we have seen, the primary purpose of a street is for public use, and it is not within the power of the municipality to divert the street to permanent private uses. It by no means follows that every obstruction of a street is a purpresture or illegal. Thus, the necessary and temporary obstructions incident to the use or repair of the street, the interruption that may be caused by the temporary depositing of earth or material in improving the adjoining lots, excavations under the street authorized by the municipality, and the like (*Girdley v. Bloomington*, 68 Ill. 47), if temporary and

reasonably necessary, must be borne as a reasonable and necessary limitation of the free and uninterrupted right of use by the public; and when made under proper regulations, and with reasonable safeguards against accident, such interruptions are not to be regarded as nuisances; the test in all such cases being that the interruption shall be reasonably necessary, and not continued for an unreasonable time. 2 Dill. Mun. Corp. 581 *et seq.*, and authorities cited; Angell, Highways, chap. 6; Wood, Nuisances, 262 *et seq.* And so in respect of iron gratings to admit light, openings for admission of coal, flap or trap doors, the extension of signs into the street, and the like, if authorized by the municipality and properly constructed, so as not to interfere with the public use of the street or sidewalk, are not to be regarded as nuisances. But it is indispensable, to take from the use of the street for such purposes the character of a nuisance, that the street or sidewalk be left free for the public uses, and in as safe condition as it would have been without such use; for the city government cannot exempt itself from liability for injuries resulting from an unsafe condition of the streets, or any part of them, and cannot delegate to others authority to make them so, for, although such occupation of the street may not be a nuisance, yet the owner or person creating the obstruction or using it, and the city after notice, will be liable for negligence in its construction or maintenance. Wood, Nuisances, 275 *et seq.*, and cases cited; Dill. Mun. Corp. *supra*; Elliott, Roads & Streets, 480-540. Every person passing over the street has a right to presume that it is in proper condition, and in every way safe, for the purpose of his passage, with due and ordinary care; and, as the municipality itself cannot be justified in creating a nuisance, no one can justify the creation of a nuisance under a license from it.

The distinction between these uses of the street when authorized and that proposed in this city is well defined. That the obstruction extending into the street 5 feet, and for the length of 85 feet, was intended to be and was permanent, is not questioned. It was for use as an areaway, adjoining the basement of the brick building to be erected upon the adjacent lot, flush with the lot line. It was surrounded by a stone wall, on the top of which was to be placed an iron railing, and the sidewalk was to be extended around it. Its perpetual use was necessary for the purposes for which it was designated, and, if the ordinance be treated as a license merely, the right to so maintain it in the public street, to the exclusion of the public and for the exclusive benefit of the abutting lot-owner, was intended to be conferred. This being so, it falls within the definition of a "purpresture" (4 Bl. Com. 167), and is *per se* a public nuisance, which the village authorities had no power to license or maintain. Wood, Nuisances, 288 *et seq.* Section 221 of the Criminal Code (1 Starr & C. Anno. Stat. p. 815) provides: "It is a public nuisance . . . (5) to obstruct or encroach upon public highways, . . . streets, alleys, commons," etc. "The king," says Judge 22 L. R. A.

Dillon (Mun. Corp. § 521), "cannot license the erection or commission of a nuisance; nor in this country can a municipal corporation do so, by virtue of any implied or general power. A building, or other structure of like nature, erected upon a street, without the sanction of the legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy the streets without express power to this end conferred upon them by charter or statute." See note. Wood, in his Law of Nuisance (sec. 742), lays down the rule that, "while a municipal corporation may provide by ordinance for the prevention and removal of, yet it cannot license, a nuisance, nor can it maintain a nuisance upon city property, but is subject to the same liability and remedies therefor, at the suit of persons injured, or in behalf of the public, as an individual would be." These texts are amply sustained by the decided cases cited in *Pettis v. Johnson*, 56 Ind. 139, the city of Indianapolis contracted with the owners of a building situated upon one of the public alleys of the city that they should construct a stairway in the alley, to afford access to rooms in the building occupied by offices of the city. The structure being permanent in its character, it was held to be a nuisance, and abated accordingly. The court says: "The city had no power to contract for such a structure in such a place. True, the city has exclusive jurisdiction over the streets and alleys, not to enable it to appropriate them, or any part of them in perpetuity, to the use of private individuals, but to keep them, so far as may be, open and free to all, and so regulate and control necessary temporary obstructions that they shall not become permanent." *Pfau v. Reynolds*, 53 Ill. 212; *Com. v. King*, 18 Met. 115; *State v. Berdella*, *supra*; *Hart v. Albany*, 8 Paige, 213, 8 L. ed. 121; *People v. Cunningham*, 1 Denio, 524, 43 Am. Dec. 709, and cases *supra*.

The permanent encroachment upon a public highway or street, unauthorized by the legislature, and the creation of a purpresture therein, which obstructs the free and uninterrupted passage of the public, is, as a matter of law, a public nuisance. The matter of inconvenience to the public, or that sufficient of the street may remain unobstructed to still accommodate the public travel, cannot be considered. The trustee of the public—the municipality—is charged with the duty of keeping and maintaining the streets, in all their parts, open and unobstructed, and in reasonably safe condition, for the public use. No question of the amount of damage done or that may ensue from the creation of the purpresture is raised, nor can it be considered in proceedings by the public, the question being simply whether there has been an invasion of the public right. Where the proceedings are instituted by a private individual for a public nuisance, the gist of his right of action is the private injury, and he must allege and prove some special damage, different in kind from that suffered by the general public. *McDonald v. English*, 85 Ill. 232; *Chicago v. Union Bldg. Assn.* 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis v.*

O'Flynn, 119 Ill. 200, 59 Am. Rep. 795. The public may institute proceedings for the abatement or prevention of the nuisance by its authorized public officers, irrespective of the question of pecuniary damages. *Jackson v. Norris*, 72 Ill. 864; *Hunt v. Chicago Horse & Dummy R. Co.* 121 Ill. 638. Nor does it seem to be necessary when the erection is itself an invasion of the public right—that is, where it is a nuisance *per se*—that the fact should be established at law, preliminary to the jurisdiction by injunction. The public is entitled to the speediest and most effectual way to prevent the threatened invasion of its right. *Wood, Nuisance*, §§ 777-786; *Dill. Mun. Corp.* 520; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Reimer's App. supra*; *People v. Vanderbilt*, 26 N. Y. 287;

Manhattan Gas Light Co. v. Barker, 7 Rott. 523; *Eden, Inj.* 11-159. And, if there has been a clear invasion of the common right,—the authorized taking for private use that which belongs to the public, as by the permanent occupation of a public street, or a portion of it,—injunction will be granted, at the suit of the proper officers, on behalf of the public, to prevent the creation and maintenance of the nuisance. 3 Pom. Eq. Jur. 1359, and *note*; *Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395; *Sparhawk v. Union Pass. R. Co.* 54 Pa. 401; *East India Co. v. Vincent*, 2 Atk. 83; *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 389, *notes*.

We are of opinion that the chancellor decided correctly, and the decree of the Circuit Court will be affirmed.

INDIANA SUPREME COURT.

BOARD OF COMMISSIONERS OF VIGO COUNTY, *App't.*,

James W. STOUT *et al.*

(.....Ind.....)

1. A court has inherent power to order an elevator in the court-house to be operated by the sheriff during sessions of court, when the use of the elevator is necessary to furnish fit and convenient means of access to the court-room, although the county commissioners direct to the contrary that the use of the elevator shall be discontinued.

2. An injunction against carrying out an order of court cannot be granted by another court of similar jurisdiction, but can be granted, if at all, only by the court which made the order.

3. The proper mode of review of an order of court directing the sheriff to operate an elevator in the court-house for convenience of access to the court-room is by appeal and not by injunction against the sheriff.

(November 23, 1893.)

A PPEAL by complainants from a judgment of the Superior Court for Vigo County in

NOTE.—Power of courts to provide the necessary places and equipment for their business.

A court has the inherent power when in session to incur such necessary expense as the exigencies of the occasion may require, which are judicially determined by the court, as directing a sheriff to board and lodge the jury, at the expense of the county, where such jury should not be allowed to separate. *Watson v. Moniteau County*, 53 Mo. 122; *Lycoming County Comrs. v. Hall*, 7 Watts, 230.

The case of *Lycoming County Comrs. v. Hall* seems to be the leading authority for the doctrine of the inherent power of a court to provide itself with what is necessary for its business.

This may also be done at the expense of the city, when the city should furnish the expenses of the court. *State v. Smith*, 5 Mo. App. 427.

But not at the expense of the state in the absence of statute. *State v. Clark*, 57 Mo. 25.

In this case the section allowing such expense had been omitted from the statute by the legislature.

And a county where the court is held is liable for incidental expenses of the supreme court in the absence of statute. *McCalmont v. Allegheny County*, 29 Pa. 417.

And *Orleans County v. State Auditor*, 65 Vt. 492, holds that the state is liable for water furnished to the court-house under a statute making the county liable for "all other expenses connected with the courts," but the case does not show who ordered it.

And a county is liable for expenses of publication of trial lists published under a rule of court, there being no statutory provision made for the payment. *Venango County v. Durban*, 3 Grant Cas. 66. And in *People v. Monroe County Suprs.*, 15 How. Pr. 225, it was held that the rules of court require the clerk to print the calendar for the general 22 L. R. A.

terms, which is clearly a county charge for which there is no provision by law, but that was not in controversy in this case.

In *People v. Greene County Suprs.*, 39 Hun, 220, 36 Hun, 619, it was held that courts have inherent power to incur necessary expenses, but that the power to order publication of terms of court is not vested in the court, as such a construction would enlarge the terms of the statute providing for such publication.

As to further expenses, see *Jones v. Lee County Suprs.* *infra*.

In *State v. Noble*, 4 L. R. A. 101, 118 Ind. 360, where the constitutionality of the supreme court commission was in controversy, it was held that if they were mere assistants of the court an act authorizing their appointment by the governor would be unconstitutional as such appointment belongs to the judicial powers of the court.

And the supreme court of Wisconsin has the inherent power to appoint its own janitor, although the superintendent of public property has charge of the state house where the statute provides that he shall not interfere with any rooms appropriated to state officers. *Re Janitor of Supreme Court*, 35 Wis. 410.

The district court has the inherent power to appoint its own court crier and tipstaff whose duty combines that of janitor also, and as such he may be required to take charge of the steam heating apparatus for the court even to the exclusion of heat from the other county offices if necessary, and at the expense of the county. *Re Court Officers*, 3 Pa. Dist. Rep. 196, 31 Phila. Leg. Int. 54.

But *State v. Smith*, 82 Mo. 51, reversing 15 Mo. App. 412, holds that in St. Louis the power to appoint a court janitor is vested in the commissioners

favor of defendants in an action brought to enjoin defendants from operating or interfering with the passenger elevator in the Vigo county court-house. *Affirmed.*

The facts are stated in the opinion.

Messrs. Faris & Hamill, for appellant:

If the board of county commissioners, as is clearly held by this court, has the control and management of county business, it surely may make orders respecting county property that may interfere with a continued running of a certain order of things as well as to put a certain order of things in motion in the first place.

O'Boyle v. Shannon, 80 Ind. 159.

If there exists any authority to call in question the management and control of the board of commissioners over the elevator in question the action should have been commenced in some regular proceeding known to the law. Rev. Stat. 1881, § 814, gives us a rule for the commencement of actions in this state, and section 1168 prescribes the method of issuing writs of mandates to inferior tribunals. The only proceeding entitled to a standing in a court of justice for the purpose of requiring a board of commissioners to answer or give an account of its control and management of county property would lie under this latter section, and a circuit court would only have the right of passing judgment on such a question, if such right exists at all, when the question was presented to the jurisdiction by the practice known under said section 1168, Rev. Stat. 1881. This record shows orders of court directed against persons who were not parties to any

proceedings before it and against whom no process or notice had been directed.

Weisbach v. Arnold, 3 Wash. Terr. 111; *Hoffman v. Lake County Comrs.* 96 Ind. 84; *State v. Clark*, 4 Ind. 315; *Posey County Comrs. v. Saunders*, 17 Ind. 437.

Messrs. McNutt & McNutt for appellees.

Howard, Ch. J., delivered the opinion of the court:

This was a suit brought by the appellant board of county commissioners to enjoin the appellees from operating or interfering with the passenger elevator in the Vigo county court-house.

A demurrer to the complaint having been overruled, the appellees answered in three paragraphs, the first being in general denial and the second and third setting up affirmative matter.

It is assigned as error that the court overruled appellant's demurrer to the affirmative paragraphs of the answer and the sufficiency of these paragraphs is the only question presented for our decision.

In the second paragraph of the answer it is averred, amongst other things, that the Vigo county court-house is an iron and stone structure, 207 feet long by 150 feet wide and three stories high above the basement; that it cost \$480,000, is built upon a public square in the city of Terre Haute and fronts on four streets, with a public entrance from each street. That there are two stairways at the ends of the building, but no public stair-

of the board of public works by statute, subject to approval by the president of the board of public works, and the court cannot regard the appointment of an obnoxious janitor as a vacancy, and appoint another.

And under Miss. Code 1892, § 928, directing the circuit and chancery courts to make an allowance to clerks for supplies to be certified to the supervisors, it must be allowed or disallowed and not simply certified. *Jones v. Lee County Supra.* (Miss.) Dec. 19, 1892.

And under N. Y. Code, § 81, a court of record may order the sheriff to furnish a room and supplies if the board of supervisors fail, but the justices of the city court cannot make such an order as justices. *People v. New York City Ct.* 16 N. Y. S. R. 537.

A probate judge in Dakota may require the sheriff to procure room and fuel for the court, under the statutes, if the commissioners fail to furnish one, but he cannot rent an office himself and collect the expense from the county. *Cleary v. Eddy County*, 2 N. Dak. 387.

The power of the county commissioners to repair the court-room does not take from courts of record power to order repairs under Ind. Stat., 1 Gavin & Hord, 64, §§ 3, 5, authorizing courts to allow such sums as may be due to persons furnishing furniture for the court-room or making repairs thereof. *Nash v. State*, 33 Ind. 78.

But a court has no power to order the sheriff to provide suitable rooms and equipments when the county commissioners on notice immediately proceed to furnish them in time, and so notify the court, and the sheriff procures his after such notice. *Barnett v. Ashmore*, 5 Wash. 163.

Nor to order the sheriff to purchase matting where the statute imposes that duty on the county commissioners. *Neosho County Comrs. v. Stoddard*, 13 Kan. 207.

And in California the judge of the superior court 22 L. R. A.

cannot select or take possession of any room in the court-house he may desire that has been assigned to another by the board of supervisors. If the court-room is insufficient the board may be required to act under Code, § 144. *San Joaquin County v. Budd*, 96 Cal. 47.

And under a statute authorizing a judge to direct the sheriff to furnish the court-room if the county does not, he cannot anticipate the action of the county. *Los Angeles County v. Los Angeles Super. Ct.* 96 Cal. 380.

Nor can he order the county treasurer to pay for such supplies which he has certified as required by the statute, when the statute does not give that power to the judge. *Ex parte Widber*, 91 Cal. 387.

And where the court was annoyed by the traffic on the street during its sessions, the power to prevent the noise by use of ropes across the street was sustained. *Belvin v. Richmond*, 1 L. R. A. 807, 86 Va. 574.

The power to hold court in the county in another place than the court-room or the court-house, will be presumed to have been properly exercised. *Mohon v. Harkreader*, 18 Kan. 383; *Bates v. Sabu*, 64 Vt. 511; *State v. Peyton*, 32 Mo. App. 522; *LeGrange v. Ward*, 11 Ohio, 257; *Stafford County Comrs. v. State*, 40 Kan. 21; *Smith v. Jones*, 23 La. Ann. 44.

But the court cannot order the court-house building to be moved to another site, but may require that it be made more comfortable. *Benton County v. Thompson*, 7 Ind. 265.

Of much interest on the question here presented is the Indiana case of *White County Comrs. v. Gwin* (Ind.) post, 402, which decides that the power to make necessary repairs to a court-house is inherent in a court, but that it cannot extend to a practical reconstruction or extension of the building.

L. T.

way at or near the center; that in the original plan of the court-house, provision was made at a cost of \$10,000, for an elevator in the center, to reach the several floors from the basement up. That the elevator is in keeping with the style, finish, and fixtures of said building. That it is customary to use elevators in public buildings of the dimensions and use of said court-house. That the offices of the clerk, sheriff, recorder, treasurer, auditor, and the board of county commissioners are upon the first floor. The second floor is occupied by the circuit and superior courts, the office of the prosecuting attorney and the law library. The main entrances to the circuit and superior courts are at the center of the building, near the elevator, but about sixty feet from the end stairways. The third floor is occupied by the grand jury, the petit jury, the court reporter, and the superintendent of the county schools. That the elevator is a great convenience to grand jurors and persons subpoenaed before them as witnesses; also to petit jurors: that it is a great convenience to judges, jurors, parties, attorneys, and witnesses who are compelled to attend the sittings of the courts, and to those who, as a part of the public, choose to do so; that said elevator is a great convenience in carrying the records to and from the offices of the court on other floors; that in the ways aforesaid, and in many other ways, the operation of the elevator facilitates the carrying on of the business of the courts, and is the principal means of access to the Vigo circuit court-room; that the board of commissioners, from the time the court-house was opened for use, in April, 1887, ran and operated the elevator; that the person last employed by the board to operate the elevator did not run the same to suit the convenience or necessities of the circuit and superior courts; that it was frequently shut down before the courts adjourned, or so soon thereafter that persons in attendance on the courts were compelled to go down on foot, and the records used in the courts and belonging to offices on other floors had to be carried; that the elevator frequently remained shut down after the courts had convened, so that persons attending court were compelled to use the stairways, while the records had to be carried up; that such neglect to properly operate the elevator caused those attending the courts great inconvenience and annoyance; that the Honorable David N. Taylor, *Judge* of the Vigo circuit court, having frequent complaints made to him of such neglect and malfeasance of the elevator-man, and himself observing the inefficiency in the operation of the elevator, and being duly advised in the premises, issued the following order:

"It is hereby ordered that the elevator running from the basement to the court-room floor be run and operated in accordance with the following schedule: During all terms of court from 8 A. M. until ten minutes past twelve noon, and thereafter so long as court shall be in session, and from a quarter past one until half past five during any term of court, and at all times during court, giving persons attending thereon a reasonable time to pass down therefrom after the adjourn-

ment of same, Sundays excepted. And the clerk is ordered to certify a copy hereof to the sheriff, and the sheriff is ordered to serve the same on the person or persons in charge of and running said elevator, and upon the board of county commissioners, and make return of such service into court."

That after the service of said order, the person in charge of the elevator failed to obey the same and failed and neglected to operate the elevator at times when the circuit and superior courts were in session; wherefore the circuit court directed the defendant, James W. Stout, who was then and is now the duly elected, qualified, and acting sheriff of Vigo county, to take charge of the elevator and run the same according to the aforesaid schedule; that the defendant Stout is operating the elevator under the direction and by the order of the Vigo circuit court, and the defendant Lynch is the deputy of said Stout, and is acting as such in running said elevator. The board of commissioners also entered an order upon their records that the interests of the people of the county and a due regard for an economical administration of the affairs of the county, do not require the further running of the elevator, and therefore ordered it closed.

This paragraph of the answer concludes by averring that the Vigo circuit court did thereupon cause the said sheriff by himself and his said deputy to operate the elevator for the purpose of expediting and facilitating the business of the said circuit and superior courts, that the said circuit court so continued the operation of said elevator because in the exercise of its best judgment it deemed it necessary and expedient in carrying on the business of the said courts and a great public convenience. That the operation and running of said elevator is necessary in carrying on the business of the said circuit court.

The third paragraph of the answer is substantially the same as the second.

It is not seemly that a dispute such as this should have arisen between the parties concerned. We have, however, to consider the case as it comes to us. The controversy must seem trivial, but the questions involved are important.

The control of county property and the management of county business generally are confided by law to the commissioners of the county. In contemplation of law, in so far as the financial affairs of the county are concerned, the board of county commissioners is the county. The construction, maintenance, and custody of all county buildings, not excepting the court-house, are in the hands of the board. They provide and care for all the offices necessary for the conduct of county affairs, including court-rooms, offices for the clerk and sheriff of the court, jury rooms, jail and other rooms and buildings convenient and necessary for the conduct of the business of the courts. This, of course, includes the means of access to the court, whether by doors, halls, corridors, stairway, or elevators.

But while the powers and duties of the board of county commissioners within the county are thus ample and complete, as a

constituent part of the administrative department of the state government, yet it must be kept in mind that these powers and duties are intrusted to the board for certain defined purposes, and that the commissioners are trustees for the carrying out of such purposes. The commissioners may not exercise their powers arbitrarily and without regard to the trusts committed to their keeping. The treasurer's office should be suitable for the safe keeping of the funds of the county. The records of deeds, showing title to the property of the people, should not be exposed to needless hazard. The jail should be such as to provide for the humane and safe keeping of those confined therein charged with the violation of the laws. And so for other trusts committed to the board.

Should any such trust be disregarded or abused, resort may be had to the courts by any aggrieved party, or by one authorized to act for the people at large. In case, however, the court itself is the party aggrieved, more delicate and important considerations are presented. The court-house, as the term implies, is chiefly for the use of the court, the remaining uses being subordinate and to a great extent incidental.

Courts are an integral part of the government and entirely independent, deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution, or established in pursuance of the provisions of the constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts. *Little v. State*, 90 Ind. 338, 46 Am. Rep. 324; *Smythe v. Boneoli*, 117 Ind. 865; *Ex parte Griffiths*, 118 Ind. 88, 8 L. R. A. 398; *State v. Noble*, 118 Ind. 350, 4 L. R. A. 101; *State v. Hyde*, 121 Ind. 20; *Langenberg v. Decker*, 181 Ind. 471.

While the power of a court is essentially judicial, being the power to hear and adjudicate causes, yet it has also such incidental powers as are necessary to the full and free exercise of its purely judicial functions. The court may therefore make such rules and regulations as are necessary to secure its own freedom of action and to carry on its business with dignity, decorum, order, due dispatch and convenience.

The Statute (Rev. Stat. 1881, § 1817) recognizes and asserts such implied power of the court, in addition to its strictly judicial powers, to make judgments, sentences, decrees, orders, injunctions, and to issue process, namely, the power "to do such other acts as may be proper to carry into effect the same," that is, the power to do what may be necessary for the exercise of its own proper functions. Judge Buskirk, in speaking of orders and rules of court made in pursuance of such power, says that, "while they are in force, they are as binding upon the court, parties and attorneys as though enacted by the legislature." Buskirk, Pr. 374, and authorities there cited.

Sections 1415 and 1416 of the same statutes more particularly recognize the power of the court to order the preparation of the court-house for the reception of the court, also to make orders for necessary heating, supplying furniture, and making repairs. *Nash v. State*, 88 Ind. 78.

Even without statutory enactment, however, the court, as we have seen, possesses all powers necessary for the free and untrammelled exercise of its functions. Considering, therefore, the facts concerning the Vigo county court-house as detailed in the answer, and as admitted to be true by the demurrer thereto, there can be but little doubt that the order made by the court as to the running of the elevator was a proper exercise of the inherent powers of the court. In the construction of the building, the elevator was made the principal, and was the only convenient entrance into and exit from the court-room. The stairways, located in a part of the building remote from the court-rooms, were plainly not a commodious means of access, nor were they intended for such purpose. Considering, too, the great cost of the edifice and of the elevator itself, it would be most unreasonable that the court, its judge, the officers, jurors, attorneys, parties, and witnesses, and the people generally who chose to attend upon the proceedings of the court, should be compelled to seek an entrance to so noble a seat of justice by way of obscure and distant stairways, when the county had provided a convenient and fit approach in the center of the building and near to the doors of the court-room. To prevent the use of the elevator under the circumstances appears as a perversion of the very purpose for which the court-house was built. It was not, perhaps, proper, except in case of urgent necessity, for the court to take upon itself the care and management of the court-house generally, or of any part of it, this being a duty confided by law to the county commissioners, the immediate representatives of the people. But under the conditions as they appear by the facts set forth in the answer, the dignified and proper administration of justice required the moderate and reasonable order issued by the court. The schedule provided for in that order was only for the time when the court should be in session and this the court had an undoubted right to ask. And when the order was disregarded by the person in charge of the elevator, the court might, as it did, direct its sheriff, by himself or deputy, to take charge of the elevator, or the court might appoint a bailiff to attend to that duty. When the order was served upon the man in charge of the elevator, and upon the board of county commissioners, it was but right and proper that they should have complied with it. It asked only that the chief purpose for which the court-house had been built and the elevator erected should be carried out. It would appear, indeed, that the elevator was expressly built for the needs of the court. The second and third floors, to which the elevator runs, are devoted almost exclusively to the use of the court, jury, and court officers. The county officers, including the commissioners themselves, are

located on the first floor, and it would seem that but for the uses of the court, no elevator would have been needed in the building at all. Yet the board of commissioners went so far as to enter an order upon their records directing the total discontinuance of the elevator. The answer states that the circuit court, in the exercise of its best judgment, deemed it necessary and expedient in carrying on the business of the courts, that the elevator should be operated. It is further expressly alleged that the operation and running of the elevator is necessary in carrying on the business of the circuit court. These averments alone would make the answer good. The rule governing this case, to be deduced from what we have said, and from the authorities cited, is, that it was the right of the county commissioners, as it was their duty, to provide a suitable and convenient place for the holding of the courts of the county; but that if they failed in the exercise of such right and the discharge of such duty, the court could not, by their failure to act, or by any unwarranted act of theirs, be impeded in its own freedom of action under the constitution and laws of the state. It was the inherent right of the court, and it had the power, to provide a suitable court-room, and if that were already provided, to secure also fit and convenient means of using such court-room, including facilities for access thereto, suitable and necessary for the court itself, and in keeping with the character and plan of the building. What we have said thus far would be also applicable, if this were an appeal from the order of the court directing the sheriff to take charge of the elevator. The suit, however, was one for injunction to restrain the officers of the court from carrying out the order of the court itself. We have here, then, not an appeal from an order of court, but a collateral attack upon such order. The court had undoubted jurisdiction of the subject-matter, the approach to its own court-room, and its action could be reviewed only by appealing from its order. The order would not in any case be absolutely void, and hence could not be attacked collaterally.

There is this further to be said: The action was brought in the Vigo superior court to enjoin the carrying out of an order of the Vigo circuit court. One court is thus, in effect, asked to set aside or modify the order of another court of similar jurisdiction. This cannot be done. *Gregory v. Perdue*, 29 Ind. 66.

If the suit could under any circumstances be brought, it should have been brought in the circuit court. The proper procedure, however, would have been to file a petition in the Vigo circuit court asking to have the order complained of set aside or modified. From an adverse decision on such a request, if there should be one, an appeal might then be taken, and the reasonableness and propriety of the action of the court inquired into.

The judgment of the Superior Court is affirmed.

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BOARD OF COMMISSIONERS OF WHITE COUNTY, *Appl.*

James P. GWIN *et al.*

(.....Ind.....)

1. Long acquiescence in the universal custom of courts to sit at county seats is equal to positive law requiring the courts to be held at those places.
2. The power of courts to order necessary repairs to the court-room is inherent and incidental to jurisdiction like the power to punish for contempt.
3. The constitutional separation of the departments of government is not violated by a statute authorizing circuit courts to repair their court-rooms.
4. The power of circuit courts to authorize repairs to the court-room cannot extend to the practical reconstruction of the court-house or to the construction of lasting and permanent improvements such as extensions, additions, and enlargements.
5. A void order of court to make a practical reconstruction of the court-house is subject to collateral attack by way of injunction although the order purports to be for repairs and would have been valid if confined to necessary repairs only.

(January 23, 1894.)

A PPEAL by complainant from a judgment of the Circuit Court for White County in favor of defendants in a suit brought to enjoin defendants from carrying out a contract for the alleged repair of the court-house, which had been made under an order of the court.

Reversed.

The facts are stated in the opinion.

Messrs. Guthrie & Bushnell and Davidson & Lewis, for appellant:

The powers of government are divided into three separate departments.

Const. art. 3, Rev. Stat. 1881, § 160.

The board of commissioners belongs to the administrative department.

The general assembly may confer upon the boards doing county business in the several counties powers of a local, administrative character.

Const. art. 6, § 10, Rev. Stat. 1881, § 160.

The general assembly has conferred upon the board of commissioners power to make orders respecting the property of the county and take care of and preserve such property.

Rev. Stat. 1881, § 5745.

The board of commissioners has very broad powers over county finances, property, and institutions, and its discretion in the control and disposition of such finances and property and institutions is seldom, if ever, interfered with by the courts.

State v. Clark, 4 Ind. 815; *Nixon v. State*, 96 Ind. 111; *Platler v. Elkhart County Comrs.*

NOTE.—See note to the preceding case, on the subject of the power of courts in respect to court-houses, etc.

108 Ind. 869; *Boehmer v. Schuykill County*, 46 Pa. 452; *State Bank of Bay City v. Chapelle*, 40 Mich. 447; *Orleans County Supra. v. Bowen*, 4 Lans. 24; *Shanklin v. Madison County Comrs.* 21 Ohio St. 575.

The general assembly has further provided that such commissioners shall cause a court-house to be erected and furnished.

Rev. Stat. 1881, § 5748; *Moffit v. State*, 40 Ind. 220; *Kitchel v. Union County Comrs.* 128 Ind. 841.

The general assembly has further provided that, "whenever it shall be necessary to construct, complete, or repair the court-house, the county commissioners may borrow for that purpose any sum of money not exceeding one per centum on the assessed valuation."

Rev. Stat. 1881, § 5749.

The board of commissioners has exclusive jurisdiction to erect and repair the court-house, including the court-room.

1. The legislative enactments and decisions confer jurisdiction in those matters upon that board, and there are no express enactments which confer jurisdiction in those matters upon the circuit court or upon any other board or officers except the board of commissioners.

2. It is the manifest policy of our laws that such jurisdiction "should belong to a single tribunal, and that should, it would seem, as is the fact, be the county board."

Benton County Comrs. v. Thompson, 7 Ind. 265.

Appellees claim that the circuit court has concurrent jurisdiction to make repairs to the court-room under the statute that "the said courts may also allow such sums as may be due to persons furnishing fuel used in term time, or furniture for court-room, or making repairs thereof."

Rev. Stat. 1881, § 1416, as construed in *Nash v. State*, 83 Ind. 78.

The fairest and most rational method to interpret the will of the legislator is by explaining his intentions at the time when the law was made, by signs the most natural and possible.

1 Bl. Com. § 2, p. 58; Bishop, Statutory Crimes, § 128.

A statute must be construed with reference to the whole system of which it forms a part.

Sutherland, Stat. Constr. § 284; *Spencer v. State*, 5 Ind. 41, 51; *Marxwell v. Collins*, 8 Ind. 88; *State v. Harrison*, 116 Ind. 304; *Evansville v. Summers*, 108 Ind. 193; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *Taylor v. Washington County Comrs.* 67 Ind. 883; *Prather v. Jeffersonville, M. & I. R. Co.* 52 Ind. 16.

And so, the practical construction given to a statute by the public officers of the state, and acted upon by those interested, and by the people, is to be considered in cases of doubt. In some cases it has been held to be conclusive.

State v. Harrison, *supra*; *Bruce v. Schuyler*, 9 Ill. 231, 46 Am. Dec. 447.

The manifest purpose of the legislature was to make it possible for tradesmen furnishing those necessary incidentals for the use of courts in term time, which it is the duty of the sheriff to provide, to get pay for the same without being compelled to wait until the commission-

ers of the county should be in session and to present their claims there for allowance.

Can it be reasonably maintained that what is here undertaken can be denominated repairs to the court-room, or even to the court-house—the entire structure?

Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.

1 Bl. Com. p. 59.

The words themselves best declare the intention of the legislature.

Sutherland, Stat. Constr. § 247; Rev. Stat. 1881, § 240.

To repair is to restore to a sound or good state after decay, waste, injury, or partial destruction; it is to again make ready—it is to again put into a state for use.

Webster's Dict.; Anderson's Law Dict.; Bouvier's Law Dict.

Additions or enlargements are not repairs.

Stephens v. Milnor, 24 N. J. Eq. 359.

Nor is repairing a street repairs to the premises.

Blount v. Janesville, 81 Wis. 654; *Elliott, Roads & Streets*, 336.

Nor does a contract for repairing a ship include furnishing a lost anchor and chain.

Anglin v. Henderson, 21 U. C. Q. B. 27.

Movable iron cells for a jail are not repairs.

Cook v. Des Moines County, 70 Iowa, 171.

To repair a building means simply to restore it to a sound condition.

First Nat. Bank of Mt. Vernon v. Sarlls, 18 L. R. A. 481, 129 Ind. 201; *Weaver v. Templin*, 118 Ind. 808; *Pittsburgh & B. Pass. R. Co. v. Pittsburgh*, 80 Pa. 72; *Romack v. Hobbs* (Ind.) Nov. 2, 1892; *Western Paving & Supply Co. v. Citizens Street R. Co.* 10 L. R. A. 770, 128 Ind. 534.

The plain literal meaning, then, of section 1416, for the purpose of this case, is this: The circuit court may allow sums due for incidental repairs to furniture of its court-room.

Ministerial and administrative duties do not belong to the judicial department.

Ex parte Griffiths, 3 L. R. A. 398, 118 Ind. 88.

The act of the court in this case was ministerial and not judicial.

Crow v. Warren County Comrs. 118 Ind. 54; *Platter v. Elkhart County Comrs.* 103 Ind. 873.

No matter what court, board, or tribunal exercises such power, it is clearly ministerial and administrative. The name given to it, or the grade of court exercising it, cannot control its classification. The nature of the thing done controls. It belongs to the executive branch of the government.

Const. art. 3, § 1; Const. art. 6, § 10; *Hamilton County Comrs. v. Cottingham*, 56 Ind. 559; *McCormick v. Johnson County Comrs.* 68 Ind. 214; *Welsh v. Bowen*, 103 Ind. 252; *Platter v. Elkhart County Comrs.* Id. 860; *Crow v. Warren County Comrs.* 118 Ind. 51; *Patton v. Montgomery County Comrs.* 96 Ind. 181.

While the judicial domain is sacred, so also are the other fields and departments of government, and the judiciary is bound to be equally watchful and punctilious about overstepping the boundaries of its own proper domain and

invading that of either of the other departments.

Const. art. 3, § 1; *Waldo v. Wallace*, 19 Ind. 569.

Constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another.

Butler v. State, 97 Ind. 377.

No one of these departments can be allowed or authorized to invade the domain of the other two, or either of them, but they must remain separate, distinct, and independent.

Shoults v. McPheters, 79 Ind. 373; *Ex parte Griffiths*, *supra*; *State v. Noble*, 4 L. R. A. 101, 118 Ind. 850; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Hovey v. State*, 119 Ind. 886; *Houseman v. Montgomery*, 58 Mich. 364; *Re Bridgefield Park*, 54 N. J. L. 288; *People v. Freeman*, 80 Cal. 233; *Re School-Law Manual*, 63 N. H. 574; *Miller v. Wheeler*, 33 Neb. 765; *Smith v. Strother*, 68 Cal. 194. See also *State v. Oleson*, 15 Neb. 249; *State v. Young*, 29 Minn. 474; *McCrossen v. Lincoln County*, 57 Wis. 184; *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *Whiting v. Townsend*, 57 Cal. 515.

Appellees claim that if the court had the power to make any repairs the order is not void, but simply erroneous. But the court did not order any independent separate thing that was repairs. No one integral part of the work can be eliminated, as repairs, leaving the residue as new construction. The court did not select, nor can any mind select, an item of separate repairs, nor was it the intention of the order, nor can it be construed as requiring the doing of anything less than the whole work for the whole price. And this view must be taken as true for the purposes of this appeal, in as much as appellees in their answer adopt that theory, and upon that theory the case was tried below.

Romack v. Hobb, *supra*; Elliott, App. Proc. pp. 481, 489, 490.

If there was an excess of jurisdiction the whole order is void.

See *Freem. Judgm.* § 120c; *Van Fleet, Collateral Attack*, § 739.

This order is void, by reason of lack of jurisdiction over the subject-matter—the court-house—and lack of power to do the thing proposed; and it is void upon its face, for the plans and specifications are made part of it. All persons contracting under this order are bound to take notice of this invalidity.

Brady v. New York, 2 Bosw. 173; *Reichard v. Warren County*, 81 Iowa, 381; *Johnson v. Indianapolis*, 16 Ind. 237.

If the order is void, it may be attacked in any manner, even collaterally, and the contractors can have no rights under it.

This action is a direct attack upon the order of the circuit court for the reason that it was brought at the earliest opportunity, in the same court, against all parties that had or could have any interest in or rights under the order, and facts are alleged in each paragraph of the complaint, which, if true, would entitle appellant to have the order in question set aside and vacated as illegal and void.

Rev. Stat. 1881, § 385; *Baker v. Armstrong*, 57 Ind. 191; *Hunter v. McCoy*, 14 Ind. 533; 23 L. R. A.

See also *Carver v. Carver*, 97 Ind. 505; *Gordon v. Goodman*, 98 Ind. 271; *Coleson v. Smith*, 9 Ind. 13; *Mandlova v. Lewis*, Id. 195.

Judge, judicatory, judicial, jurisdiction, judgment, justice, are terms that relate only to the determinations of causes, or the rights of men,—not necessarily in active litigation, but in some form as they pass *sub judice*. Even a proceeding *in rem* is in fact a proceeding *in personam*, and the seizure is not the hearing.

Windsor v. McVeigh, 93 U. S. 279, 23 L. ed. 216.

The jurisdiction of courts is the power and only the power to determine the causes of men by the regular process of the law.

Hoover v. Hanna, 3 Blackf. 48; *Robertson v. State*, 109 Ind. 79.

Jurisdiction is the power by which judicial officers take cognizance of and decide causes.

State v. Wakefield, 60 Vt. 618.

It does not follow that courts may not exercise some other powers, or what seems to be other powers. They are, however, simply incidental to the principal power. Blot out the principal power and the incident is gone.

It would be impossible to enumerate or even to classify the acts that would be within the scope of this incidental power, but the principle is not difficult to illustrate. A court may order stationery, an additional bailiff, repair of a window, the silencing of a band of music in the street, an additional chair or table and inconceivable other things, to facilitate the transaction of its business; but such things bear no analogy to the repair or reconstruction of a building for the use of the court in after years, and for use in the transaction of business not yet originated.

In *Barnett v. Ashmore*, 5 Wash. 163, the court below had ordered rooms, furniture, fuel, lights, stationery, etc., suitable for the transaction of business by the court, to be provided by the sheriff. It was held that the statute did not authorize it, and the court had no such power, and that the matter belonged to the board of commissioners.

In *Los Angeles County v. Los Angeles County Super. Ct.*, 93 Cal. 380, the court below had become impatient at the delays in finishing the new county building, and ordered the sheriff to prepare accommodations, furniture, fuel, lights, etc. The supreme court did not dignify the question with serious argument, but after a statement of the facts, in a *per curiam* opinion, said: "We do not think the court and judges have such power."

In *Neosho County Comrs. v. Stoddart*, 18 Kan. 207, an order was made by the judge of the district court. "That the sheriff of said county be and he hereby is directed to purchase eighty-one yards of cocoa matting."

The court on appeal held that the sheriff with or without the order of the court, had no power to make the purchase.

The executive, legislative, and judicial departments are forever aloof from each other. The legislature could not clothe the circuit courts with the duties of building court-houses, jails and bridges if it were so minded.

Sanders v. Cabaniss, 43 Ala. 172. See also *Ex parte Griffiths*, 3 L. R. A. 398, 118 Ind. 83; *Hovey v. State*, 119 Ind. 895; *Barnett v. Ash-*

more, *supra*; *Clary v. Eddy County*, 2 N. Dak. 391; *San Joaquin County v. Budd*, 96 Cal. 47; *Shanklin v. Madison County Comrs.* 21 Ohio St. 583. See also *Rotenberry v. Yalobusha County Suprs.* 67 Miss. 470.

The failure of one officer or tribunal to do its duty does not enlarge the authority of another or clothe him with power to discharge the omitted duty.

Clary v. Eddy County, supra; *Dickinson Hardware Co. v. Pulaski County*, 55 Ark. 437.

Messrs. John H. Gould, George R. Eldridge, Emory B. Sellers and William E. Uhl, for appellees:

The incidental power of courts to make repairs was recognized by the supreme court in the case of *Benton County Comrs. v. Thompson*, 7 Ind. 265. It was recognized by the legislature by sections 1415 and 1416, Rev. Stat. 1881, and again by the supreme court in *Nash v. State*, 38 Ind. 78.

See also *Cole's Widow v. His Executors*, 7 Mart. N. S. 41, 18 Am. Dec. 242; *State v. Noble*, 4 L. R. A. 101, 118 Ind. 359.

A court cannot be controlled in the exercise of a discretion.

Carlisle v. Wilkinson, 12 Ind. 91; *Griffith v. State*, Id. 548.

The findings and orders of May 16, May 26, and July 11, 1892, being of and concerning that part of the county's property over which the court had jurisdiction to act, conclude appellant and all others affected by them, and no parol evidence is admissible to show that any fact found by the circuit court did not exist.

Evansville, I. & O. S. L. R. Co. v. Evansville, 15 Ind. 395; *Little v. Thompson*, 24 Ind. 146; *Wright v. Wells*, 29 Ind. 354; *State v. Needham*, 32 Ind. 825; *Ney v. Swinney*, 36 Ind. 454; *Hornaday v. State*, 43 Ind. 806; *Clay County Comrs. v. Markle*, 45 Ind. 96; *Mullikin v. Bloomington*, 72 Ind. 161.

When courts of general jurisdiction assume jurisdiction over property, the presumption is that such jurisdiction exists, unless the contrary is shown.

Burton v. Ferguson, 69 Ind. 486; *Houk v. Barthold*, 73 Ind. 21; *Kinnaman v. Kinnaman*, 71 Ind. 417; *Brown v. Anderson*, 90 Ind. 93.

Unless the order of the White circuit court made on July 11, 1892, for the repair of the court-room of said county is absolutely void on its face, this action will not lie. Irregularities, errors, omissions, mistakes, either in form or substance, will not avail the appellant nor can it cause any inquiry into matters *dehors* the record.

Bass v. Fort Wayne, 121 Ind. 889; *Jackson v. Smith*, 120 Ind. 520; *Kleyla v. Haskett*, 112 Ind. 515; *Hume v. Little Flat Rock D. Asso.* 72 Ind. 499; *Moore v. Tanner*, 5 T. B. Mon. 42, 27 Am. Dec. 35; *Perkins v. Haywood*, 132 Ind. 95; *Harman v. Moore*, 113 Ind. 221; 1 Freem. Judgm. §§ 180-182.

The White circuit court had jurisdiction of the matter of the repair of the court-room in question. The powers of that court are derived from the constitution of Indiana. That instrument vested in the supreme and circuit courts the judicial power of the state.

Ind. Const. art. 7, § 1.

This vested in the courts the whole judicial 23 L. R. A.

power of the state with all the incidents thereof.

State v. Noble, supra; *Kilbourn v. Thompson*, 108 U. S. 168, 26 L. ed. 377; *People v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49.

The judicial authority granted by the constitution is beyond legislative control.

State v. Noble, supra; *Ex parte Griffiths*, 3 L. R. A. 398, 118 Ind. 83; *Wright v. Defrees*, 8 Ind. 293; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 197; *Houston v. Williams*, 18 Cal. 24, 78 Am. Dec. 565; *Vaughn v. Harp*, 49 Ark. 160; *Shoults v. McPheeters*, 79 Ind. 374; *Smythe v. Bonnell*, 117 Ind. 366; *Little v. State*, 90 Ind. 338, 48 Am. Rep. 224.

The grant of judicial power in the constitution refers to the power as it then existed.

State v. Noble, 4 L. R. A. 101, 118 Ind. 361; *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346; *De Oastelluz v. Fairchild*, 15 Pa. 18, 53 Am. Dec. 570.

If the judicial department of the state government is independent of the others, if it may not voluntarily cease to continuously perform its constitutional functions, if no other department may, by affirmative act or by neglect of duty, hinder, delay, or force a discontinuance of the exercise of those powers by the judicial department, then, of necessity, courts must be held to possess the inherent power to do or cause to be done anything which if omitted would result in the cessation of the exercise, by courts, of judicial power.

If courts be held to possess inherent power to do these minor things, necessary only that the court's decrees may properly and in due form be carried out, or the dignity of the court upheld, must not this same department of government, of necessity, have power to order those things which will enable it to act, and which if not so ordered would prevent entire ly the administration of justice?

This is not the principal power of a court, but is incident to the principal power and inseparable from it.

United States v. Hudson, 11 U. S. 7 Cranch, 32, 8 L. ed. 259; *Little v. The State, supra*; *Respublica v. Oswald*, 1 Dall. 319, 1 Am. Dec. 246; *Clark v. People, Breese*, 340, 12 Am. Dec. 177, and note; *State v. Woodfin*, 27 N. C. 199, 42 Am. Dec. 161; *Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209; *Brown v. Brown*, 4 Ind. 637, 58 Am. Dec. 641; *Ex parte Smith*, 28 Ind. 47; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 229, citing, *Deutschman v. Charleston*, 40 Ind. 449; *Cooley, Const. Lim.* 114, 116; 2 Story, Const. 377; *State v. Noble, supra*.

A judge has authority to order ropes stretched across a street during the hours when his court is sitting, to prevent travel in front of the court-house, when the noise of passing vehicles is sufficient to obstruct the proper administration of justice therein.

Belvin v. Richmond, 1 L. R. A. 807, 85 Va. 574.

We concede that the statutory power to repair the court-room is conferred upon the board of commissioners as well as upon the circuit courts. Hence, concurrent jurisdiction is conferred. It follows that the tribunal which first takes jurisdiction of the repairs, retains it until the end.

Indiana & I. R. Co. v. Williams, 22 Ind. 198; *Coleman v. Barnes*, 33 Ind. 93; *Taylor v.*

Pt. Wayne, 47 Ind. 274; *Ex parte Bushnell*, 8 Ohio St. 599; *The Robert Fulton*, 1 Paine, C. C. 620; *Shelby v. Bacon*, 51 U. S. 10 How. 56, 18 L. ed. 826.

In *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369, the court said: "It has always been adjudged that upon a covenant to repair, the covenantor is bound to rebuild a house accidentally destroyed by fire or thrown down by enemies during his term."

Bro. Cov. 4; *Paradine v. Jane*, Aleyn, 27, Dyer, 88 a, pl. 10; *Earl of Chesterfield v. Duke of Bolton*, Com. Rep. 627; *Walton v. Waterhouse*, 2 Saund. 423 a, note; *Bullock v. Dommitt*, 6 T. R. 659; *Phillips v. Stevens*, 16 Mass. 288; *Brecknock Navigation v. Pritchard*, 6 T. R. 750; *Lockrow v. Horgan*, 58 N. Y. 685.

Appellant must fail because it seeks to collaterally attack the order and judgment of a court of general jurisdiction.

Smith v. Hess, 91 Ind. 424; *Exchange Bank v. Ault*, 102 Ind. 322; *Harman v. Moore*, 112 Ind. 221; *Littleton v. Smith*, 119 Ind. 280; *Indianapolis & St. L. R. Co. v. Harmless*, 124 Ind. 25; *Morrill v. Morrill*, 11 L. R. A. 155, 20 Or. 96; *Wilkinson v. Schoonmaker*, 77 Tex. 615; *Haines v. Flinn*, 26 Neb. 880; *Van Dyke v. Johns*, 1 Del. Ch. 93, 12 Am. Dec. 76; *Moore v. Tanner*, 5 T. B. Mon. 42, 17 Am. Dec. 85; *Fisher v. Bassett*, 9 Leigh, 119, 38 Am. Dec. 227; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Rodgers v. Evans*, 8 Ga. 143, 52 Am. Dec. 890.

The judgments of courts of general jurisdiction will be upheld against a collateral attack, unless they appear on the face of the record to be void.

Earle v. Earle, 91 Ind. 27; *Smith v. Hess*, *supra*; *Lantz v. Maffett*, 102 Ind. 23.

Superior courts are presumed to act by right, and not by wrong, and their acts and judgments are consequently conclusive in themselves; and they cannot be contradicted or convicted of error by extraneous evidence.

Pease v. Whitten, 31 Me. 117; *Cauldwell v. Curry*, 98 Ind. 363; *Paine v. Mooreland*, 15 Ohio, 445, 45 Am. Dec. 585; *Cochran v. Loring*, 17 Ohio, 409; *Parks v. Moore*, 18 Vt. 188, 37 Am. Dec. 589; *McDonald v. Leewright*, 31 Mo. 29, 77 Am. Dec. 631; *Fowler v. Whitman*, 2 Ohio St. 270; *Cook v. Darling*, 18 Pick. 898; *Wells v. Mason*, 5 Ill. 84; *Wright v. Watson*, 11 Humph. 529; *Barron v. Tart*, 18 Ala. 668.

The word "void" can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity can not be made manifest.

Freem. Judgm. § 116.

It being conceded that the court had power to make some repairs to the court-room, then it is wholly immaterial here whether the judicial determination of the court was wise or unwise, erroneous or otherwise, for "the power to decide at all, necessarily carries with it the power to decide wrong as well as right."

Snelson v. State, 16 Ind. 29; *Spaulding v. Baldwin*, 31 Ind. 376; *Curry v. Miller*, 42 Ind. 320; *Lawrence County Comrs. v. Hall*, 70 Ind. 469; *Porter v. Stout*, 73 Ind. 3; *Cooper v. Reynolds*, 77 U. S. 10 Wall. 308, 19 L. ed. 981; 22 L. R. A.

Sibley v. Waffle, 16 N. Y. 180; *Atkins v. Kinman*, 20 Wend. 241, 32 Am. Dec. 584; *Jackson v. Cransford*, 12 Wend. 538; *Perkins v. Haywood*, 132 Ind. 95.

The rule is invoked to uphold all final judgments and decrees of courts of competent jurisdiction. And interlocutory and *ex parte* orders are protected by the same principle and cannot be collaterally assailed; for example:

An order of discharge in bankruptcy.

Wiley v. Pacey, 61 Ind. 457, 28 Am. Rep. 677; *Blair v. Hanna*, 87 Ind. 298; *Begoin v. Brahms*, 138 Ind. 160.

An order of a court of admiralty concerning a ship.

Oroudon v. Leonard, 8 U. S. 4 Cranch, 424, 2 L. ed. 670.

An order appointing a guardian for minors.

Dequindre v. Williams, 31 Ind. 444.

An order appointing an administrator.

Ferguson v. State, 90 Ind. 38.

An order for the probate of a will.

2 Smith, Lead. Cas. 669; *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190.

An order against the probate of a will.

Schultz v. Schultz, 10 Gratt. 358, 60 Am. Dec. 335.

An order of allowance made by a board of commissioners.

State v. Buckles, 39 Ind. 272.

An order of allowance made by the circuit court.

Gill v. State, 72 Ind. 266.

An order of sale of the ward's real estate on the petition of the guardian.

Davidson v. Bates, 111 Ind. 891.

An order made by a justice of the peace overruling a motion for a change of venue.

State v. Wolover, 127 Ind. 306.

An order concerning a ditch or drain.

Montgomery v. Wasem, 116 Ind. 343.

An order approving the current report of an executor, administrator or guardian, is *ex parte* and interlocutory, but not subject to a collateral attack.

Parsons v. Milford, 67 Ind. 489; *Candy v. Hamore*, 76 Ind. 125.

An order repairing and furnishing a court-room.

Nash v. State, 83 Ind. 78.

The principle is invoked to uphold even the acts of quasi judicial officers, when assailed collaterally.

Jackson v. Smith, 120 Ind. 520; *Chegaray v. Jenkins*, 5 N. Y. 876; *Van Rensselaer v. Cottrell*, 7 Barb. 129; *Van Rensselaer v. Witbeck*, Id. 138; *Beach v. Furman*, 9 Johns. 229; *Perry v. Richardson*, 9 Gray, 216; *Macklot v. Davenport*, 17 Iowa, 883; *Hughes v. Kline*, 30 Pa. 227; *Deane v. Todd*, 22 Mo. 92; *Erskine v. Hohnbach*, 31 U. S. 14 Wall. 613, 20 L. ed. 745; *Williams v. Mitchell*, 49 Wis. 284; *Bass v. Pt. Wayne*, 121 Ind. 339; *McIneney v. Sullivan*, 126 Ind. 407.

McCabe, J., delivered the opinion of the court:

Suit to enjoin the appellees, the sheriff, auditor, and treasurer of said county, and Charles Pearce and Thomas Morgan, contractors, from carrying out a certain contract entered into by said Gwin as sheriff of said county, under the order of said circuit court,

on one side, and said Pearce and Morgan on the other, by which it was claimed by the appellant that the old court-house of the county was being, or about to be, demolished, and substantially a new court-house was to be erected instead of the old, at a cost of \$82,087.50; while it was claimed on the other hand that the carrying out of the contract was only making needed repairs of the court-room. There is really no material controversy about the facts, but the main dispute is about the law that governs the case.

It is alleged in the complaint, and the evidence shows, that on the 16th day of May, 1892, the White circuit court made and entered a finding and order condemning the court-room as unsafe and unfit for further use, in the following words: "The circuit court, being duly advised, finds that the court-room in the court-house of this county is so out of repair that it is unsafe longer to hold the sessions of court therein, that the plastering on the ceiling is loose and liable to fall upon persons in the court-room engaged in business before this court; that the jury room is both unsafe and unfit for occupancy, and jurors while deliberating endanger their health and lives while remaining therein; that the walls of the court-room are cracked, that the records of this court are not protected and are in danger of loss by fire, and the papers in causes pending are also in danger of loss by fire and otherwise; that papers in cases disposed of and which constitute part of the records of this court, are kept in a damp and insufficient vault, where they are mildewing and rotting, and will be lost unless removed from the place where they are now kept, that there is insufficient room for the library, and no chambers for the judge nor grand jury room in said court-house; that the belfry is unsafe and liable to fall or be blown down, and thus the lives of persons going to and from the sessions of this court are endangered; that the roof over the court-room is so out of repair as to utterly fail to keep out rain, many of which defects are patent and others apparent upon investigation; and that no steps are being taken by the board of commissioners to repair said court-room so as to make it fit for use. It is therefore ordered by the court that the court-room now occupied by this court be, and is hereby, condemned as unsafe and unfit for use until repaired."

On May 26, 1892, the said court ordered said court-room repaired by an order modified on July 11, 1892, and entered of record as follows: "In the matter of the circuit court-room. The court having heretofore found that the present court-room is unsafe and unfit for the transaction of the business of this court, it is therefore now ordered by the court that said court-room be repaired. And the court now appoints James F. Alexander & Sons, competent architects, to submit plans and specifications for such repairs. And comes now said James F. Alexander & Sons, and submit such plans and specifications, which are in these words and figures, to wit: (insert) and the court having examined the same, and being duly advised in

the premises, finds that said court-room can be properly repaired according to said plans and specifications, and cannot be repaired so that the same will be safe and permanent by the adoption of any other plans and specifications. Wherefore the court now approves and adopts said plans and specifications and orders that said court-room be repaired in accordance therewith.

"And it is further ordered that James P. Gwin, the sheriff of this county, proceed to cause said repairs to be made, and he shall employ persons to do said work of repairing said court-room, such employment to be made in such manner as he shall see fit, and he shall superintend the construction of said repairs. The said repairs shall be completed on or before the 1st day of November, 1892, and upon the completion of said repairs, the said sheriff shall report the fact to this court, and also certify the costs of such repairs, and the person or persons to whom the costs thereof are due, for allowance as provided by law. And said court does now appoint James F. Alexander & Sons, architects, to inspect said work and make all proper estimates during the progress of said repairs.

"And comes James P. Gwin, sheriff of this county; and reports to the court that in pursuance to the order in this matter, he has employed Pearce and Morgan to make the necessary repairs to the circuit court-room herein before ordered, and taken from them a bond conditioned for the faithful performance of said work, and the protection of this county against loss, which acts of said sheriff are approved by the court. And all persons are forbidden and prohibited from in any way hindering or delaying the progress of said repairing and from interfering with said sheriff, or any person or persons employed by him, or acting under him while engaged in the making of said repairs; and the sheriff is ordered to remove at once from the court-room all the furniture and fixtures therein so that work of repairing may begin immediately."

It is further shown that the court ordered the said sheriff to procure another room in the town of Monticello in which to hold court, which was done, and the court and its records moved out of said court-house and to the building thus secured to be occupied and used as a court-room while the work contemplated was being done.

It is further alleged in the complaint that about the year 1850 the board of commissioners of White county built the court-house now in question in the upper part of which is the court-room, giving a minute description of the building, the original cost of which is stated to be but \$10,000, while the contract price of the work contemplated in the order as reduced by the modification, is \$82,087.50, with a liability under the order allowing the court and architect to change the plans and specifications to reach many thousands of dollars more. That no additions had ever been made thereto, and that said court-house as originally constructed in the public square at the county seat was a substantial two-story brick court-house, 70 feet long by 48 feet wide and 30 feet high,

surmounted by a wooden belfry 10½ feet square and 25 feet high, containing on the first floor offices and vaults for the clerk, auditor, treasurer, and recorder, and on the second floor a large and commodious court-room and a small jury room, which court-room and offices had been continuously used by the officers and courts up to July 12, 1892; that appellant had repaired it from time to time; that the plans and specifications require the tearing away of so much of the old building as to constitute a practical destruction of it and a remodeling and reconstruction thereof; that the contract was entered into without the plans and specifications having been first filed in the office of the county auditor, and without having advertised for bids.

The material parts of the appellee's answer are as follows:

"That the court-house at Monticello, White county, Indiana, was and still is the only place in said county provided for and as a place of holding the sessions of the circuit court of said county. That on the 16th day of May, 1892, and long prior thereto, said building was out of repair, to wit: that the plastering on the ceiling of the court-room was loose and liable to fall upon persons in the court-room engaged in business before the White circuit court; that the foundation of said building was and is defective in this, to wit: that the part thereof under ground is composed of boulders laid too loosely and not to sufficient depth to give the required strength to sustain the walls built thereon, and because of said defective foundation, the walls of said building have settled and cracked and will fall to the ground unless they are strengthened and supported. That to sustain said walls from below, it is necessary to place thereunder a sound and secure foundation of cut stone and cement, and to hold said walls in place and prevent them from splitting and falling outward, it is necessary to give them lateral support, by the erection against the same of the additional walls contemplated by the contract of the defendants, Pearce and Morgan; that by placing under the walls a new foundation, properly constructed, etc., which can be easily done under the contract of Pearce and Morgan, . . . without removing or in any wise impairing said walls, and by the erection of said additional walls, said building would be given sufficient strength and securely held in place, and that unless said walls are so strengthened and supported as aforesaid, it would be impossible to make the repairs that are necessary to the court-room, which occupies the second story of said building, and which is the only room provided for the holding of the circuit court of said county; that because of the insecure and dilapidated condition of the walls of said court-room hereinbefore mentioned, the same is unsafe and dangerous in this, to wit: that they are liable to give way and fall at any time upon the persons who may be in or near said building and because of the dangerous condition of said walls, the said court-room cannot longer be occupied or used as such. That the roof

leaks, rendering it unfit for occupancy; that many of the rafters and other timbers supporting said roof, and joists supporting the ceiling and floor of said court-room, have, by reason of age and exposure to wet, become rotten and thereby weakened to such an extent that they are liable to give way and fall at any time and kill or injure persons that might then be in said building; that by reason of the cracking and spreading of the walls, the joists of the ceiling and floor of the court-room did and do not rest in or upon the walls of said room, and none of said joists have sufficient rest or footing in or upon said walls to securely support the same, and are liable to fall and endanger the lives of persons in said building and court-room."

We have set out the substance of the complaint and answers and the order of the court, so as to exhibit the version of each party as to the nature of the power exercised by the circuit court in ordering what it denominates repairs of the court-room. It appears from all these averments, and the plans and specifications which are a part of the record of the order, that the work contemplated therein will be the construction of a new foundation and basement of cut stone, bearing no resemblance to the old foundation; large portions of the old walls are to be destroyed and taken away, and those that are left to remain are to be supported by new walls, so as to support and keep them from falling. The joists, floors, and ceilings are to be made new throughout, the roof and rafters are to be made new, the windows and doors are to be made new, the inside finishing is to be made new. There are extensions and additions to be constructed beyond the dimensions of the old building, there are rooms and apartments to be added that were not in the old building. Indeed, about all that will remain of the old building when the plans and specifications are carried out will be so much of the old walls as are to be left standing, and that part of the brick that comes out of the old demolished walls that are sound, and which by the specifications may be used in the new walls for back filling.

Issue was joined and the court below, after hearing the evidence, found for the appellees and rendered judgment in their favor over a motion for a new trial. About the only point on which it can be said that there was any conflict in the evidence was as to the alleged dangerous condition of the building. As to the nature of the work to be done under the order of the court there was no conflict. It is contended by the appellee that there is a collateral attack on the adjudication of the court, by which the necessity and order for the work was adjudicated. And it is contended that mere errors and irregularities in the order are unavailable on such an attack. We have no doubt if the circuit court had the power to make the order, that this attack thereon being collateral must fail. *Bass v. Fort Wayne*, 121 Ind. 889.

The first inquiry which appellee's contention suggests is this: Was the order made by a court at all? A court is defined to consist of persons officially assembled at a time and place appointed by law for the admin-

istration of justice. *Re Allison*, 18 Colo. 525, 10 L. R. A. 790; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Levy v. Bigelow*, 7 Ind. App.

It appears from the record of the order that when it was made the proper persons, namely, the clerk, sheriff, and judge of the White circuit court had assembled at the time appointed by law for holding said court. The place where they assembled was within the county and within the county seat of said county of White. But there is no statute fixing the place for holding the White circuit court at any particular point in the county. Indeed, we have been unable to find any statutory or constitutional provision fixing the place in any county where the circuit court should be held from the organization of the state to the present time. The nearest approach to such a provision is section 24 of the Act of 1888, for the regulation of county business, which provides that, "the circuit courts in counties where court-houses shall not have been erected, shall be holden for the time being at the place designated by law or selected by the court." Rev. Stat. 1888, p. 155.

There has always been a provision that the circuit court of each county should be held in the county, but none that such courts should be held at the county seat, or even in the court-house, or at any other particular place in the county; yet no one can doubt that it is the law that circuit courts shall be held at the county seats of the various counties. A large number of statutes proceed upon the idea that the county seat is the local habitation of the circuit court, yet none of them so expressly provides. Among them is section 5944, Rev. Stat. 1881, passed in 1858, relating to the clerk of the circuit court, and providing that, "such clerk shall keep his office open at the county seat, in a building provided for that purpose by the board of commissioners of the county every day in the year (Sundays and the Fourth of July excepted) between the hours of nine A. M. and four P. M. where, by himself or deputy, he shall attend to the duties of his office not otherwise provided for." The statute providing for posting advertisements of, and the place where judicial sales are to be made, and many others tend to show the intention to have been that circuit courts shall be held at the county seat. Rather it has been assumed by such legislature that such a law had already been passed. In construing statutes, the whole system must be looked to, and statutes upon cognate subjects may be referred to, though not strictly *in pari materia*, to ascertain the meaning of any particular part. Sutherland, Stat. Constr. § 284.

Other statutes, and the general principles of law will be considered in construing statutes. *Crawfordsville & S. W. Turnp. Co. v. Fletcher*, 104 Ind. 97; *Stout v. Grant County Comrs.* 107 Ind. 848; *Evansville v. Summers*, 108 Ind. 189; *State v. Harrison*, 116 Ind. 800.

It was held by this court in *Franklin County Comrs. v. Bunting*, 111 Ind. 148, that though there was no statute authorizing the county board to provide a sheriff's residence, yet as the statute made it the duty of the county

board to provide and maintain a county jail, and enjoins on the sheriff the duty to keep the jail, and inasmuch as it has always been the custom of boards of county commissioners to make suitable provision for the sheriff's residence; that this custom had given a construction to the law which could not be disregarded, even if there was doubt as to the meaning of the statute. This court in that case said: "In speaking of a practical construction given to a statute, the supreme court of Illinois said: 'It has always been regarded by the courts as equivalent to positive law.'" *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447.

By another court the principle was stated thus: "We cannot shake a principle which in practice has so long and so extensively prevailed. *Rogers v. Goodwin*, 2 Mass. 476. There are many cases which declare and enforce this principle, among them are *Stuart v. Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 4 L. ed. 97; *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 5 L. ed. 257; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213-290, 6 L. ed. 606-682; *Minor v. Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627; *State v. Parkinson*, 5 Nev. 15; *Pike v. Megoun*, 44 Mo. 491; *People v. La Salle County Suprs.* 100 Ill. 495; *State v. French*, 2 Pinney, 181."

It has been the universal custom to hold the circuit courts at the county seats without exception, from the organization of the state to the present time, under an interpretation of the statutes that they imperatively required the court to be so held. This long acquiescence in such a construction is equal to positive law, requiring such courts to be so held. Sutherland, Stat. Constr. §§ 808, 809; *State v. Harrison*, *supra*.

Likewise, the statute requires "the county commissioners to erect a court-house jail, and public offices for the clerks, recorder, treasurer, and auditor, . . . where the same has not been done, shall keep the public buildings of the county in repair and such offices, if practicable, shall be made fire proof, and shall be occupied by such officers respectively." Rev. Stat. 1881, § 5748.

But there is no provision unless in a special act for removal of county seats requiring such court-houses or other public buildings to be built at the county seat, yet the universal practice, without a single exception, has been that court-houses and other public buildings, connected with the courts or the administration of justice, have been erected at the county seat. The Act of 1875, providing for the various duties of county boards in relation to the construction of court-houses and other public buildings of the county makes no provision that court-houses are to be built at the county seat. And yet in view of the long and uniform practical construction given to these statutes amounting now to positive law, if the board of commissioners were to attempt to erect a court-house at the expense of the county at any other place than the county seat, such attempt would be illegal, and their acts in furtherance thereof would be void and liable to be enjoined. So, too, in case the circuit court should com-

vene at any place outside of the county seat the acts and proceedings at such other place would be void.

The Constitution of 1816 provided for a supreme court and circuit courts. Section 6, article 4, Constitution of 1816, General Laws of Indiana, from 1816 to 1817. This court was organized by Act approved December 28, 1816. That Act provided that the place of meeting of this court should be at the court-house at the seat of government. That had reference to the town of Corydon, in Harrison county. That Constitution was repealed and superseded by the Constitution of 1851, and there has never been any statutory or constitutional provision fixing a place for this court to meet and hold its sessions from that time to this. But it has been the universal custom and practice for this court to meet and hold its sessions at the capitol of the state, with as much regularity as if there had been a statute of the state imperatively requiring such meetings and sessions at the state capitol. That practice has been so long continued and the construction of our statutes relating to the same has been so long acquiesced in and accepted as unquestioned by everybody, and all the departments of the state government, that it amounts now to positive law that the state capitol is the only lawful place where this court can assemble to take judicial action. The more recent statutes organizing courts have provided where the same should be held. The act providing for superior courts provides that they are to be held at the county seat, and in the court-house, unless the county board furnish some other place for them to be held in the county seat. The act in relation to criminal courts makes a similar provision. The act creating the appellate court of this state provides for holding its sessions at the capitol of the state. It follows from the principles above announced that by long practice, uniformly acquiesced in all over the state giving our statutes the construction that the circuit courts must hold their sessions at the county seat, amounts now to positive law, and that the White circuit court when it made the order in question here was lawfully assembled at the time and place designated by law for the administration of justice, and was therefore a court.

These principles of construction will apply to a far more important phase of the case further on.

It is further contended by the appellant that, the circuit court being clothed with powers belonging to one department of the state government only, namely, the judicial, it can exercise no power not judicial in its nature, and that it is beyond the constitutional authority of the legislature to confer any such power upon that court, and it is contended that the power to make the order in question is not judicial, but is administrative or ministerial. The constitution divides the powers of the government of the state "into three separate departments, the legislative, the executive including the administrative, and the judicial, and no person charged with official duties under one of these departments shall exercise any of the

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functions of another, except as in this constitution expressly provided." Rev. Stat. 1881, § 96. Therefore the appellant contends that even though the legislature may have attempted to confer the power on the circuit courts to repair their court-rooms, such legislation is in conflict with the constitutional provision just quoted, because the power is not judicial, but is administrative or ministerial, and cannot be exercised by the judicial department. We have already seen that such power has been expressly conferred on the boards of commissioners by section 5748, Rev. Stat. 1881. The appellees claim that section 1482, 1 Burns' Revision of 1894, Rev. Stat. 1881, section 1416, also confers the power on the circuit courts. It reads as follows: "The said courts may also allow such sums as may be due to persons furnishing fuel used in term time, or furniture for the court-room, or making repairs thereof."

It is also contended on behalf of the appellees that the circuit court is possessed of this power independent of the legislature, as one of the incidental or inherent powers of the court as a judicial tribunal, of which the legislature could and cannot deprive it. An eminent author says: "Judicial power as contra-distinct from the power of the law has no existence. Courts are mere instruments of the law. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature, that is, to the will of the law." Hawes, Jurisdiction of Courts, § 4.

"And when courts are said to exercise a discretion, it is a mere legal discretion a discretion to be exercised in discerning the course prescribed by law, and when it is discovered, it is the duty of the court to follow it." Id. § 29; *Osborn v. Bank of United States*, 22 U. S. 9 Wheat. 386, 6 L. ed. 234.

The state constitution further provides that, "the judicial power of the state shall be vested in a supreme court, in circuit courts, and in such other courts as the general assembly may establish." 1 Burns' Rev. 1894, § 161.

And that, "the state shall, from time to time, be divided into judicial circuits, and a judge for each circuit shall be elected by the voters thereof. He shall reside within the circuit, and shall hold his office for the term of six years, if he so long behave well." Id. § 160.

These constitutional provisions make the circuit courts, when organized, constitutional tribunals; but if nothing else existed in the way of constitutional provision or legislative enactment, the circuit courts would have nothing but an imaginary existence, an existence only in legal contemplation, but no real potential existence.

Browne on Jurisdiction, says: "Courts may be established, and their jurisdiction defined by the constitution or organic law of the state, or by legislative enactment. Generally, however, jurisdiction proceeds from statutory power granted, except where it is given by the constitution, of which the Supreme Court of the United States is an example; and the statutes prescribe the manner

in which the court shall be conducted and the form and procedure, and appoint, or provide for the appointment or election of judges and subordinate officers, as well as the method or rules of procedure governing them. There are no courts in this country, except those so created." Browne, Jurisdiction, § 12.

In *Levy v. Bigelow*, *supra*, the appellate court said: "A court has been defined as a place where justice is judicially administered. Co. Litt. 58; 3 Bl. Com. 23. This definition, however, has been often criticized as too narrow, being limited by the word 'place.' The prominence of the word 'place' in this definition no doubt arises from the ancient idea that the king was the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times and under our form of government, the judicial power is exercised by means of courts. A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and the persons by whom judicial functions are to be exercised are essential to complete the idea of a court. It is in its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court, in the general legal acceptance of the term. But the court may exist in legal contemplation without any officers charged with the duty of administering justice."

It is by legislative enactment alone that these constituent elements of the circuit courts of this state have been brought into existence, and thereby the legislature has called into being the actual and real existence of the circuit courts of this state, as contradistinguished from their existence solely under the constitutional provisions quoted above. The Legislature has made them courts of general jurisdiction. Burns' Rev. 1894, § 1366; *Barkley v. Tapp*, 87 Ind. 25.

The common law having been adopted by the legislature before the state was organized, and while it was a territory, which has been re-enacted and continued in force ever since, all the common-law powers of a court of general jurisdiction, not locally inapplicable and inconsistent with our form of government, are vested in the circuit courts by virtue of their reaction, as before stated, and by virtue and force of the common law in force in the state when they were called into existence by the legislature, subject only to the limitations of the constitution of the state and the Constitution of the United States, and the treaties and laws made in pursuance thereof.

One of the limitations of the constitution of the state is that the courts are inhibited from exercising any power but judicial, and therefore are forbidden from exercising administrative or ministerial powers as courts. Ordering and paying for repairs of their court-rooms is ministerial or administrative. *Hamilton County Comrs. v. Cottingham*, 56 Ind. 559; *McCormick v. Johnson County Comrs.*, 68 Ind. 214; *Orow v. Warren County Comrs.*, 118 Ind. 51, and authorities there

cited; *Patton v. Montgomery County Comrs.*, 96 Ind. 181.

But courts of general jurisdiction were by the common law clothed with what was known as incidental or inherent power. The power to punish for contempt belongs to this class, and it is to be noted that law-writers and courts nearly always designate it as the power of the court, and scarcely ever call it jurisdiction to punish for contempt. Browne, Jurisdiction, § 115 a; Hawes, Jurisdiction of Courts, §§ 221-223. The common law authorized courts to exercise this power, not because it was judicial in the strict sense, but because it was absolutely essential for the maintenance and preservation of the dignity, authority, and jurisdiction of the court. See same authorities.

Because self-preservation is said to be the highest law of nature. The courts and law-writers all agree that, "the power to hear and determine a cause is jurisdiction." Browne, Jurisdiction, § 1, p. 2; *Quart v. Abbott*, 103 Ind. 233, 52 Am. Rep. 662; *Lantz v. Maffett*, 103 Ind. 23; Hawes, Jurisdiction of Courts, §§ 1, 2.

But the power to hear and determine a contempt is never spoken of as a constituent element of the power to punish for such contempt. It is rather essential that the court have jurisdiction to hear and determine some cause and be engaged in the exercise of such jurisdiction as a condition and constituent element of its power to punish for contempt. See Browne, Jurisdiction, § 115 a, and authorities there cited; Hawes, *supra*.

It follows that it is out of absolute necessity that this inherent power to punish for contempt springs, and not out of the general jurisdiction of the court to hear and determine causes generally. Because, says Hawes on Jurisdiction, *supra*: "The power of the court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld except under the circumstances, and in the manner provided by law."

The power to repair the court-room of the circuit court is akin to the power to punish for contempt. Like the power to punish for contempt, it springs out of absolute necessity, out of that highest law of nature, self-preservation, and does not belong to the general jurisdiction, but is incidental to such jurisdiction, and is inherent in the court, and was so when the circuit courts were first called into existence by the legislature. Browne on Jurisdiction, sec. 14, says: "Where jurisdiction is conferred on a court by the constitution, the legislature may nevertheless regulate the mode and manner of its exercise and such legislative enactments will be obligatory unless it practically deprives the court of the power granted."

Whether this inherent power to repair the court-room was conferred by the legislature or the constitution is unimportant to inquire, as in either case the legislature has the authority to regulate the exercise of that power so long as the act of regulation does not deprive the court of the power. The section of the statute already quoted regulates the exercise of that power without impairing it.

It is, however, to be observed that as circuit courts were in existence in the state as courts of general jurisdiction, invested with these inherent powers when the constitution was adopted, the presumption arises that it was the intention of the framers of that instrument that such courts should continue to be clothed with such inherent and incidental powers. *State v. Noble*, 118 Ind. 850, 4 L. R. A. 101.

Therefore, section 1482 of the Statute, *supra*, conferring and regulating the power of circuit courts to repair their court-rooms is not in conflict with section 1 of article 8 of the Constitution already quoted, forbidding persons charged with official duties under one of the departments of the state government from exercising any of the functions of another, except as otherwise expressly provided in the Constitution. Such is the construction the statute and Constitution has received. *Benton County Comrs. v. Thompson*, 7 Ind. 265; *Nash v. State*, 88 Ind. 78.

If there were any doubts as to the correctness of this construction, the great length of time it has been received and acted on according to the principles already laid down gives to it the force of positive law. There is no necessity for the exercise of any power beyond repairs by the circuit courts. Both the power to repair and to build court-houses has been wisely conferred upon the board of commissioners in the exercise of the large administrative and ministerial powers constitutionally vested in that body by the legislature. And the exclusive power to build court-houses and other county buildings has been vested by the legislature in such county boards.

But a doorway may be broken down by casualty or otherwise, leading to and from the court-room, so as to interfere with the due administration of justice therein, or a window broken out with like effect, or furniture destroyed or any other circumstance that transpires, by which the court-room is so impaired in its usefulness as to materially interfere with the due administration of justice therein; the inherent power of the court ought to and does exist to afford temporary relief for the time being, to order and pay for such repairs as will enable the court to continue the due administration of justice therein. But it is contended that even if this inherent power does exist, that it is not an unlimited power, and must be confined to repairs in the sense of that necessity out of which the power springs, and that it does not exist to the extent of practically rebuilding or reconstructing the court-house, or to the construction of lasting and permanent improvements, such as extensions, additions, and enlargements to the court-house. We are of opinion that this contention must prevail because such is the law. But it is contended by the appellees, on the other hand, that if the power to repair existed at all, and the White circuit court in its attempt to carry such power into execution erred and went beyond what might be termed legitimate repairs, it was a mere error in judgment, a mere irregularity that did not affect the jurisdiction, and that such error and irregularity could not be inquired into in this collateral way. Counsel say that: "The finding of the court and the decree of the court is directed to the repair of the court-room, and it finds that every part of it is necessary and proper in the making of said repairs."

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If epithets and names freely applied in an order complained of could give it a fixed character, which would be conclusive upon the courts, then the order here in question has conclusively adjudged the subject thereof to be repairs of the court-room, pure and simple, because in that short order the word "repairs" and "repaired" are used no less than twenty times. Then in addition to the details of the dangerous dilapidation of the old court-house, set forth in the order, the fact that the commissioners were taking no steps to repair it is made prominent in the order though they had ample notice of its condition. Browne on Jurisdiction, § 26, says: "When recitals in the record show any facts which negative the jurisdiction of the court, then the record is self-impeached."

This was a suit in equity. Equity looks at the intent, rather than the form; it always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. 1 Pom. Eq. Jur. § 878.

We have already seen that when the plans and specifications made a part of the order are carried out, there will be left standing only a very small part of the old building, a small portion of the old walls; everything else will be new, and there will be additions and extensions, all of which will be entirely new. It is manifest from the face of the record of the order that the intent was to come as near building a new court-house as possible, and yet retain any semblance of repairs. It is quite manifest from the order that the only reason that any portion of the old, dilapidated wall was retained was to furnish a nucleus around which repairs could be made with some plausibility, and so that the court might be able to say the work ordered was repairs. The work contemplated and described in the plans and specifications cannot be denominated "repairs," with any regard to accuracy of expression, as we shall hereinafter see. But if a part of the work ordered were legitimate repairs which the court had power to make yet the whole is so blended as to be inseparable, which places the whole beyond the jurisdiction of the court. *Freem. Judgm.* § 120 c; *VanFleet, Collateral Attack*, 789.

It is also manifest from reading the record of the order that had the court felt assured that it possessed the power to rebuild the court-house, it would have done what all must agree ought to have been done, namely, demolish the entire building and build an entirely new court-house on the old site. It would not have gone through the unseemly process of "sewing new cloth onto an old garment, or putting new wine into old bottles." St. Mark 11: 22.

The old building originally cost but \$10, -

000, and was at the time worth about \$7,000. Probably an entirely new court-house could have been built for the \$32,087.50, the contract price of the alleged repairs. If the appellants had courageously performed their duty and built a new court-house before their neglect had driven the judge of their circuit court into extreme measures, they would have saved their county from much needless expense and loss. But, however overwhelmingly the evidence may establish that an entire new court-house was imperiously demanded, yet if the White circuit court had no power to build one, or had no power to do what it attempted to do, that consideration cannot add to or enlarge the power of the court so as to justify the act. Counsel for appellees ask: "Must the court remain in a dangerous structure until it falls upon it and destroys the lives of the persons constituting it? Cannot the court anticipate calamities by provident use of human skill? Must a court wait until a judge is killed or maimed before resorting to that highest law, self protection. Is it not within the power of the court to protect itself against . . . a veritable death trap?" We answer the first of these interrogatories in the negative, the second in the affirmative, the third in the negative and the fourth in the affirmative.

The court is not bound to remain in a dangerous structure until it falls and destroys the life of judge or officers; it can anticipate such calamities by provident use of human skill; it is within the power of the court to protect itself against such a veritable death trap as the court-house in question seems from the evidence to have been. All these things granted, and it does not follow that that power will enable the court to build additions and extensions to such death trap and thereby and therein expend over \$32,000 of the public funds of the county to hold up a death trap, the whole value of which does not exceed \$7,000, under color of repairs. Under the circumstances disclosed in the evidence, the court could have protected itself precisely as it could and would have done if the old court-house had blown down or burnt up some night. No one would have thought of an attempt on the part of the court to rebuild it but the court would at once have secured another room, as it actually did do, for temporary use in the administration of justice, until the proper authority could rebuild the court-house. In support of the claim that the extraordinary power attempted to be exercised here was one which belonged to the circuit court, counsel assert that "the judiciary of Indiana is entirely independent of any power on earth except the power of the people, independent even of them, except that the people might change the constitution, and in the exercise of that power, the people could not abolish either the judiciary or its inherent power without conflicting with the Constitution of the United States." This proposition is too broad. It is true, the judicial department is independent of the other two departments. The constitution erects a state government, clothed with the sovereign power of the people, and divides that power into three

distinct departments, to be exercised in each exclusively by the officers of that department. In that sense alone the several departments are independent of each other. *Wright v. Defrees*, 8 Ind. 298; *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *State v. Noble*, *supra*.

The judicial department is no more independent of the legislative and executive departments that each of them is independent of the judicial department. *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375.

The three departments being invested with the entire sovereignty of the people and constituting the state government are not so independent of each other as that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as nugatory and not binding on every department of the state government. And to that extent does the appellee's contention go, as we understand it. What is meant by the independence of the judicial department is that it may exercise its functions of expounding and enforcing law in the administration of justice, and that no part of these functions can be exercised either directly or indirectly, by either the legislature or the executive; indeed, that those in authority in the other departments cannot even so much as cross the line dividing the domain of the judicial from the other departments to make a suggestion as to how the judicial department shall perform its functions or what kind of judgments or decrees it ought to render or what exposition it shall give to the laws. But when the judicial department has rendered its decree, and thereby given an exposition and construction of the law, such decree and construction is binding on both the other departments. And so, too, when the legislature is exercising its functions of making laws, those in authority in the judicial department cannot take any part in the exercise of those functions; they cannot even cross the line dividing the judicial from the legislative domain, to make a suggestion as to how the legislature should perform its functions, or what kind of laws it should make. *Smith v. Myers*, *supra*.

Indeed, the judiciary cannot make laws at all, whether in or out of their domain. But when the legislature has enacted laws that are not unconstitutional, they are absolutely binding on the judicial as well as the executive departments, no matter how unwise and impolitic they may be. *Smith v. Myers*, and *State v. Noble*, *supra*; *Ex parte Griffiths*, 118 Ind. 83, 8 L. R. A. 398.

Such laws are also binding on all the departments until they are repealed. To hold that the judiciary is so far independent of the legislative department that it may disregard and treat as nugatory legislative enactments passed in conformity to the constitution, is not only to draw the whole sovereign power of the state government into the judiciary, and thus destroy the independence of the other departments, but it erects a despotism which appellees contend cannot be abolished even by the people. Such a proposition is utterly untenable because it not

only violates the constitution, but is destructive of the state government and the essential principles upon which it is founded. While each department within its own bounds exercises its powers independent of each of the other departments, yet each department is bound by the acts of each of the others done within the limits set by the constitution to such powers.

Appellee, however, contends substantially that the inherent power already vested in the circuit court was extensive enough to warrant and justify the court in all that the order proposed to have done. They cite *Nash v. State*, *supra*, and *Benton County Comrs. v. Thompson*, *supra*, as a recognition of that power. They also claim the statute above cited is also a recognition of the existence of the power. But the last case is rather against the position assumed, it holding that the circuit court could not move a court-house. The other case was simply a claim for furniture furnished to the court-room and paid for by the court. Such payment was upheld on the statute already quoted.

The appellee's learned counsel cite two cases which deserve notice. The first is *Beach v. Crain*, 3 N. Y. 86, 49 Am. Dec. 369, where plaintiff granted to defendants a right of way over his land and covenanted to erect a gate at the terminus, and in the same instrument the defendants covenanted to keep the gate in repair. It being removed by some unknown person, it was held that the covenant imposed the duty on the grantee to put up a new gate, likening it to the obligation of a tenant to repair, and in case of destruction to rebuild. The other case was *Brecknock Navigation v. Pritchard*, 6 T. R. 750, where the covenant required the defendant to keep a bridge in complete repair for seven years, the bridge having been washed away, he was held liable to rebuild the same. If these cases are applicable and controlling, we must then hold that the real purpose disclosed in the order was within the power of the court, and that the incidental power of the court to repair its court-room carried with it necessarily the power, in case of its destruction or becoming unfit for use, to build a new court-house. But there are many reasons why these cases are not in point. In each case there was a contract, imposing the duty solely on one person to keep in repair. Here there was no contract obligation, but a mere discretionary power or privilege was vested in the court for temporary self protection, extending no further than that temporary protection required, but the primary duty, as we have seen, was devolved on the county board to keep the court-house in repair, and the exclusive power to rebuild. A case much more in point, and nearly parallel, indeed, exactly parallel, with the case at bar as to the extent of the power conferred where a duty to repair is imposed by law, was decided by this court, and a conclusion was therein reached contrary to that reached in the cases above referred to. It was said by Elliott, J., speaking for the whole court in that case that: "We are unable to resist the conclusion that the trustee, under color of making repairs and removing obstructions,

has changed and improved the ditch in several essential particulars. The ditch has been greatly widened and deepened, and doubtless much improved since the amount expended is almost twice the cost of the original ditch. The inference from the facts stated is that the trustee has improved the ditch instead of repairing it. Under authority to repair, there can be no enlargement and improvement except in so far as the work of repairing necessarily enlarges and improves. 'Repair,' says the supreme court of Pennsylvania, 'means to restore to sound or good condition, after injury, or partial destruction.' *Pittsburgh & B. Pass. R. Co. v. Pittsburgh*, 80 Pa. 72. The authority of the township trustee was to restore as nearly as practicable to its original condition, not to enlarge or improve, no matter how much the improvement may have been needed, nor how much property owners may have been benefited." *Weaver v. Templin*, 113 Ind. 303.

The same principle was asserted by this court in *Western Paving & Supply Co. v. Citizens' Street R. Co.*, 128 Ind. 534, 10 L. R. A. 770, where it was said: "The obligation to repair a street is one thing, and the obligation to construct a street is another and different thing. To repair a thing is to restore it to a sound state after decay, injury, dilapidation or partial destruction. To reconstruct is to construct or build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it." So the weight of authority seems to be that the power to repair does not carry with it or imply the power to rebuild or reconstruct.

While there is, as before observed, no precedent upholding the extension of the incidental power of a court to repair its court-room to the construction or reconstruction of a court-house, there is respectable authority against such extension in the following cases: *Neosho County Comrs. v. Stoddard*, 18 Kan. 207; *Barnett v. Ashmore*, 5 Wash. 163.

This incidental power has existed as long as courts of general jurisdiction have existed under the English common law. The strongest reason why it does not extend to building court-houses, or the equivalent thereof, is found in the fact that not a single precedent can be cited upholding such a power, though numerous occasions have existed in this country for a century calling for the assertion thereof. If such a power had existed, the researches of appellee's learned counsel through all the course of the common law would have been rewarded by the discovery of precedents for its exercise in the construction of court-houses by the courts of general jurisdiction. We have already seen that a practical construction given to a statute by public officers of the state, and acted upon by those interested, the people and the courts, for a very great length of time, is always regarded by the courts as equal to positive law. See the authorities above cited on this point; also; *State v. Harrison*, 116 Ind. 800; *Franklin County Comrs. v. Bunting*, 111 Ind. 148.

Mr. Endlich, in his valuable work says: "It has been sometimes said, indeed, that

usage is only the interpreter of an obscure law. Said Lord Campbell . . . there would be no safety for property or liberty if it could be successfully contended that all lawyers and statesmen have been mistaken as to the true meaning of an old Act of Parliament." Endlich, Interpretation of Statutes, § 308.

We therefore conclude that the White circuit court had no jurisdiction or power to make the order in question, and that it was void, and therefore subject to collateral attack by way of injunction. Therefore the finding of the trial court was contrary to law.

The judgment is reversed, with instructions to the trial court to grant a new trial.

NEW JERSEY COURT OF ERRORS AND APPEALS.

RAMSEY & GORE MANUFACTURING CO., *Plff. in Err.*,

Joseph N. KELSEA.

(55 N. J. L. 320.)

"Under a valid contract for the manufacture and sale of goods, with instructions

***Headnotes by VAN STOKEL, J.**

NOTE.—*Passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee.*

Whether or not the title will pass seems to depend almost entirely on the intention. There are certain acts which when taken in connection with the relation of the parties to each other and in the absence of explanatory or countervailing evidence will be held to manifest an intention to pass or retain the title. But in almost every instance the presumption arising from the acts will give way to the actual intention if that can be shown.

The question is one of intention. *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 390, 18 Am. Rep. 390.

So the mere fact that the bill of lading was taken in the name of the seller and remained undorsed will not prevent the passing of title, if, from all the facts in the case, it may fairly be inferred that it was the seller's intention that the property should pass. *Joyce v. Swann*, 17 C. B. N. S. 84.

Nor will the further fact that the contract provided for cash against the bill of lading. *Ogg v. Shuter*, L. R. 10 Q. B. 159, 44 L. J. Q. P. 161, 33 L. T. N. S. 114, 23 Week. Rep. 319.

Although the latter case was reversed on appeal upon the ground that an intention to retain title was shown by taking the bill of lading in the seller's name and retaining it under his control for his protection. L. R. 1 C. P. Div. 47, 45 L. J. Q. P. 44, 33 L. T. N. S. 422, 24 Week. Rep. 100.

Conversely the title will not pass, if the intention of the parties was that it should not. *Mason v. Great Western R. Co.*, 81 U. C. Q. B. 73.

The question whether or not the consignee has reserved his right is one of intention to be gathered from all the facts and circumstances of the transaction. *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 390, 18 Am. Rep. 390.

The rule that delivery to the carrier is delivery to the vendee is not contravened by asserting the *ius disponendi* of the vendor, when the circumstances evidence an intention to retain and where there is a special agreement to that effect. *The John K. Shaw*, 33 Fed. Rep. 491.

Question of law or fact.

The question of intent to deliver is for the jury. *Gibbons v. Robinson*, 68 Mich. 146.

Whether or not the title has passed is a question for the jury, if the evidence leaves it at all doubtful. *Alabama G. S. R. Co. v. Mount Vernon Co.*, 84 Ala. 173.

But when the facts are not in dispute, the question is for the court.

tions by the purchaser to venditor to send them to the purchaser, the delivery of the goods to a common carrier to be forwarded is a delivery to the purchaser, and the title passes to the purchaser, subject to the vendor's right of stoppage *in transitu*.

(June 19, 1898.)

ERROR to the Circuit Court for Passaic County to review a judgment in favor of

tion as to the intent to pass the title is one of law. *Smith v. Edwards*, 29 Hun, 493.

The question of intention to pass title is for the jury where a merchant ships goods on board a vessel chartered by another, charging the latter a commission for his services and taking receipts in his own name as the goods are delivered on the vessel, and finally taking a bill of lading in his own name and drawing against it on his correspondent. *Falk v. Fletcher*, 18 C. B. N. S. 408.

Where, from the circumstances attending the case, there is uncertainty as to the intention to pass title to the consignee, as where the goods are shipped to him and a bill of lading attached to a draft, which is discounted by a third person to whom the bill of lading is transferred, the question is for the jury. *Merchants Nat. Bank v. Bangs*, 103 Mass. 291.

If, by the contract of sale the seller undertakes to pay the freight the question is for the jury whether the delivery is to be considered complete when the goods are placed in charge of the carrier or not until they reach the buyer. *McLaughlin v. Marston*, 73 Wis. 670.

If the contract is to deliver free on board, the mere fact that the bill of lading is taken in the name of the consignor and by him indorsed and transmitted to his agent to be delivered to the consignee, will not prevent the passing of title, but the question is for the jury. *Browne v. Hare*, 4 Hurlst. & N. 822, 20 L. J. Exch. 6, 5 Jur. N. S. 711, 7 Week. Rep. 619, affirming 3 Hurlst. & N. 484, 27 L. J. Exch. 372.

If the sale is for cash and the goods are delivered to the carrier, the vendor retaining the bills of lading and immediately drawing on the consignee for the price, there is evidence for the jury on the question of intention to deliver before the price is paid. *Refining & S. Co. v. Miller*, 7 Phila. 97.

a. Between buyer and seller.

Delivery to designated carrier.

A delivery of goods to a carrier designated by the purchaser is of the same legal effect for the purpose of passing title as a delivery to the purchaser himself. *Merchant v. Chapman*, 4 Allen, 362; *Johnson v. Stoddard*, 100 Mass. 308; *Stafford v. Webb*, Hill & D. Supp. 213; *Waldron v. Romaine*, 22 N. Y. 368; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Taplin v. Packard*, 8 Barb. 230; *Gutwillig v. Zuberbier*, 41 Hun, 361; *Wade v. Hamilton*, 30 Ga. 450; *Biss v. Geer*, 7 Ill. App. 618; *Haug v. Gillett*, 14 Kan. 149; *Banny v. Elgby*, 5 Wis. 63.

plaintiff in an action brought to recover the contract price of certain bobbins which were alleged to have been sold and delivered to defendant. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. John W. Griggs*, for plaintiff in error:

The plaintiff was not entitled to sue for the price of the goods, but was merely entitled to recover damages for the loss of profits by reason of the cancellation of the order or the failure of the defendants to accept the goods.

If, after the goods are ordered, they are put up and marked with the purchaser's name and put on board of a steamboat designated by the purchaser, to be forwarded to his residence, the sale is complete, and the goods are the property of the purchaser notwithstanding the bill of lading is not forwarded to him, if the possession of such bill is not necessary to enable him to obtain the goods. *People v. Haynes*, 14 Wend. 546, 29 Am. Dec. 630.

If the agreement is that the property shall be delivered at the depot of a designated carrier, when it is so delivered the title passes, and if the carrier subsequently delivers it to a third person by direction of the seller, it will be liable to the buyer for the price. *Odell v. Boston & M. R. Co.* 109 Mass. 50.

If the buyer orders a particular mode of conveyance, he will be chargeable with the loss if any happen. *Vale v. Bayle*, Cowp. 294.

Delivery to carrier generally.

In the absence of some order or agreement on the part of the buyer to have the property sent to him by railroad, or of some evidence in regard to usage or the course of trade from which such an agreement may be implied, a delivery to a railroad company is not a delivery to the buyer. *Everett v. Parks*, 62 Barb. 2.

In *Perkins v. Eckert*, 55 Cal. 400, in which an instrument which might have been a bill of sale or a mortgage of certain wheat, had been given by defendant to plaintiffs, and the wheat had been delivered to a railroad company and bills of lading taken in the name of the plaintiffs, the court, in an action upon the indebtedness, in consideration of which the instrument was given, instructed that the shipment constituted a delivery to the plaintiffs, but the appellate court held that ruling to be erroneous, that there was nothing more than a constructive delivery which would not make plaintiffs liable for the loss.

In *Allen v. Comstock*, 17 Ga. 554, it was held that a general order for goods, without naming the mode of delivery, did not authorize the vendor to consider himself free from further obligation when he had delivered to a carrier so as to place the goods at the risk of the buyer, but it is intimated that he must first deliver at the place of business of the buyer.

So it was held that if there is no mention of the manner in which the goods shall be delivered a delivery to a common carrier is not a delivery to the buyer so as to place the goods at his risk. *Loyd v. Wight*, 20 Ga. 574, 65 Am. Dec. 636.

But in *Watkins v. Paine*, 57 Ga. 50, it was held that a delivery to a carrier according to the usage of trade will be a delivery to the purchaser, if the purchaser orders the goods to be shipped, although he specifies no particular carrier or class of carriers.

While in *Star Glass Co. v. Longley*, 64 Ga. 576, it was held that if the seller upon inquiry priced goods to the buyer and thereupon the buyer ordered at that price and the seller delivered the goods to a common carrier consigned to the buyer, there was a complete sale at the price named, so as 23 L. R. A.

Where there is a sale of goods generally (as distinguished from the sale of a specific chattel) no property in them passes until delivery.

Chitty, Cont. 875; *Benjamin, Sales*, Perkin's ed. 352 *et seq.*

When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as where the agreement is for the sale of chattels not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer can

to prevent the seller from subsequently disputing it.

If the buyer orders the goods to be forwarded by a carrier, a delivery to a carrier will pass the title to him, although he does not specially name the carrier; but a delivery to a carrier without the consent of the vendee, either express or implied, will not be treated as a delivery to him. *Hague v. Porter*, 3 Hill, 141.

When goods are contracted for which are to be sent to the purchaser, if the vendor send them in the mode of conveyance agreed on by the parties or directed by the purchaser; or, if no agreement be made or direction given in the usual mode; or if the purchaser being informed of the mode, assents to it; or, if there have been sales or conveyance of other goods and the vendor continues to send them in the same mode, then the goods are at the risk of the purchaser during their voyage. *Whiting v. Farrand*, 1 Conn. 60.

A delivery to the carrier is a delivery to the vendee, where the vendee has designated the carrier; where the carrier, though not designated, is the usual one employed to carry between the two places; where, though no carrier is designated, the one employed has been employed in other similar cases between the parties. *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18.

In the absence of a designation of a specified carrier, a delivery to any common carrier in the usual and ordinary course of business transfers the title. *Liggett & M. Tobacco Co. v. Collier* (Iowa) Oct. 9, 1898.

If goods are to be sent by a common carrier, a delivery to any carrier in due course of business is a sufficient delivery to the buyer. *Falvey v. Richmond*, 87 Ga. 99; *Dutton v. Sulomonsen*, 3 Bos. & P. 582; *Richardson v. Dunn*, 3 Q. B. 218, 1 Gale & D. 417; *Johnson v. Lancashire & Y. R. Co.* L. R. 8 C. P. Div. 499, 39 L. T. N. S. 443, 27 Week. Rep. 459; *Magruder v. Gage*, 33 Md. 344, 3 Am. Rep. 177; *Keasler v. Smith*, 42 Minn. 494; *Comstock v. Affolter*, 50 Mo. 411; *Hobart v. Littlefield*, 18 R. I. 341; *Ranney v. Higby*, 4 Wis. 154; *Colcord v. Dryfus*, 1 Okla. 232.

And the consignee may collect the price whether the goods are received or not. *Hill v. Gayle*, 1 Ala. 275; *Burton v. Baird*, 44 Ark. 556; *Diversy v. Kellogg*, 44 Ill. 114, 62 Am. Dec. 154.

If a buyer gives an order to a traveling agent of the seller and nothing is said about the mode of carriage, the sale will be complete when the goods are delivered to a carrier in the usual way at the seller's residence. *Copeland v. Lewis*, 3 Stark. 22.

And in a similar case it was held that an action for the price of the goods would not lie at the place of the buyer's residence. *Harwood v. Lester*, 3 Bos. & P. 617.

It is immaterial that the carrier is a teamster. *West v. Humphrey* (Nev.) Dec. 13, 1890.

As soon as goods are delivered to a carrier they are at the risk of the purchaser, although the freight is to be paid by the vendor. *King v. Meredith*, 3 Campb. 639.

The fact that the right to reject the goods if they are short in quantity or inferior in quality is re-

only affect the vendor by way of damages for non-acceptance.

Benjamin, Sales, 758; *Parker v. Pettit*, 48 N. J. L. 512; *Girard v. Taggart*, 5 Serg. & R. 19; *Atkinson v. Bell*, 8 Barn. & C. 277; 2 Mann. & R. 292; *Elliot v. Pybus*, 10 Bing. 512, 4 Moore & S. 889. See also *Clarke v. Spence*, 4 Ad. & El. 460; *Bonwell v. Kilborn*, 15 Moore, P. C. C. 809; *Gillett v. Hill*, 2 Crompt. & M. 535; *Downer v. Thompson*, 2 Hill, 187; *Hague v. Porter*, 8 Hill, 141; *Allen v. Jarvis*, 20 Conn.

50; *Moody v. Brown*, 84 Me. 107, 19 Am. Rep. 894.

If it be held that the rule is that delivery to a common carrier for transportation is delivery to the buyer, nevertheless such delivery must be of the whole quantity and not of a part, otherwise title will not pass, unless the buyer accepts them.

Benjamin, Sales, Corbin's ed. § 585; *Downs v. Marsh*, 29 Conn. 409; *Defenbaugh v. Weaver*, 87 Ill. 182.

served by the buyer will not prevent the delivery to the carrier from placing them at his risk. *Gates v. Carquinez Pkg. Co.* 78 Cal. 429.

If the seller agrees to furnish the property free on board cars, the title will pass when the property is shipped consigned to the purchaser. *Smith v. Edwards*, 29 Hun, 428.

The sale of property at a certain price, which shall cover all freight and insurance, to be sent by steamer will be complete when the goods are shipped, so that they are afterward at the risk of the buyer. *Mee v. McNider*, 109 N. Y. 500.

The property in goods sold in bond for exportation passes on their delivery to the carrier, although they are still subject to the custody of the custom officers and cannot leave the country until the duties are paid. *Waldron v. Romaine*, 22 N. Y. 363.

If goods are delivered to a carrier by the vendor addressed to the purchaser while the latter is under the age of twenty-one but do not reach him until he has attained that age, infancy is a good defense to an action for their price. *Griffin v. Langfield*, 3 Campb. 264.

Shipping property corresponding with the order vests the title absolutely in the buyer so as to preclude his subsequently refusing to take it on its arrival at destination. *D. M. Osborne & Co. v. Van Atten*, 3 Wash. Terr. 52.

If the goods are delivered to the carrier consigned generally to the buyer at a city where he resides, without any particular place of delivery being designated, the title passes. *Bacharach v. Chester Freight Line*, 133 Pa. 414.

The presumption that delivery to a carrier passes title may be rebutted by evidence of a course of dealing by which the seller undertook to deliver at the buyer's place of business. *McLaughlin v. Marston*, 73 Wis. 670.

In the absence of evidence showing a contrary intention, the seller's contract is complied with, if the goods correspond with the order at the time of delivery to the carrier. *Lord v. Edwards*, 2 L. R. A. 519, 148 Mass. 478.

The whole doctrine of the right of stoppage *in transitu* assumes that the vendee has acquired a title such as would enable him to bring trover, were it not for his insolvency. *Grosvenor v. Phillips*, 2 Hill, 147.

But the cases turning upon the right of stoppage *in transitu* depend upon principles so far distinct from the mere question whether or not the title has passed that they have been omitted from this note.

Effect of shipper's mistake or negligence.

If the consignment does not comply with the order, the shipment remains at the risk of the consignor. *Bruce v. Pearson*, 3 Johns. 534.

If a smaller quantity than that ordered is delivered to the carrier, and the buyer is notified and fails to repudiate the action, the sale will be held to be complete and the title to have passed in respect to the property forwarded. *Richardson v. Dunn*, 2 Q. B. 218, 1 Gale & D. 417.

If the quantity sent and the mode of transportation do not correspond with the order, there must be an actual acceptance by the buyer to render him liable. *Corning v. Colt*, 5 Wend. 254.

The seller must comply with the conditions of shipment stipulated for by the buyer in the contract of sale. *Woodruff v. Noyes*, 15 Conn. 385.

If the goods are not of the quality ordered, the title will not pass. *Ellis v. Roche*, 73 Ill. 280.

If the goods did not correspond with the order, the title will not pass. *Barton v. Kane*, 17 Wis. 22, 84 Am. Dec. 728.

The burden is on the seller to show that he complied with the terms of the order. *Wolf v. Dietzsch*, 75 Ill. 206.

If the quantity delivered to the carrier is in excess of that ordered by the buyer, so that there is something to be done to complete the transaction, the title does not pass. *Downer v. Thompson*, 2 Hill, 187.

But if a contract for the sale of sugar provides that it shall be delivered free on board, and the course of dealing is that a cargo shall be shipped which is sometimes sufficient to cover several orders, when the sugar is placed on board it is so far at the risk of the buyer that he has an insurable interest, although the particular portion which shall be appropriated to the filling of his order has not been marked and separated from the bulk. *Stock v. Inglis*, L. R. 12 Q. B. Div. 573.

If the purchaser designates the carrier by whom the goods are to be shipped, a delivery to another carrier will not pass the title. *Hills v. Lynch*, 3 Robt. 42.

If the seller disregards the instructions of the buyer as to shipment, the title does not pass, and the goods are still at the seller's risk. *Wheelhouse v. Parr*, 141 Mass. 563.

The duty of the shipper may include giving advice of the shipment to the consignee. *Goom v. Jackson*, 5 Esp. 112.

The fact that, in response to an order to ship goods by any conveyance and notify the buyer of the shipment, the seller informs him that they will come by a certain conveyance, when in fact they are not sent until a later one, will not prevent them from being at the buyer's risk. *Cooke v. Ludlow*, 2 Bos. & P. 119.

The failure of the shipper to properly designate the owner and place of destination by reason of which the goods are lost in transit will prevent a completion of the sale, so as to render the buyer liable for the price. *Finn v. Clark*, 10 Allen, 484, 12 Allen, 522.

The buyer cannot take advantage of a want of insurance, if he himself ordered the seller not to insure. *Elmore v. Kearny*, 23 La. Ann. 479.

The mere transposition of the buyer's initials in the consignment will not defeat a recovery from him, if there is nothing to show that such error caused the loss of the goods. *Garretson v. Selby*, 37 Iowa, 529, 18 Am. Rep. 14.

The fact that the shipper releases the carrier from liability for damages which may result to the goods during carriage will not prevent the passing of title, if the buyer orders them to be sent by railroad and the railroad company will not transport

Messrs. Stevenson & Humphreys, for defendant in error:

As a contract can be made only by the consent of all the contracting parties, it can be rescinded only by the consent of all.

2 Parsons, Cont. p. 678; 2 Benjamin, Sales, Corbin's 4th Am. ed. pp. 975, 977.

In an action for the price of goods "bargained and sold" it is only necessary to prove a valid sale; it is not necessary to prove a de-

livery; the right of action is perfect without delivery.

Doremus v. Howard, 23 N. J. L. 390; *Fraser v. Fredericks*, 24 N. J. L. 162.

When the manufacturer has finished a chattel according to order and set it apart for the buyer, the property is at the buyer's risk and he becomes liable for the price though he has not accepted the chattel or has refused to accept it.

the goods without the release. *Stafford v. Walter*, 67 Ill. 83.

If the delivery is to a carrier designated by the buyer, notice to him is not necessary to pass the title at his risk. *Bradford v. Marbury*, 13 Ala. 530, 46 Am. Dec. 364.

In order to place the goods at the risk of the buyer, the seller must in delivering them to the carrier exercise due care and diligence so as to provide the consignee with a remedy over against the carrier. *Ward v. Taylor*, 56 Ill. 494.

If the order is to send goods by a particular coach, and there is a rule that the carrier will not be answerable for goods above a certain value unless insured, the vendor is not bound to insure in order to clear himself of the risk, especially if there has been a course of dealing between the parties and he never has insured before. *Cothay v. Tute*, 3 Campb. 123.

If the goods are of such value that special precautions are necessary to make the carrier liable for their loss, a delivery to the carrier simply, without taking such precautions, is not a sufficient delivery so as to charge the buyer with their value in case they are lost by the carrier. *Clarke v. Hutchins*, 14 East, 475.

Effect of fraud.

If the shipment is procured by fraud, the title will not pass. *Stephenson v. Hart*, 1 Moore & P. 867, 4 Bing. 476.

The shipment and not the loading the important fact.

The property in oil to be laden in a barge does not pass as fast as it is placed in the barge, if the contract is for a barge-load. *Rocheester & O. Oil Co. v. Hughey*, 56 Pa. 322.

Under a contract for a boat-load of coal slack the title does not pass as fast as the slack is delivered into the boat, but only when the boat-load is completed. *Hays v. Pittsburgh, G. & B. Packet Co.* 38 Fed. Rep. 552.

While the goods are only partly delivered on board the vessel and the shipper holds the receipts for them, there has been no transfer of title. *Jones v. Bradner*, 10 Barb. 193.

If the agreement is that the goods shall not pass to the buyer until paid for, a modification agreement to ship before they are paid for will not change the title until they have actually passed beyond the seller's control, therefore goods in a partly loaded car still belong to the seller. *Summers v. Wagner*, 87 Mich. 272.

The delivery is not complete so as to pass title until the goods have passed fully out of the power of the shipper into possession of the railroad company for transportation. *Wenger v. Barnhart*, 55 Pa. 801.

b. Between consignor and consignee.

It has been said that the rule that delivery to the carrier is a delivery to the buyer does not apply, unless there is an actual purchase of the goods shipped. *Alsberg v. Latta*, 30 Iowa, 445.

A shipment made without orders, or contrary to orders, is at the risk of the shipper during the voyage. *The Francis*, 2 Gall. 391.

In a case where property had been captured in

transitu as prize and had been claimed by the consignee, the court said, to produce a change of property from the shipper to the consignee it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other to buy. Intention of the consignor to vest the right to property in the consignee would not be sufficient to effect a change of title until the goods were received, or some evidence given of an agreement by the consignee to take them on his own account. *The Francis*, 13 U. S. 8 Cranch, 359, 3 L. ed. 589.

If a shipper has general discretionary orders to ship what and when he pleases, the shipment will be at his risk, unless, at the time of making it, he, by some overt, unequivocal act, designates or appropriates the shipment to his correspondent. Until such appropriation the property is not changed. *The Francis*, 2 Gall. 391.

But it has been held that if, by the correspondence and course of dealing between merchants in different places, one is authorized to send goods to the other without special order, the property in goods so sent vests in the latter upon the delivery to the carrier. *Morberger v. Hackenberg*, 18 Serg. & R. 23.

The delivery of goods to a carrier by the consignor does not necessarily vest the property in the consignee, but the general presumption that it does may be rebutted by the circumstances in the case. *Dunlop v. Lambert*, 6 Clark & F. 600.

In *Johnson v. Stoddard*, 100 Mass. 306, it is intimated that the question whether or not the delivery of the goods to the carrier, without taking a bill of lading for them and transmitting it to the consignee, would amount to a delivery, will depend largely on the question of custom.

Where a hired chattel is, by the terms of the agreement, received by the bailee at the place of the contract and then shipped by the bailor to the home of the bailee, who offers to pay the freight, the chattel is in the possession of the bailee. *Ludden & B. S. Music House v. Dusenbury*, 27 S. C. 464.

So far as third persons are concerned, however, the consignee may sometimes be regarded as owner.

The carrier is authorized to treat the consignee as entitled to control the manner of delivery of the goods. *Sweet v. Barney*, 23 N. Y. 335.

The carrier is authorized to deliver to the consignee at a place different from that stated in the bill of lading. *Pennsylvania Co. v. Holderman*, 69 Ind. 13.

The consignee has such an interest as to entitle him to direct as to the place of delivery of the property. *London & N. W. R. Co. v. Bartlett*, 7 Hurlst. & N. 400, 81 L. J. Exch. 92, 5 L. T. N. S. 350, 10 Week. Rep. 109; *Cork Distilleries Co. v. Great Southern & W. R. Co. (Ireland)* L. R. 7 H. L. 299, 8 Ir. C. L. Rep. 384.

Consignment to satisfy debt.

A mere shipment of goods in pursuance of a contract between the consignor and consignee, whereby the former was to pay the freight and the latter, after he had sold the goods, was to credit the

2 Benjamin, Sales, Corbin's 4th Am. ed. p. 463; *Ballentine v. Robinson*, 46 Pa. 177; *Bement v. Smith*, 15 Wend. 493; *West Jersey R. Co. v. Trenton Car Works Co.* 83 N. J. L. 517; *Hires v. Hurff*, 89 N. J. L. 4.

The appropriation in most executory contracts of sale is by the act of the seller, usually manifested by a delivery of the goods to the buyer or to a carrier, to be transported to him. In either case the property passes when the

goods are placed beyond the seller's control. 2 Benjamin, Sales, Corbin's 4th Am. ed. p. 465.

When goods of a certain character are ordered, and the buyer directs that they be sent to him by a common carrier, or where from the course of trade delivery to a common carrier to be sent to the buyer, is the evident intent, in such case the property passes as soon as the goods are put in the carrier's possession.

proceeds to the account of the consignor, does not vest the title in the consignee in the absence of the bill of lading or notice of the shipment. *Helena First Nat. Bank v. McAndrews*, 5 Mont. 383.

But the title to property, which the debtor intends to appropriate for the payment of his creditor's debt will pass to the creditor when the debtor delivers them to a carrier, takes a bill of lading for the benefit of the creditor and mails it to the creditor, subject to the right of the creditor to repudiate the transaction when it comes to his knowledge. *Brown v. Bowe*, 35 Hun. 433.

A consignment to pay a debt did not formerly pass title in Louisiana. *Wilson v. Smith*, 12 La. 375.

But subsequent legislation modified this so far as it related to a creditor who had made advances on the consignment. *Chaffe v. Heyner*, 31 La. Ann. 594.

And a creditor who has made advances on the faith of the property shipped seems to be generally better protected than a general creditor.

A delivery of goods to a carrier, consigned to forwarding merchants, who have made advances on the faith of them, is virtually a delivery to them which will permit them to maintain a suit for their possession against one to whom they have been unlawfully delivered by the carrier. *Fitzhugh v. Wiman*, 9 N. Y. 559.

A delivery of goods to a carrier on account of a consignee who has advanced money on them gives him a priority of title over one who receives a second bill of lading for the same goods, with notice that the first had been issued. *Stevens v. Boston & W. R. Corp.* 8 Gray, 263.

The right of a consignee in advance to his consignor with a bill of lading in his name is a qualified property commensurate with and to support his lien and no more. *Patterson v. Perry*, 10 Abb. Pr. 82.

A delivery to a carrier of goods to be forwarded to one on account of his advances is a delivery to the latter so far as to pass the title intended to be passed for lien or sale. *Schumacher v. Eby*, 34 Pa. 521.

If in accordance with prior authority a consignor sends goods to a consignee and draws against the bill of lading, the consignee acquires a lien against the goods for the payment of past advances which will be superior to that of an attaching creditor of the consignor. *Vallé v. Carré*, 36 Mo. 575, 38 Am. Dec. 161.

Consignment for sale.

A factor to whom property is consigned for sale does not in general get any title to the property by the mere fact of shipment although the consignor is his debtor.

The mere consignment to a factor without more will not confer title to him. *Woodruff v. Nashville & C. R. Co.* 2 Head, 87.

Factors acquire no lien until they have accepted the consignment according to its terms. *Winter v. Coit*, 7 N. Y. 233, 37 Am. Dec. 522.

Factors acquire no lien for general balance until the property is actually received unless there is an agreement to that effect, expressed or implied from the course of dealing, and if they receive a bill of 23 L. R. A.

lading with advice of a draft against it, they can acquire no lien until they have accepted on the terms named in the letter. *Ibid.*

A constructive possession is not sufficient to enable a factor to retain the goods on general account. *Walter v. Ross*, 3 Wash. C. C. 233; *Ryberg v. Snell*, Id. 403; *Kinloch v. Craig*, 3 T. R. 112, 783, 4 Bro. P. C. 47.

To give a factor a lien on the goods consigned but not actually received by him, the consignment must be to him in terms and he must have made advances or acceptances on the faith of it. *Davis v. Bradley*, 28 Vt. 113, 65 Am. Dec. 236.

The mere loading of goods consigned to a factor for sale does not, prior to the forwarding of the shipping receipts, give him a lien as against attaching creditors of the consignor. *Hodges v. Kimball*, 49 Iowa, 577, 31 Am. Rep. 153.

If the goods are to be shipped to factors, the mere insertion of their names in the bill of lading does not invest in them the ownership of the property, if the owner retains possession of the bill of lading. *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190.

If a merchant consigns goods to a factor who receives them, the factor can acquire no title which will pass to his assignees in insolvency. *Godfrey v. Furzo*, 3 P. Wms. 133.

Goods consigned to a mere factor are not subject to the rule of the carrier making the goods subject to a lien not only for the freight of the particular goods, but also for any general balance due from their respective owners. *Wright v. Snell*, 5 Barn. & Ald. 350.

If property is delivered to a carrier upon consignment to a factor for sale, the consignee only acquires title thereto in case the shipment is accompanied by an unconditional consignment. An agreement to ship, although founded upon a good consideration, gives no title, but the owner of the property may, notwithstanding, impose such conditions upon the consignment as he chooses, and the consignee can only acquire title thereto by performing the conditions. *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631.

A delivery to the master of a vessel is not a delivery to the factor, where the consignor has merely written to him apprising him of the consignment and requesting him on the faith of it to accept bills, although the bills are actually accepted in accordance with the request. *Nichols v. Clent*, 3 Price, 547.

If goods are shipped under a contract that they are to be sold on joint account of the consignor and consignee, or on account of the consignor at the consignee's option, the title will not pass until the consignee has exercised his option. *The Venus*, 12 U. S. 8 Cranch, 253, 3 L. ed. 553.

If goods are consigned to be sold for a certain purpose, until the consignees have done some act recognizing the appropriation of it to the purpose specified and the beneficiaries have signified their acceptance of it so as to create a privity between them, the property remains at the risk and on account of the consignor. *Tiernan v. Jackson*, 30 U. S. 5 Pet. 530, 3 L. ed. 234.

Some cases have gone a great ways in denying the title of the factor.

2 Benjamin, Sales, Corbin's 4th Am. ed. pp. 466-469; 1 Benjamin, Sales, Corbin's 4th Am. ed. p. 195; *Ranney v. Higby*, 4 Wis. 154; *The Sally Mages*, 70 U. S. 8 Wall. 451, 18 L. ed. 197; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17.

Where the vendor is bound to send the goods to the purchaser, delivery to a common carrier is a delivery to the purchaser himself; the carrier being in contemplation of law in such case the bailee of the person to whom,

not by whom, the goods were sent; the latter when employing the carrier being regarded as the agent of the former for that purpose.

2 Benjamin, Sales, Corbin's 4th Am. ed. p. 909, and cases there cited; also 1 Benjamin, Sales, Corbin's 4th Am. ed. pp. 443, 462; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 90; *Fragano v. Long*, 4 Barn. & C. 319;

It was held that the shipment of goods to a factor in payment of a debt and the receipt by him of the bill of lading does not give him any right of property as against creditors of the consignor, in *Saunders v. Bartlett*, 12 Helsk. 316.

So it has been held that the fact that goods are shipped and the bill of lading delivered to the carrier for the consignee, to whom the consignor owes a debt, is not sufficient to pass the title to the consignee, if he is merely a factor for the sale of the goods, although out of the proceeds he is to pay his own claim, so as to prevent an attaching creditor of the consignor acquiring the title to them. *Bonner v. Marsh*, 10 Smedes & M. 376, 48 Am. Dec. 764.

But other courts seem to hold that a plain intention to pass the title will have that effect.

If property is shipped to factors expressly to pay them for previous advances, and the bill of lading is transmitted to them, the property will pass. *Desha v. Pope*, 6 Ala. 690, 41 Am. Dec. 78.

If, in pursuance of a contract to ship goods to be sold to pay advances, the promisor delivers the goods to a carrier consigned to the promisee and notifies the latter of the shipment, the intent to pass the title is sufficiently shown, and if the carrier delivers the goods under a subsequent order of the shipper to a third person, it will be liable for conversion. *Bailey v. Hudson River R. Co.* 49 N. Y. 70.

If the factor has made advances on the faith of the shipment he occupies a much better position.

If the consignment is to commission merchants who have made advances on goods, the delivery to the carrier passes the title to the consignees, so as to give them a title which will support an action of replevin. *Grosvenor v. Phillips*, 2 Hill, 147.

Where one consigns property to a factor, specifically to meet a bill drawn upon him, and transmits a vessel's receipt, sufficient title vests in the factor to enable him to maintain trover against one unlawfully taking the property. *Evans v. Nichol*, 4 Scott, N. R. 43, 6 Mann. & G. 614, 5 Jur. 1110.

The delivery by a consignor to a carrier of goods to be transported to consignees, in pursuance of a special agreement that they shall sell the goods to pay a draft made against them and apply any surplus to pay previous advances made by them to the consignor, and the sending of the bill of lading attached to the draft to the consignee, passes title to the consignee so as to render the goods no longer subject to attachment by the creditors of the consignor. *Halliday v. Hamilton*, 73 U. S. 11 Wall. 560, 20 L. ed. 214.

But some of the courts have required much more to vest title in the factor than the mere consignment and advances on the faith of it.

Thus a factor has no lien unless he has possession of the goods either by himself or his agent, although he has made advances on them, paid the freight and has possession of the bill of lading. *Oliver v. Moore*, 12 Helsk. 432.

Merely shipment of goods to a factor who has accepted drafts on the faith of it does not give him any title to the goods, unless a bill of lading or shipping receipt is forwarded to him. *Elliott v. Bradley*, 23 Vt. 217.

22 L. R. A.

Shipment to one whose money paid for the goods.

When the consignment is to the one who has advanced money for the purchase of the goods, the delivery to the carrier severs the authority of the consignor over them. *Nelson v. Chicago, B. & Q. R. Co.* 3 Ill. App. 180; *Chaffe v. Heyner*, 31 La. Ann. 594.

Shipment by agent to principal.

If an agent indebted to his principal ships property to him on board a ship under a bill of lading making the property deliverable to the principal, the title vests in the principal and the agent cannot countermand the direction. *Sumner v. Elder*, 1 Binn. 108.

If goods are purchased in a foreign country by an agent upon the order of the purchaser, a delivery on board the ship for transportation is a delivery to the purchaser and the property will vest in him by that act, and he will have no election to accept or reject it, and hence his title will not be affected by a subsequent order by the shipper to pay the proceeds to a third person. *The Mary and Susan*, 14 U. S. 1 Wheat. 26, 4 L. ed. 27.

Property shipped by a factor is to be regarded as that of the consignee, so far as the question whether or not it is subject to seizure as enemy property is concerned, although it may be shown in defense that the factor exceeded his authority and that in consequence the consignee repudiated his action so that the property never passed out of the consignor. *Fry v. United States*, 70 U. S. 8 Wall. 451, 18 L. ed. 197.

If an agent in one country ships goods to his principal in another and places in the mail the bill of lading making the goods deliverable to the principal, they have passed absolutely beyond his control, and the mere fact that he draws a bill of exchange against the bill of lading, which is dishonored, will not operate to re-vest in him any control over the property. *Ex parte Banner*, L. R. 2 Ch. Div. 278, 45 L. J. Bankr. 73, 84 L. T. N. S. 199, 24 Week. Rep. 479.

Consignment without condition.

If the goods are left with a common carrier to be delivered to the consignee, without any qualification or restriction, the consignor parts with all control over the goods. *Philadelphia & R. R. Co. v. Wireman*, 86 Pa. 264.

And the passage of title is not prevented by failure of the vendor to send the vendee a bill of lading. *Ober v. Smith*, 73 N. C. 313.

c. Conduct indicating an intention to retain title. Consigning to shipper's agent.

If the consignment is to the shipper's agent with secret instructions to deliver to the buyer on certain conditions, the delivery to the carrier will not pass the title to the buyer. *The Merrimack*, 12 U. S. 8 Cranch, 317, 3 L. ed. 375.

Where the shipper consigns the property to his own agent to be subsequently delivered to the purchaser, no property passes by the simple fact of delivery to the carrier. *The St. Jose Indiano*, 14 U. S. 1 Wheat. 208, 4 L. ed. 73.

Boswell v. Green, 25 N. J. L. 390; *Thompson v. Conover*, 32 N. J. L. 466; *West Jersey R. Co. v. Trenton Car Works Co.* Id. 517.

Van Syckel, J., delivered the opinion of the court:

It appears in the case that the defendants, who live in Paterson, N. J., made a valid contract in March, 1890, with the plaintiff, who is a bobbin manufacturer in New Hampshire, under which the latter was to manufacture

6,000 bobbins and send them to the defendants at Paterson. The following are the controlling facts in the case: The contract was made in March, 1890, and the plaintiff at once commenced to make the bobbins. On the 28th of March, 1890, the defendants wrote to one Wilkins, who had introduced them to the plaintiff, requesting him to tell the plaintiff to stop the order for the time being. It does not appear that the contents of this letter were communicated to the plaintiff. On the 29th

If the goods are consigned to the agent of the consignor, no title will pass to the one for whose use they are intended until there has been some further act of delivery to him. *Redd v. Burrus*, 58 Ga. 574.

But the fact that the goods are consigned to the shipper's agent will not prevent a passing of title, if they are on account and risk of the buyer. *The Merrimack*, 12 U. S. 8 Cranch, 317, 3 L. ed. 575.

So the fact that the goods are consigned to an agent of the shipper for the purpose of facilitating the exercise of a right of stoppage *in transitu*, will not prevent the passing of title. *Ibid.*

Conversely the fact that goods are consigned to one person for the use of another will not vest the property in the former so as to make it subject to attachment for his debts. *Grove v. Brien*, 49 U. S. 8 How. 426, 12 L. ed. 1142.

Agreement to deliver at designated place.

If the contract is to deliver at the buyer's place of business the title will not pass until such delivery is made. *Sneathen v. Grubbs*, 88 Pa. 147.

If the vendor undertakes to deliver at a certain place, the property is at his risk until it is so delivered. *McNeal v. Braun*, 53 N. J. L. 617; *Allis v. Voigt*, 90 Mich. 126; *Taylor v. Cole*, 111 Mass. 363.

If the goods are to be delivered at the buyer's place of residence, freight to be paid by the seller, they are at his risk during the transit. *Murray v. Nichols Mfg. Co.* 34 N. Y. S. R. 62.

If the contract of sale requires the seller to ship the property to a certain place and requires that the payment should be made when they arrive, their re-shipment does not change the title so as to place the goods at the buyer's risk while in transit. They do not become at his risk until they have been delivered at the designated place. *Thompson v. Cincinnati, W. & Z. R. Co.* 1 Bond, C. C. 152.

If the consignor expressly undertakes to deliver in a foreign country, the property remains in him and the character of the goods, in reference to their being subject to seizure as prize or not, is determined by his rights. *Ludlow v. Bowne*, 1 Johns. 1, 3 Am. Dec. 377; *DeWolf v. New York Firemen's Ins. Co.* 20 Johns. 214.

Where flour was sold by a shipper "to arrive at Boston," the title remains in him until such arrival. *Hooper v. Chicago & N. R. Co.* 27 Wis. 81, 9 Am. Rep. 420.

If the contract obliges the seller to deliver at a certain place, the default of the carrier cannot excuse him, since the carrier is his agent. *Braddock Glass Co. v. Irwin*, 158 Pa. 440.

If the contract obligates the vendor to deliver the goods at a certain place, mere proof that he delivered them to the carrier at his place of business is not sufficient to entitle him to recover for their price. See *v. Bernheimer*, 6 Jones & S. 40.

If it is the express contract that the property is to be shipped by the seller to the place of business of the purchaser at the expense of the seller, the place of delivery is the purchaser's place of business, and any loss on the way must fall on the seller. *Devine v. Edwards*, 101 Ill. 183.

Under an order for flour to be manufactured and

delivered by the vendor at the vendee's place of business, no title passes until there has been an acceptance by the buyer of the flour tendered by the seller. *Hanauer v. Bartels*, 2 Colo. 514.

But the contract may vest the title in the buyer at the time of shipment, notwithstanding the seller is to deliver the goods at their destination. Such a contract was held to exist where, immediately on the shipment of the goods, the insurance policy and bill of lading were handed over to the buyer, so that from all the circumstances in the case the intention was manifest to place the title in him. *Caloutta & B. S. N. Co. v. De Mattos*, 33 L. J. Q. B. 322.

In *Sparkes v. Marshall*, 2 Bing. N. C. 761, 3 Scott, 172, 3 Hodges, 44, it was held that, although the goods were to be delivered at the residence of the buyer, yet he had an insurable interest in them from the time he was notified of their being placed in the carrier's possession.

And it has been held that although the manufacturer undertakes to deliver the goods at the buyer's place of business, the buyer must accept them if they are only deteriorated to the extent that is a necessary incident of the transportation. *Bull v. Robinson*, 10 Exch. 342, 2 C. L. Rep. 1274, 24 L. J. Exch. 165.

Bill of lading.

Without going into the question of how far a bill of lading represents the goods so that the title to them may be passed by an assignment of the bill of lading, it may be said that as between consignor and consignee the form of, and method of dealing with, the bill of lading is a potent factor in determining the intention as to the location of the title.

The ordinary effect of passing title by delivery to the carrier may be controlled by taking a bill of lading. *Bruce v. Wait*, 3 Mees. & W. 15; *Wait v. Baker*, 2 Exch. 1, 17 L. J. Exch. 307; *Turner v. Liverpool Docks Trustees*, 6 Exch. 543, 20 L. J. Exch. 368; *Ellershaw v. Magniac*, 6 Exch. 570; *The Aurora*, 4 C. Rob. 218; *Jones v. Brewer*, 79 Ala. 545; *Berger v. State*, 50 Ark. 20; *Seymour v. Newton*, 105 Mass. 272; *Farmers & M. Nat. Bank v. Logan*, 74 N. Y. 568.

Agents for the purchase of goods may retain title in themselves until they are paid for, by taking a bill of sale in their own names and taking a bill of lading in such terms as to show their intention to retain the control and disposition of the property. *Farmers & M. Nat. Bank v. Logan*, *supra*.

The fact that an invoice is sent to the alleged owner is not sufficient to pass the title to him, if the bill of lading is taken in the name of a third person, although it is at the request of such owner, if the accompanying draft is sent to the third person and paid by him. *Dows v. National Exch. Bank of Milwaukee*, 91 U. S. 618, 23 L. ed. 214.

Making goods deliverable to consignee's order.

If the goods are sent by the consignor on his own account, subject to his own order, they remain his until some further act is done to transfer the title to the consignee. *Baker v. Fuller*, 21 Pick. 818.

of March, 1890, Wilkins replied to the letter of the defendants, asking them to explain why they wished to have the order canceled. The case shows no reply to this letter. On the 6th of June, 1890, the plaintiff shipped to defendants by railroad 1,400 bobbins, and on July 25, 1890, the balance of the 6,000 were shipped

in same way. Both lots arrived safely in Paterson, and on the 14th of August, 1890, the defendants wrote to the plaintiff that they would not accept or pay for them. This suit was instituted to recover the price agreed upon when the order was given.

The first ground of defense is that the con-

If the property is delivered to the carrier as that of the vendor and subject to his order, no title will pass to one claiming as vendee. *Lester v. McDowell*, 18 Pa. 91.

If the goods are consigned to the shipper in the care of the purchaser, the title will not pass so as to place them at the purchaser's risk. *Ward v. Taylor*, 56 Ill. 494.

The title does not pass if the property is shipped consigned to the seller. *Sohn v. Jervis*, 101 Ind. 878.

If the shipping receipts direct the carrier to deliver the goods to the shipper's order, the title will not pass so as to authorize a delivery to the buyer until such order has been given. *Libby v. Ingalls*, 124 Mass. 503.

Taking the bill of lading in the name of the consignee prevents the title from passing until the bill of lading is assigned. *McCormick v. Joseph*, 77 Ala. 238.

A seller's taking a bill of lading in his own name is strong evidence against an intention to pass title. *Reynolds v. Scott* (Cal.) July 18, 1884.

If, by the bill of lading, the goods are to be delivered to the order of the vendor, it clearly operates, in the absence of rebutting evidence, to retain the title in the vendor, and indicates an intention that the property shall not pass. *Alabama G. S. R. Co. v. Mount Vernon Co.* 84 Ala. 178.

The fact that the buyer has paid for the property before it is placed on board will not give him a title to it if, prior to its shipment, he receives a telegram from the seller that it would not be shipped to him, and the seller takes bills of lading subject to his own order, or that of a fictitious person, which he indorses to a third person. *Gabaron v. Kreeft*, L. R. 10 Exch. 274, 44 L. J. Exch. 238, 33 L. T. N. S. 365, 24 Week. Rep. 146.

In case of a contract to deliver fifty barrels of potash for cash on delivery, where the buyer procured a vessel for the shipment and directed the potash to be delivered on the vessel and the sellers so delivered it but took receipts in their own names, which were stolen by the buyer and a bill of lading issued to him on the faith of them, it was held that the title had not passed. *Brower v. Peabody*, 13 N. Y. 121.

But although the goods are made deliverable to the consignee's order, the title will pass if he sends the consignee a letter containing an order on the carrier for their possession, which is accepted by the carrier. *Hatch v. Lincoln*, 13 Cush. 34; *Hatch v. Bayley*, 12 Cush. 27.

So the mere fact of the consignee's taking the bill of lading in his own name is not in all cases to be taken as conclusive. Other circumstances may be such as to control its effect.

If the contract is to deliver the goods on the rail of the vessel, the fact that after they are so delivered the seller takes a bill of lading in his own name is merely evidence for the consideration of the jury as to whether he intended to deliver or not. *Gibbons v. Robinson*, 63 Mich. 146.

If, after receiving an advance from a commission merchant, a consignor ships a carload of goods consigned to the commission merchant, accompanied by an invoice of the shipment with a letter of advice stating, "We deliver this load on account of our indebtedness,"—the fact that the bill of lading is taken by the consignor in his own name and not 33 L. R. A.

forwarded, will not prevent the title from passing. *Straus v. Wessel*, 80 Ohio St. 211.

If, after acceptance of the draft drawn for the purchase money, the goods are delivered to the carrier, the passage of the title will not be prevented by the taking of the receipts by the seller in his own name. *Hall v. Richardson*, 16 Md. 397, 77 Am. Dec. 303.

A more conclusive fact is the one as to the location of the risk during transit.

If the goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee. *The Frances*, 12 U. S. 8 Cranch, 418, 3 L. ed. 609.

Conversely in *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Exch. 164, 47 L. J. Exch. 418, 38 L. T. N. S. 597, it is said that if the property is shipped at the buyer's risk, the fact that the seller takes the bills of lading in his own name and retains control of them will show nothing further than that he intended to secure the price, and that upon tender thereof the buyer would have an absolute right of property in the goods, notwithstanding the bills of lading had been indorsed to a third person.

If the goods are shipped on account and at the risk of the consignee, the mere fact that the bills of lading are taken making the goods deliverable to the consignee's own order, does not prevent the passing of title so that, if the consignee obtain possession, the consignor cannot recover, although there may be a liability on the part of the carrier for delivering contrary to his orders. *Coxe v. Harden*, 4 East, 211, 1 Smith, 20.

In *Nichols v. Client*, 3 Price, 547, it is said that wherever a delivery of goods to a carrier consigned to a person at a distance has been considered as a delivery to the consignee it has been invariably at his proper risk and under a formal consignment by indorsement of bills of lading.

If a merchant sends goods to another on the latter's account and draws bills on him for such goods the title will pass, although the money is not paid. *Godfrey v. Furzo*, 3 P. Wms. 185.

The words "free on board" in a contract of sale indicate that after the goods are shipped they will be on account and at the risk of the buyer. *Stook v. Ingila*, L. R. 12 Q. B. Div. 578.

If the consignor advises the consignee by letter that he has chartered a ship on his account and encloses him an invoice of the goods laden on board, which were therein expressed to be for account and risk of the consignee, the title vests in the consignee; and if the consignor's agent obtains possession of them and refuses to deliver them without immediate payment, the consignee may maintain trover for them. *Walley v. Montgomery*, 3 East, 585.

And if, in addition to placing the goods at the risk of the consignee, the bill of lading is indorsed and transmitted to him, the intention to vest the title in him is usually regarded as conclusively shown.

The property will vest upon the delivery of the goods on board, on account and risk of the consignee, and transmission of the bill of lading. *Key v. Cotesworth*, 7 Exch. 565, 23 L. J. Exch. 4.

Where, in response to an order to ship goods, they are placed on board a ship in regular course

tract was made by Ramsey & Gore, and not by the Ramsey & Gore Manufacturing Company, and that, therefore, the motion to nonsuit on the trial should have prevailed. There is no merit in this contention. The letter of August 14, 1890, acknowledges that it is the contract of the company.

The second objection is that all the bobbins were not sent at once, and that the defendants were not bound, under the contract, to accept less than the whole number ordered. Conceding this to be so, the sufficient answer is that this objection was not taken on the trial below, and, when the letter notifying the plaintiff of

of trade and a bill of lading taken making them deliverable to the shipper's order, which is immediately indorsed to the buyer and transmitted to an agent for him, the title passes so as to place the goods at the risk of the buyer. *Browne v. Hare*, 8 Hurlst. & N. 484, 27 L. J. Exch. 373, affirmed in 4 Hurlst. & N. 822, 20 L. J. Exch. 6, 5 Jur. N. S. 711, 7 Week. Rep. 619.

If the goods are delivered to the carrier for the account and at the risk of the consignee, and the invoice and bill of lading transmitted to him, the title is passed so that the subsequent failure of the consignee to perform his contract by sending a banker's draft in payment, will not revert the title in the consignor so as to enable him to regain possession of the property. *Wilmshurst v. Bowker*, 8 Scott, N. R. 571, 7 Mann. & G. 383, reversing 3 Scott, N. R. 273, 2 Mann. & G. 792. And also apparently overruling the same case on a former hearing, 5 Bing. N. C. 541.

A debtor who accepts an order from his creditor to purchase goods, and after complying with it puts them on creditor's vessel sent for them, as the creditor's, advises him of the shipment on his account and risk and remits him the invoice, thereby passes the title and he cannot regain it by subsequently sending the bill of lading payable to the order of — to his agent, accompanied by a draft, with instruction to deliver the bill of lading to the creditor only in case he accepts the draft. *Ogle v. Atkinson*, 5 Taunt. 759, 1 Marsh. 828.

Shipping receipts forwarded to the consignee will give him the same rights that he would acquire by a bill of lading. *Davis v. Bradley*, 28 Vt. 113, 65 Am. Dec. 235.

Bill of lading in name of consignee.

The presumption is that the consignees named in the bill of lading to whom the property is to be delivered on the sole condition that they pay the freight, have the title thereto. *Webb v. Winter*, 1 Cal. 417.

A delivery of goods in the usual course of business to be transported to the buyer and the taking of a bill of lading in the buyer's name transfers the title to the goods and places them at the buyer's risk. *Putnam v. Tillotson*, 13 Met. 517.

The actual shipment of goods pursuant to the order of the buyer on board a vessel designated by him for that purpose, under a bill of lading making the goods deliverable to the buyer, passes the title to him, and the seller cannot defeat his right by retaining the bill and sending it to his own agent with directions not to deliver it until the goods are paid for. *Stanton v. Bager*, 16 Pick. 497.

The delivery by a shipper to a carrier of goods consigned to a third person and a bill of lading taken in the name of such third person, for the purpose of securing an existing indebtedness from the shipper to the third person, operates as a transfer of the legal title, although the third person has not signified his assent to the transaction. *Grove v. Brien*, 49 U. S. 8 How. 499, 18 L. ed. 1143.

Where goods were shipped under a bill of lading stating that they were "shipped by order" and were to be delivered "to order or assignee," the court held that the only proof of ownership was the possession of the bill of lading, and that, although the shipment was to factors, for sale and accounting of profits, yet persons to whom the

factors had assigned the bill of lading were entitled to the property. *Glidden v. Lucas*, 7 Cal. 28.

If lumber is delivered on board cars consigned to the buyer, the fact that the bills of lading are retained by the laborers to secure payment of their wages is not sufficient to defeat the passing of the title. *Hope Lumber Co. v. Foster & L. Hardware Co.* 58 Ark. 193.

If the goods are consigned by the bill of lading to the consignee, the fact that the bill is retained by the consignor and sent to his agent with directions not to deliver it until the price is paid, will not prevent the title from passing. *Robinson v. Pogue*, 35 Ala. 267.

But in one case it was held that a bill of lading by which goods are made deliverable to the consignee is revocable until the goods or bill of lading are delivered to him. *Mitcheil v. Ede*, 11 Ad. & El. 388, 3 Perry & D. 513.

So that delivery of goods on board a ship belonging to the consignee and taking a bill of lading making the goods deliverable to the consignee, he paying the freight, will not transfer the title; but the consignor may change the destination of the goods by subsequent indorsement on the bill of lading. *Ibid.*

Draft against bill of lading.

If property is consigned to a correspondent, subject to a bill of exchange, the title will not pass until the acceptance of the bill. *Brandt v. Bowlby*, 2 Barn. & Ad. 923.

If the bill of lading is attached to a bill of exchange and forwarded to a bank for collection the title will not pass. *Seelingson v. Philbrick*, 6 Fed. Rep. 601.

If goods are delivered to a carrier to be forwarded to a consignee for sale, the fact that the bill of lading is made out in favor of the consignee and that the consignor is indebted to the consignee for previous advances, will not operate to transfer the title to the consignee, if a draft is drawn against the shipment and attached to the bill of lading and placed in the hands of a bank to be held until the draft is accepted. *Bank of Rochester v. Jones*, 4 N. Y. 497, 55 Am. Dec. 390.

If goods are ordered to be shipped with a draft at sight attached to the bill of lading, the direction is evidence that the title to the goods is not to pass until the draft is paid. *Indiana Nat. Bank v. Colgate*, 4 Daly, 41.

Persons to whom property is consigned for sale have no right to receive and retain the property and dishonor the draft drawn against it, although there was due them from the consignor a balance on an old account. *Commercial Bank of Keokuk v. Pfeiffer*, 108 N. Y. 942.

If a draft accompanies the bill of lading, the consignee cannot claim title to the property and refuse to accept the draft. *First Nat. Bank v. Crocker*, 111 Mass. 168.

Shipping the goods according to the orders and intentions of the purchaser and handing over bills of lading to his agents to be forwarded to his consignees will pass the title, although he subsequently refuses to sign the draft upon the consignees, which was to be the seller's security for payment of the purchase price. *Harrison v. Williamson*, 3 Edw. Ch. 430, 6 L. ed. 455.

If the goods are deliverable to the order of the

the defendants' refusal to accept was written, the whole number of bobbins were in Paterson, of which fact the defendants had notice.

The third ground of defense is that the order to stop for a time terminated the plaintiff's right to fill the order, but to this I cannot agree. His right, under the contract, was to

proceed at once with the manufacture of the goods, and to make delivery within a reasonable time. The defendants had no right to require him to stop temporarily, and could not, by such notice, change the plaintiff's rights under the contract.

The fourth ground relied upon by the de-

consignor, and the bill of lading with draft attached is forwarded for collection, no title passes. *Alderman v. Eastern R. Co.* 115 Mass. 238.

The fact that the contract provides that the goods shall be shipped free on board does not make a delivery to the carrier a delivery to the purchaser, if the bill of lading is taken to the vendor's order and attached to a draft transmitted to the vendor's agent for collection. *Erwin v. Harris*, 37 Ga. 363.

Retention of the bill of lading and forwarding it to agents to deliver to the vendee on payment of the draft, of themselves, sufficiently indicate an intention to retain possession and control of the property shipped. *Bergeman v. Indianapolis & St. L. R. Co.* 104 Mo. 77.

Where the consignor sends the bill of lading to his agent at the port of delivery, accompanied by a bill of exchange to be accepted by the consignee, with directions to hand over the bill of lading when the bill of exchange is accepted, the presumption is that the title should not pass until acceptance. *Shepherd v. Harrison*, L. R. 5 H. L. 116, 40 L. J. Q. B. 144, 24 L. T. N. S. 857, 20 Week. Rep. 1, affirming L. R. 4 Q. B. 196, 493, 38 L. J. Q. B. 105, 177.

But it has been held that if the goods are delivered under a bill of lading stating that they are on account of the consignee as his own goods and to be delivered to him, the fact that bills are drawn for the unpaid purchase money is not sufficient to prevent the passing of the title. *Ogle v. Atkinson*, 1 Marsh. 323, 5 Taunt. 759.

So if the goods were delivered to the carrier consigned to the buyer, and the bill of lading taken in his name, the jury may be authorized to find an intention to deliver to him, although the bill of lading was attached to a draft and sent to a bank with direction not to deliver the bill of lading until the draft was accepted. *Wigton v. Bowley*, 120 Mass. 353.

And the mere fact that the master of the vessel attempts to withhold the goods until the consignee accepts the draft drawn against the bill of lading, will not prevent the delivery upon the boat passing the title. *Groning v. Mendham*, 5 Maule & S. 180.

It has been held that if the bill of lading is taken in the name of the consignor and attached to a draft, the title will not pass to the consignee until the draft is paid. *Jenkyns v. Brown*, 14 Q. B. 493, 19 L. J. Q. B. 293, 14 Jur. 505.

So the fact that the bill of lading is taken in the name of the shipper and attached to a draft and forwarded through a bank for collection does not import an intention to give credit, so that the buyer is entitled to the bill of lading upon acceptance of the draft. *Minnesota Secur. Bank v. Luttgen*, 20 Minn. 383.

Conversely it has been held that when a bill of lading is transferred to the consignee, and at the same time he accepts the bill of exchange for the value of the goods, he acquires an absolute interest. *Dows v. Cobb*, 10 N. Y. Leg. Obs. 161.

There seems to be no doubt but that the payment of the draft and receipt of the bill of lading will vest the title in the consignee. *Forchheimer v. Stewart*, 66 Iowa, 504.

Special contracts or courses of dealing.

When goods are placed in the charge of a carrier 23 L. R. A.

under a contract by a mining company to ship to a bank the product of its mine in consideration of advances made by the bank, and that the carrier should be regarded as an agent of the bank, the title passes. *First Nat. Bank v. McAndrews*, 7 Mont. 180.

After a boat is completely laden and a receipt for the contents taken from the master and the receipt is sent to a consignee accompanied by an agreement that the consignee may have the property if he will accept a draft against it, the acceptance of the draft passes the title so that the property cannot be subsequently appropriated to another person. *Bryans v. Nix*, 4 Mees. & W. 778, 1 Hurlst. & N. 480.

Shipment, accompanied by notice thereof in accordance with the order, passes title to the buyer. *Schmertz v. Dwyer*, 68 Pa. 353.

If in accordance with a course of dealing, goods are consigned, a letter of advice is forwarded, and a bill of exchange drawn against the consignment and accepted by the consignee, the title passes, although there is no express agreement that it should do so. *Holbrook v. Wight*, 24 Wend. 199, 25 Am. Dec. 607.

In *Tooke v. Hollingworth*, 5 T. R. 215, 3 H. Bl. 501, where, by agreement the consignor, was to send the consignee all of a certain kind of property which he could at a certain price and who from time to time drew upon the consignee for the value, and having made drafts sent some property to enable the consignee to meet them, after the consignee had become bankrupt, it was held that the consignor was entitled to get the property back, on the ground that it was sent for a particular purpose, and that that purpose not having been answered the property remained in him.

Imposition of conditions.

The imposition of conditions on the consignee will prevent the passing of title until the conditions are complied with. *The Frances*, 13 U. S. 9 Cranch, 133, 3 L. ed. 606.

The title will not pass if the property is shipped subject to the performance by the vendee of a condition precedent. *Millhiser v. Erdman*, 98 N. C. 282.

If the sale is so conditional that delivery to the buyer himself would not pass title until the condition is complied with, a delivery to the carrier will not have that effect. *Stone v. Perry*, 60 Me. 43.

Where coal was sold and shipped on board a vessel chartered by the buyer to be paid for in cash against bill of lading in the hands of the seller's agent at the port of delivery, it was held that no property passed until the condition was fulfilled. *Moakes v. Nicolson*, 19 C. B. N. S. 290, 34 L. J. C. P. 273.

If the sale is on condition that notes shall be sent in payment, the title will not pass until the notes are sent, although the goods are delivered to a carrier for transportation. *Hirschhorn v. Canney*, 96 Mass. 149.

If the goods are delivered to a carrier under a contract for payment of cash on arrival, the payment of the cash is a condition precedent to the passing of title. *Daugherty v. Fowler*, 10 L. R. A. 314, 44 Kan. 623.

But a stipulation for payment on arrival will not of itself prevent the title from passing, or make either payment or arrival a condition precedent.

fendants is the debatable one, and that is that there was no acceptance by the defendants, and therefore that the title did not pass to defendants, and the price consequently cannot be sued for; that the only remedy of the plaintiff is an action of damages for nonacceptance. If the question in this case was whether there

was delivery and acceptance to take the case out of the statute of frauds, it would be clear that the plaintiff could not recover, for there was a refusal to accept. In this case the contract is conceded to be a valid contract in writing, and the question presented is the narrower one, whether there was such a delivery as

thereto, if the seller has appropriated the goods to the contract by delivering them to a carrier designated by the buyer, or, in the absence of such designation, to a carrier in due course of trade. *Farmers Phosphate Co. v. Gill*, 1 L. R. A. 467, 69 Md. 537.

In *Norfolk Southern R. Co. v. Barnes*, 104 N. C. 25, it was held that if goods are sold and shipped to be delivered upon payment of the purchase money, the right of property passes to the buyer, but the right of possession remains in the seller until the price has been paid; and that if the buyer obtains possession without paying the price and sells to a bona fide purchaser, the seller cannot retake the goods.

The fact that the payment was to be made upon the arrival of the goods does not impose the risk of transit on the seller, if his contract was to deliver on a certain boat at Boston bound for the buyer's place of residence. *Barry v. Palmer*, 19 Me. 303.

The mere fact that the obligation to pay is dependent upon the acceptance of the materials by a building committee will not prevent the passing of title, if the materials shipped were of the quality which the contract called for, so that the committee was bound to accept. *Rechtin v. McGary*, 117 Ind. 182.

d. Sufficiency of change of possession as regards creditors.

The delivery to the carrier is a sufficient change of possession to make the sale valid as against attaching creditors. *Hall v. Gaylor*, 37 Conn. 550.

Under a completed sale of hay to be delivered at a river landing, there is a sufficient change of possession when it is delivered at that place and there taken possession of by an agent of the buyer and by him placed on board a vessel for transportation to market, to prevent its being attached as the property of the vendor. *Schmidt v. Nunan*, 63 Cal. 371.

e. Place where sale is consummated.

Intimately connected with the question how far delivery to a carrier is a delivery to a buyer is the further one as to what is to be considered as the place where a sale is consummated.

In *Tegler v. Shipman*, 38 Iowa, 194, 11 Am. Rep. 118, the question of the place of sale seems to be made to depend upon the fact as to where the contract was completed rather than where the property was delivered, the court stating that if an agent for the sale of liquors forwarded an order to his principals in another state, to be by them accepted or rejected at their pleasure, the sale would be in the latter state, but if he made the sale and forwarded the statement of it to them to be filled then the sale must be held to have been made where the agent transacted the business.

But the place of delivery is usually regarded as the important fact.

A written order sent from one state to another and the shipment of the goods in the latter state according to the order makes the sale complete there, so as not to be within inspection laws of the state where the buyer resides. *Atlantic Phosphate Co. v. Ely*, 32 Ga. 433.

In the absence of any agreement between the parties to the contract, a delivery of goods ordered to a carrier is in law a delivery to the purchaser, so 22 L. R. A.

as to make the place of sale where the goods were so delivered. *Kline v. Baker*, 99 Mass. 253.

The place of sale of intoxicating liquors is where the sale is completed by a delivery of liquors in fulfillment of the general order to the carrier. *Abberger v. Marrin*, 102 Mass. 70; *Brookway v. Maloney*, Id. 308; *Dolan v. Green*, 110 Mass. 322; *Frank v. Hoey*, 128 Mass. 293; *Dunn v. State*, 3 L. R. A. 190, 32 Ga. 27; *Herron v. State*, 51 Ark. 133; *Sarbecker v. State*, 66 Wis. 171, 55 Am. Rep. 324; *Territt v. Bartlett*, 21 Vt. 134; *Whitlock v. Workman*, 15 Iowa, 354; *Williams v. Feinman*, 14 Kan. 238; *Torrey v. Corlies*, 38 Me. 333; *Banohor v. Cilley*, 38 Me. 553; *Kling v. Fries*, 33 Mich. 275; *Sullivan v. Sullivan*, 70 Mich. 533; *Pearson v. State*, 4 L. R. A. 335, 66 Miss. 510; *Woolsey v. Bailey*, 27 N. H. 217; *Smith v. Smith*, 37 N. H. 24; *Garland v. Lane*, 46 N. H. 245; *Boothby v. Plaisted*, 51 N. H. 430, 12 Am. Rep. 140; *Garbracht v. Com.* 96 Pa. 449, 42 Am. Rep. 550; *Mack v. Lee*, 13 R. I. 293; *Dame v. Flint*, 64 Vt. 533; *Banohor v. Warren*, 33 N. H. 133.

The delivery of liquors to a carrier to be transported to a buyer in another state in pursuance to an order received by mail completes the sale and passes the title. *Oroutt v. Nelson*, 1 Gray, 536.

That the seller undertakes that the liquors shall remain good for a reasonable time after reaching its destination, and, if destroyed in transit through any fault of the seller, he would bear the loss, does not fix the place of the buyer's residence rather than that of the seller's residence as the place of sale. *Arnold v. Prout*, 51 N. H. 537.

The place of shipment of the goods is the place of sale within the law providing for a tax on business. *Shriver v. Pittsburgh*, 66 Pa. 444.

The fact that the dealer himself takes the order will not complete the contract so as to make the buyer's residence the place of sale, if the order is transmitted and filled by delivery to a common carrier at the seller's place of residence in another state. *State v. Hughes*, 22 W. Va. 755.

The fact that the order is taken by the seller himself does not prevent his place of business, where he sets apart the liquor and delivers it to a carrier, from being the place of sale. *Sortwell v. Hughes*, 1 Curt. C. C. 244.

Receipt by merchants in one state of an order from their agent in another state, who has authority only to solicit orders, followed by the filling of the order and delivery to a carrier for transportation, will make the place of sale the seller's residence, and it is immaterial that he undertook to pay the freight. *Finch v. Mansfield*, 97 Mass. 39.

But if the seller of liquor undertakes to deliver it at the buyer's residence in another town, the sale may be found to have been completed there. *Com. v. Burgett*, 136 Mass. 450; *Well v. Golden*, 141 Mass. 384.

So if a seller of liquor resident in one state sends his agent to take orders in another state, agreeing to deliver the goods in the latter state, the sale will not be complete upon delivery of the liquors to the carrier in the former. *Suit v. Woodhall*, 113 Mass. 391.

If one receiving an order for intoxicating liquors transmits it to his agent where the buyer resides, to be by him delivered to the buyer, the sale will not be completed by delivery to the carrier. *Berger v. State*, 50 Ark. 20.

And if the liquors are to be sent subject to the

passed the title to the vendees, so that they may be held for the purchase price. The vendor claims that the delivery of the goods to the common carrier constituted a delivery to the purchasers, and passed the title to them, subject only to the right of stoppage *in transitu*. It is not asserted that the receipt by the

carrier constitutes acceptance by the vendees; it is only a delivery, not an acceptance. That the carrier, in the absence of authority to accept, represents the purchasers only to receive and forward. Although the cases upon this subject are not entirely in accord, the authorities generally hold that a delivery to a com-

approval of the buyer, the place of sale will be held to be that of the buyer's residence. *Rindskopf v. D'Ruyter*, 39 Mich. 1, 38 Am. Rep. 340.

If the contract is that the liquors need not be paid for unless they suit the buyer, the sale is not complete until after the purchaser has received the liquors and had an opportunity to make an election. *Wilson v. Stratton*, 47 Me. 120.

The fact that liquors are sold under a contract that they may be returned if not as represented does not, however, prevent the title from passing when they are delivered to the carrier. *Schlesinger v. Stratton*, 9 R. I. 373.

Under a statute making void all contracts or agreements relating to the sale of intoxicating liquors, if the seller takes the order himself the transaction will be void, although the liquors are put up and shipped at his place of business in another state. *Webber v. Howe*, 38 Mich. 150, 24 Am. Rep. 590.

Goods sent C. O. D.

The courts are at variance as to the effect of sending the goods C. O. D. On one side it is held that—

If the buyer directs the goods to be sent to him by express C. O. D., a delivery to the express company passes the title to the buyer. *Crook v. Cowan*, 84 N. C. 743.

When goods are forwarded through a carrier designated by the buyer marked C. O. D., the carrier is the agent of the purchaser to receive the goods from the seller and the agent of the seller to collect the price from the purchaser, and the sale is complete when the goods are delivered to the carrier. *Pilgreen v. State*, 71 Ala. 368; *State v. Carll*, 43 Ark. 353, 51 Am. Rep. 566; *Brechwald v. People*, 21 Ill. App. 212; *Com. v. Fleming*, 5 L. R. A. 470, 120 Pa. 138.

In case intoxicating liquors are sent into the state C. O. D., they may, if seized by the state, be reclaimed by the buyer, if not liable to confiscation, since the title passed when the bargain was struck, subject to the vendor's lien, so as to give the buyer a right of property in the liquors. *State v. Intoxicating Liquors*, 73 Me. 273.

Conversely it is held that—

The title to liquor sold in retail quantities and shipped C. O. D. remains in the seller until it is delivered and the price paid, so as to make the seller liable for a violation of the liquor laws, if he is not licensed to sell in the place at which the delivery is made. *United States v. Shriver*, 23 Fed. Rep. 124; *S. C. sub nom. People v. Shriver*, 31 Alb. L. J. 153, *Chicago Legal News*, Feb. 21, 1895.

Goods sent C. O. D. are at the risk of the vendor, although sent by the carrier named by the vendee. *Baker v. Bourcault*, 1 Daly, 23.

When liquors are sent C. O. D., the carrier is the agent of the consignor, and the title does not pass until they are delivered and paid for. *State v. Four Jugs of Intoxicating Liquor*, 58 Vt. 140.

The fact that goods are shipped C. O. D. indicates an intention by the seller to retain possession, and delivery to the carrier is not a delivery to the buyer. *Wagner v. Hallack*, 3 Colo. 173.

The decisions may be partly reconciled by determining who directed the shipment.

The judge, in delivering the opinion in *United States v. Cline*, 26 Fed. Rep. 537, recognizes the rule that when liquors are delivered to a carrier marked

C. O. D., the carrier is the agent of the seller, and the sale is not completed until they are delivered and the price paid.

If the articles shipped are manufactured at the order of the purchaser, the mere fact that they are shipped C. O. D. will not prevent the manufacturer from collecting for his services. *Higgins v. Murray*, 73 N. Y. 252.

1. Effect of receipt by carrier to satisfy statute of frauds.

There is no sufficient acceptance to take the case out of the statute of frauds, where the goods are delivered to a common carrier, who is designated by the buyer but not expressly authorized to accept them, if they never come into the buyer's actual possession and he never sees, examines, or exercises any control over them or receives the bill of lading. *Johnson v. Cuttle*, 105 Mass. 447, 7 Am. Rep. 543.

A delivery of goods in accordance with a parol contract to a general carrier not designated or selected by the buyer, does not constitute such a delivery and acceptance as to satisfy the statute of frauds. *Rodgers v. Phillips*, 40 N. Y. 519.

If the statute of frauds requires acceptance of the goods, receipt by a carrier designated by the buyer is not sufficient to show acceptance. *Fontaine v. Bush*, 40 Minn. 141.

Delivery of goods to a general ship, although corresponding closely to the description given by the buyer, if accompanied by a bill of lading in the name of the seller's agent, does not constitute such an acceptance by the buyer as will take the case out of the statute of frauds. *Frostburg Min. Co. v. New England Glass Co.*, 9 Oush. 115.

If the goods are to be sent subject to the buyer's approval, a delivery to the carrier will not be sufficient to take the case out of the statute of frauds. *Rindskopf v. D'Ruyter*, 39 Mich. 1, 38 Am. Rep. 340.

The fact that the buyer designates a particular carrier for the transportation of the goods, does not empower him to accept them so as to take the case out of the statute of frauds. *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533.

The shipment on board a vessel selected by the vendor, and the signature of a bill of lading making the goods deliverable to the vendee's agent, though a sufficient delivery to support an action for goods sold and delivered, is not sufficient to make a binding contract within the statute of frauds. *Meredith v. Meigh*, 3 Bl. & Bl. 364, 23 L. J. Q. B. 401, 17 Jur. 649.

Where goods were verbally ordered, with no order given as to the manner of sending, the delivery to the carrier directed to the purchaser was not sufficient to take the case out of the statute of frauds so as to pass the title to the purchaser and prevent the seller from maintaining an action against the carrier for their loss. *Coats v. Chaplin*, 2 Gale & D. 552, 3 Q. B. 453, 6 Jur. 1123.

A delivery of goods on board a ship chartered by the buyer is not sufficient to take the case out of the statute of frauds. *Acebal v. Levy*, 10 Bing. 876, 4 Moore & S. 217.

The receipt by the carrier of goods under a parol contract for sale, to be transported to the buyer, does not constitute such an acceptance as to take the case out of the statute of frauds, if the carrier was not specially authorized to accept it so as to bind the buyer. *Atherton v. Newhall*, 123 Mass. 141, 25 Am. Rep. 47.

mon carrier of the goods, properly addressed to the vendee, is a delivery to the vendee, subject to the vendor's right of stoppage *in transitu*, and to the vendee's right to reject for nonconformity to the contract. *Brown v. Hodgson*, 2 Campb. 87; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Dunlop v. Lambert*, 6 Clark

& F. 600; *Fragano v. Long*, 4 Barn. & C. 219; *Dawson v. Peck*, 8 T. R. 330; *Krulder v. Ellison*, 47 N. Y. 86, 77 Am. Rep. 402; *Wilcox Silver Plate Co. v. Green*, 73 N. Y. 17; *Spencer v. Hale*, 30 Vt. 816, 73 Am. Dec. 309; *Stanton v. Eager*, 16 Pick. 467; *Hunter v. Wright*, 12 Allen, 548; *Hall v. Richardson*, 10

Mere authority to receive goods for transportation carries no implied authority to accept them so as to satisfy the statute of frauds. *Allard v. Gressert*, 61 N. Y. 1.

And the great weight of authority is that delivery to a carrier is not sufficient to take the case out of the statute of frauds. *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461; *Langeman v. Stevens* 5 N. Y. Leg. Obs. 19; *Sherman v. Williams*, 4 N. Y. Week. Dig. 415; *Billin v. Henkel*, 9 Colo. 394; *Simmons Hardware Co. v. Mullen*, 33 Minn. 196; *Norman v. Phillips*, 14 Mees. & W. 277, 14 L. J. Exch. 306, 9 Jur. 832; *Rickard v. Moore*, 33 L. T. N. S. 841; *Tower v. Tudhope*, 37 U. C. Q. B. 200; *Smith v. Hudson*, 6 Best & S. 431, 34 L. J. Q. B. 145, 11 Jur. N. S. 622, 12 L. T. N. S. 377, 18 Week. Rep. 683; *Hart v. Bush*, El. Bl. & El. 494, 37 L. J. Q. B. 271, 4 Jur. N. S. 633; *Nicholson v. Bower*, 1 El. & El. 173, 23 L. J. Q. B. 97, 5 Jur. N. S. 246; *Lloyd v. Wright*, 23 Ga. 215; *Denmead v. Glass*, 30 Ga. 637; *Hausman v. Nye*, 62 Ind. 486, 30 Am. Rep. 199; *Keiwert v. Meyer*, 42 Ind. 587, 30 Am. Rep. 206; *Maxwell v. Brown*, 39 Me. 96, 63 Am. Rep. 606; *Grimes v. Van Vechten*, 20 Mich. 410; *Smith v. Brennan*, 62 Mich. 342.

But in *Hart v. Sattley*, 3 Campb. 538, it was decided that if the delivery is to a carrier who has been in the habit of receiving and transporting goods from the buyer to the seller, the carrier must be considered as having been constituted by the buyer his agent to accept the goods within the statute of frauds.

Hart v. Sattley was recognized as authority in *Sortwell v. Hughes*, 1 Curt. C. C. 244.

And it has been held in Vermont that delivery to a carrier selected and named by the purchaser and their acceptance by him constitutes a sufficient receipt and acceptance to take a parol sale out of the statute of frauds. *Spencer v. Hale*, 30 Vt. 314, 73 Am. Dec. 309; *Strong v. Dodds*, 47 Vt. 348.

The buyer will not be permitted to set up the statute of frauds to defeat the action if the goods are placed on the vessel according to his directions and are afterwards taken possession of by him and treated as his own. *Goddard v. Demeritt*, 48 Me. 211.

In *Morton v. Tibbitt*, 15 Q. B. 423, 19 L. J. Q. B. 382, 14 Jur. 609, the buyer had purchased wheat by sample and directed it to be sent to him by carrier. It was so sent and he took the sample and after its arrival attempted to sell it by the sample, and the court held that whether or not the delivery to the carrier was sufficient, his acts of ownership subsequently were evidence from which a jury might find acceptance sufficient to take the case out of the statute of frauds.

A letter to the seller, "I have spoken to Warner and hired him to freight" the goods down the river. "You will please deliver them to him,"—is a sufficient appointment of Warner as agent to receive delivery within the statute of frauds. *Thompson v. Menck*, 4 Abb. App. Dec. 400.

Where there was a parol contract for the sale of hay, to be delivered on a barge, of which the buyer was half owner, and he directed his partner to go with the barge to receive the hay, the trial court held that there was a sufficient acceptance when the hay was placed upon the barge to take the case out of the statute of frauds, and the appellate court held that the correctness of this holding was not questioned in such a way that it could be passed upon on appeal. *Silver v. Bowne*, 55 N. Y. 559, 22 L. R. A.

But a mere request of the person in whose hands the property is to see that it is delivered and measured up properly, accompanied by a request to send it by a certain boat, does not make a delivery to the boat a sufficient acceptance to take the case out of the statute of frauds. *Astey v. Emery*, 4 Maule & S. 232.

The acceptance and dealing with the bill of lading may also constitute an acceptance within the statute of frauds. *Currie v. Anderson*, 2 El. & El. 522, 20 L. J. Q. B. 37, 6 Jur. N. S. 442, 3 Week. Rep. 274.

Although delivery of a bill of lading at the buyer's office from which he is absent on account of sickness, and which he returns as soon as he is notified of its presence, is not a sufficient acceptance of the goods to take the case out of the statute of frauds. *Quintard v. Bacon*, 99 Mass. 185.

If the buyer selects the particular goods and specifies the carrier to whom they are to be delivered, a delivery to and receipt by the carrier will constitute such an acceptance as to take the case out of the statute of frauds. *Glen v. Whitaker*, 51 Barb. 451.

And after the buyer has accepted the goods delivery to a carrier designated by the buyer will constitute such a delivery and acceptance as will take the case out of the statute of frauds. *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721.

And a delivery of goods to a carrier is a delivery to a buyer, though the carrier was not designated by him, so as to take the case out of the provisions of a statute of frauds, providing that the sale shall be void *inter alia* when no part of the property is delivered. *Bullock v. Stehger*, 4 McCrary, 184, 13 Fed. Rep. 244; *Liggett & M. Tobacco Co. v. Collier* (Iowa) Oct. 9, 1898.

g. Right to maintain action.

There is no definite rule on which all the courts agree as to who is the proper one to maintain an action for nondelivery of the goods or their loss while in transit. Actions have been brought by consignor, by consignee, and by owner, and in most instances something in the facts of the case has made the action proper so that many of the decisions are simply to the effect that the one who brought the action could maintain it without attempting to settle definitely that it could have been maintained by no one else.

Owner may sue.

The owner should bring the action, and the consignee is presumed to be the owner in the absence of proof to the contrary. *Congar v. Galena & C. U. R. Co.* 17 Wis. 477.

If the bill is general to A., and the invoice only shows that they are upon account of B., the property is in A. and he must bring the action. *Evans v. Marlett*, 1 Ld. Raym. 271, 12 Mod. 158, 8 Salk. 280.

If, by the bill of lading, the goods are, to be delivered to A. to the use of B., B. is the owner and must bring the action. *Ibid.*

In an action by the owner of goods lost in transit, a prior recovery by the consignor is no defense. *Coombs v. Bristol & E. R. Co.* 3 Hurlst. & N. 1, 27 L. J. Exch. 202.

Right of consignor.

If the consignor is the owner of the goods he may maintain the suit.

Md. 896, 77 Am. Dec. 803; *Magruder v. Gage*, 83 Md. 844, 8 Am. Rep. 177; 1 Benjamin, Sales, §§ 161, 181; Story, Sales, § 806; 2 Kent, Com. 499.

The distinction is made in some of these cases that, in order to give to the delivery to the carrier the effect of a delivery to the buyer,

the carrier must be selected or named by the buyer. When the contract of the manufacturer is simply to make the goods at an agreed price, he has fully executed the agreement on his part when the goods are produced at his factory, ready to be delivered on demand. In that case, however, he is not authorized by the

If, by the contract, the title did not pass to the consignee, the consignor is the proper person to sue for the loss of the goods. *Madison, L. & P. R. Co. v. Whitesel*, 11 Ind. 55.

The consignor may show that the goods belonged to himself and not to the consignee, for the purpose of maintaining an action against the carrier for their loss. *Harrison v. Hixson*, 4 Blackf. 226.

If goods are forwarded for sale on approval, the action for their loss must be brought by the consignor. *Swain v. Shepherd*, 1 Mood. & R. 223.

If there is such fraud in the case that there has been no sale, the delivery to the carrier will not pass the title out of the shipper so as to prevent his bringing action for a wrong delivery. *Duff v. Budd*, 3 Brod. & B. 177, 6 Moore, 496.

If the shipment is made at the risk and for the account of the consignor he must bring an action for the loss. *Sargent v. Morris*, 3 Barn. & Ald. 277.

If the consignor is the owner of property and the consignee merely his agent, the suit for its destruction is properly brought in the name of the consignor. *Price v. Powell*, 8 N. Y. 322.

If the consignor brings suit, he must show by his complaint that he was the owner of the property rather than the consignee. [*Pennsylvania Co. v. Holderman*, 69 Ind. 18.

Conversely it has been held that if the goods are shipped under a bill of lading stating that it is by order and on account of the consignee, the consignor cannot maintain an action for their loss. *Brown v. Hodgson*, 2 Campb. 37.

So delivery of goods to a boatman in response to an order to ship them *via* canal passes the title to the buyer so as to prevent the seller from maintaining an action in his own name for their loss. *Krudler v. Ellison*, 47 N. Y. 36.

So a mere agent who, in pursuance of his duty, consigns property to his principal, the true owner, has no sufficient title after the property has been delivered to the carrier to maintain an action for its loss. *Thompson v. Fargo*, 49 N. Y. 188, 10 Am. Rep. 342.

It is generally held that the consignor may maintain suit on the carriage contract although he is not the owner of the property.

In *Davis v. James*, 5 Burr. 2680, in which the shipper delivered the goods to the carrier to be transported to the consignee and himself paid the freight, the court held that he might bring an action on the agreement between himself and the carrier, in case the goods were lost.

In *Moore v. Wilson*, 1 T. R. 659, an action was brought against the carrier by the consignor with an allegation that the hire was to be paid by the plaintiff, and the court held that proof that it was to be paid by the consignee was no variance because the consignor was in law liable.

Where a laundress sent linen which she had washed to the owner by a carrier whom she paid, she was held entitled to maintain an action for its loss. *Freeman v. Birch*, 1 Nev. & M. 420, 8 Q. B. 483, note.

In case goods are lost in transit, the consignor may bring action, if he has made a special contract for their carriage with the carrier. *Dunlop v. Lambert*, 6 Clark & F. 600.

The suit may be brought by the one with whom the carriage contract was made. *Mead v. South Eastern R. Co.* 18 Week. Rep. 735.

If the contract is made by the shipper and freight

paid by him, he may maintain an action in his own name for failure to deliver according to the bill of lading. *Joseph v. Knox*, 8 Campb. 380.

If the shipper guarantees payment of freight and makes special agreement for the carriage, action may be brought for their nondelivery by the consignor with whom the contract was made, or by the consignee, who is the owner of the goods. *Stafford v. Walter*, 67 Ill. 83.

In *Goodwyn v. Douglas, Cheves*, L. 174, it is said that if the vendor pays the freight and voluntarily takes on himself the selection of the carrier and mode of conveyance, he must stand the risk of loss and may maintain an action against the carrier therefor.

A shipper of goods who has contracted for their safe conveyance may sue for injuries thereto in transportation, although the title has vested in the consignee. *Hooper v. Chicago & N. R. Co.* 27 Wis. 81, 9 Am. Rep. 439.

It seems, however, that the existence of a carriage contract is not in all cases conclusive. For it has been held that an action founded on a bill of lading should be brought by the shipper with whom the contract was made, or, if the consignee was the actual owner of the goods, it may be brought by him. *Dows v. Cobb*, 12 Barb. 310, 10 N. Y. Legal Obs. 161.

But some of the cases are strong in favor of the shipper. Thus the shipper named in a bill of lading may sue the carrier for injury to the goods while in transit, although all the interest, general or special, has passed to the consignee. *Blanchard v. Page*, 8 Gray, 281.

When carrying goods from seller to purchaser, if there is nothing in the relation of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery in execution of the order of sale, the employment is by the seller and actions based upon the contract may be in the name of the consignor. If, however, the purchaser designates the carrier, making him his agent to receive and transmit the goods, or if the sale is complete before delivery to the carrier and the seller is made the agent of the purchaser in respect to the forwarding of them, the contract of service may be held to be with the purchaser, and he alone would be entitled to maintain an action for breach of the carriage contract. *Finn v. Western R. Co.* 112 Mass. 524, 17 Am. Rep. 128.

Suit by consignee.

If goods by bill of lading are consigned to A. A. is the owner and must bring the action against the master of the ship, if they are lost. *Evans v. Marlett*, 1 Ld. Raym. 271, 12 Mod. 156, 8 Salk. 290.

A consignee to whom property has been shipped in satisfaction of prior advances, or who accepts a draft for the value of the goods, acquires the absolute title so as to enable him to sue upon the bill of lading. *Dows v. Cobb*, 12 Barb. 310.

Consignees of goods and holders of the bill of lading who have made advances upon it have an interest or property in the goods which will entitle them to maintain an action against the carrier for breach of the contract. *Adams v. Bissell*, 28 Barb. 382.

If goods are delivered to a carrier to be delivered by him to a third person and the goods are lost, the

vendee to deliver them for transportation. But when the purchaser instructs the vendor to send the goods to him it does not appear how it makes any difference in the rule applicable to the case whether he names the carrier or not. If the carrier is not specified, the vendor, acting in this respect under the order of the purchaser to forward the goods, is his

agent in the selection of the carrier, and in either case the carrier is, in contemplation of law, chosen by the purchaser. In this case the purchasers expressly instructed the plaintiff to send the goods from New Hampshire to Paterson. When the goods passed out of the possession of the plaintiff into the hands of the carrier, who must be regarded as the

consignee only can bring the action. *Snee v. Prescott*, 1 Aik. 245.

The buyer may maintain an action for the loss of goods shipped under an order, "to dispatch the goods on insurance being effected." Terms three months' credit from time of arrival." *Fragano v. Long*, 4 Barn. & C. 219, 6 Dowl. & R. 288.

The consignee has such an interest as to enable him to maintain an action for the nondelivery of the goods if there is no evidence of ownership in the consignor. *Arbuckle v. Thompson*, 37 Pa. 170.

In *Anderson v. Clark*, 2 Bing. 20, in which according to a custom of dealing between the parties, goods were shipped consigned to plaintiff against which a draft was drawn which plaintiff refused to pay and thereupon the carrier by direction of the shipper redelivered the goods to the shipper, the plaintiff was held entitled to maintain an action for the nondelivery.

The consignees are to be held, in the absence of any showing to the contrary, to have such an interest in the consignment as to enable them to maintain an action for its nondelivery. *Tromson v. Dent*, 38 Eng. L. & Eq. 41.

If the goods are consigned without reservation on the part of the consignor, the consignee is the proper party to bring an action for their loss. *Merchant's Despatch Transp. Co. v. Smith*, 76 Ill. 342.

The consignees are entitled to maintain an action for the loss of the goods. *D'Anjou v. Deagle*, 3 Harr. & J. 208; *Armentrout v. St. Louis, K. C. & N. E. Co.*, 1 Mo. App. 158.

The party to whom, by the terms of the bill of lading, the property is to be delivered, may maintain replevin therefor. *Powell v. Bradlee*, 9 Gill & J. 276.

If the goods are bought and paid for and the bill of lading executed to the vendor acknowledging the receipt of the goods to be conveyed to the vendee, the contract of transportation is in legal effect with the vendee, and he may sue for the nondelivery of the goods. *Gwyn v. Richmond & D. R. Co.*, 35 N. C. 429, 39 Am. Rep. 708.

The consignee named in the bill of lading is presumed to be the owner of the property, and in the absence of evidence to control the effect of that document, he is entitled to maintain an action in his own name against the carrier for the loss of the goods. *Lawrence v. Minturn*, 58 U. S. 17 How. 100, 15 L. ed. 58.

If the goods are shipped for the account and risk of the consignee, he paying freight, and it is so expressed in the invoice and bill of lading, the delivery to the carrier passes the title to him and he alone can sue if they are not delivered. *Potter v. Lansing*, 1 Johns. 215, 3 Am. Dec. 810.

In *Daves v. Peck*, 8 T. R. 380, 3 Esp. 12, the court held that if the seller delivers the goods to the carrier according to the direction of the buyer, the buyer is the one to maintain the action, in case the goods are lost. Cases in which actions had been maintained by the shipper were distinguished, and it was not disputed that the consignor might sue, and under those circumstances the carrier would not be permitted to plead as a bar a former recovery by a stranger in the person of a consignee, and that the result might be a double recovery against the carrier.

22 L. R. A.

Goods delivered to a carrier under an arrangement that the consignee should receive them, pay the freight and apply the proceeds of the sale in payment of prior advances in the ordinary course of trade, are so far in the possession of the consignee that he alone can maintain an action for their wrongful conversion. *Wetzel v. Power*, 5 Mont. 214.

A factor *del credere* who has made advances upon goods consigned to him for sale has a lien upon the goods and may maintain an action against the carrier for nondelivery. *Holbrook v. Wight*, 24 Wend. 189, 35 Am. Dec. 607.

So the purchaser to whom the goods have been shipped in accordance with his order is the proper one to name as owner in an indictment for their theft. *Walker v. State*, 9 Tex. App. 39.

But some cases have held that if the title was not in the consignee he could not sue.

A mere consignee having no interest in the goods consigned cannot maintain an action against the carrier for an injury to the goods during the voyage. *Ogden v. Coddington*, 3 E. D. Smith, 817.

The presumption arising from the bill that title has vested in the consignee and that he should properly bring an action for loss of the property may be subject to explanation and removable by proof. *Jones v. Sims*, 6 Port. (A.) 138.

If the contract is within the statute of frauds, a mere delivery to the carrier will not vest title in the consignee, so as to enable him to sue for loss of the goods. *Ooombs v. Bristol & E. R. Co.*, 3 Hurlst. & N. 610, 37 L. J. Exch. 401.

In *Alabama G. S. R. Co. v. Mount Vernon Co.*, 84 Ala. 173, it is said that if the bill of lading is taken in the name of a seller and attached to a draft, the title is presumptively retained in the seller, and payment of the draft by the purchaser after the loss of the goods does not vest title in him so as to enable him to sue the carrier for their loss.

Other cases have recognized a right in the consignee to sue although the title was shown to be in another person.

The consignee may bring an action for the loss of the goods, although the shipment was upon account of the consignor who also paid the freight. *Griffith v. Ingledew*, 6 Serg. & R. 429, 9 Am. Dec. 444.

The consignee of goods may sue the common carrier for their loss, although another person was the owner of them. *Southern Exp. Co. v. Armistead*, 50 Ala. 350.

Admiralty suits.

In admiralty, the consignee may sue for breach of the carriage contract. *McKinlay v. Morrish*, 69 U. S. 21 How. 355, 16 L. ed. 104.

The assignee of a bill of lading may maintain a libel in admiralty in his own name for the loss of the goods. *The Vaughan and Telegraph*, 31 U. S. 14 Wall. 253, 20 L. ed. 807.

The title to goods sold on credit and delivered to a carrier marked with the initials of the buyer and insured at his risk, consigned to third parties at an intermediate port, to be by them transhipped, has passed out of the seller so that he cannot maintain a libel in his own name for their loss. *Blum v. Caddo*, 1 Woods, C. C. 64.

H. P. F.

agent of the purchasers to transport them, the transfer of the title to the purchasers became complete, and all the rights of ownership in them passed to the purchasers. If the carrier had converted the goods to his own use, the defendants could have maintained an action

for them; or if there had been a loss in transit it would have fallen on them.

In my opinion, therefore, the vendor was entitled to recover the contract price, and *the judgment below should be affirmed.*

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE of West Virginia, *Plff. in Err.*,

v.
W. H. FLANAGAN.

(.....W. Va.....)

***A party residing in Doddridge county sends a postal card through the mail to a licensed wholesale liquor dealer doing business as such in Wood county, directing a package of whiskey to be sent him by express C. O. D. The order thus sent having been received in Wood county, and having been complied with by delivering the package, marked "C. O. D.," addressed to the purchaser in Doddridge county,—*Held*, that under the circumstances the sale was made in Wood county, and said wholesale merchant was not liable, under indictment in Doddridge county, for retailing liquors without license in Doddridge county.**

(June 21, 1893.)

ERROR to the Circuit Court for Doddridge County to review a judgment of not guilty after trial of an indictment against defendant for the unlawful sale of intoxicating liquors. *Affirmed.*

The facts are stated in the opinion.

Mr. T. S. Riley, Atty-Gen., for the State.
Mr. John Bassel for defendant in error.

English, P., delivered the opinion of the court:

At the November term in the year 1890, W. H. Flanagan was indicted in the circuit court of Doddridge county for unlawfully selling spirituous liquors in said county without having obtained a license therefor as required by law. A motion was made to quash the indictment, which was overruled. The plea of not guilty was interposed. Issue was joined thereon, and the matters arising thereon were submitted to a jury, which resulted in a verdict of "not guilty," whereupon the attorney for the state moved the court to set aside the verdict of the jury, and grant the state a new trial, because said verdict was contrary to the law and evidence, which motion was overruled, and the state excepted, and tendered three bills of exception, which were signed, sealed, and saved to it, and made a part of the record in the cause.

The facts upon which said indictment was predicated, and about which there appears to be no controversy, are set out in said first bill of exceptions as follows: On the 17th day of September, 1890, H. McCally, a resident of

West Union, Doddridge county, W. Va., mailed to the defendant, W. H. Flanagan, a duly licensed wholesale and retail dealer in spirituous liquors at Parkersburg, Wood county, W. Va., not licensed in said Doddridge county, a written order or postal card to send him (McCally) one-half gallon of whiskey, collect on delivery; that said defendant received said order, and caused said spirituous liquors so ordered to be packed and delivered to the express agent at Parkersburg, with instructions to express same to the said McCally at West Union, C. O. D., or collect on delivery, to West Union; that the same was so expressed and received by said McCally at West Union from the express agent, B. H. Maulsby, and that said agent returned the price of said liquor,—\$1.50,—paid by the said McCally to the said agent at West Union, Doddridge county, to the said defendant at Parkersburg; and that he received the same,—which were all the facts shown in evidence to the jury on said trial, and thereupon the prosecuting attorney of Doddridge county moved the court to instruct the jury that under the state of facts above detailed, reciting them, if they believed them beyond all reasonable doubt, they must find the defendant guilty as charged in the indictment; but the court refused to give said instruction, and the state excepted, and thereupon the defendant asked the court to instruct the jury that, if they found from the evidence the facts above detailed, they should find for the defendant, to the giving of which instruction the state by her attorney objected, but the court overruled said objection, and gave said instruction, and the state excepted; and, the jury having found a verdict for the defendant, the attorney for the state moved to set aside the verdict, because the same was contrary to the law and the evidence, which motion was overruled, judgment was rendered upon the verdict, and the state applied for and obtained this writ of error.

The action of the court with reference to said instructions and upon said motion to set aside the verdict of the jury is assigned and relied upon as error. In order to reach a correct conclusion in this case, it is necessary to determine where this sale was made. The defendant is charged with selling spirituous liquors in the county of Doddridge, without a license, and, if the proof shows the sale to have been made in the county of Wood, he is not guilty of the offense charged, and should have been acquitted. This indictment does not charge the defendant with soliciting orders for whiskey in Doddridge county, and, if it did, the charge would not be sustained by the proof. It merely charges an unlawful selling without a license in the county of

*Headnote by ENGLISH, P.

NOTE.—As to how far delivery of property sold to a carrier passes title to the vendee, see note to preceding case.

Doddridge. The order for the whiskey was sent by postal card through the mail. The knowledge that the whiskey was desired was communicated to the defendant, Flanagan, by the postal card after it was taken from the postoffice of Wood county. He then received the order in Wood county, and complied with it in Wood county, by packing the whiskey and delivering the same to the express agent in said county. It is true the package was sent C. O. D., but that only authorized the express agent to receive the purchase money on delivering the package. The postal card directed the package to be sent by express, C. O. D., and the defendant, Flanagan, in pursuance of this request, delivered the same to the express agent, who acted in a dual capacity, to wit, as the agent of McCally, the consignee, in receiving and carrying the package to its destination, and as the agent of Flanagan, the consignor, in collecting the purchase money. In the case of *Garbracht v. Com.*, 96 Pa. 449, 42 Am. Rep. 550, which is cited by Judge Green in the case of *State v. Hughes*, 22 W. Va. 755, the facts were very similar to those in the case we are considering. A party was indicted for selling liquor without a license. The defendant was the agent of a wholesale dealer in liquors, who was doing business in the city of Erie, and as such took orders for liquors from parties residing in Mercer county; and it was held in that case that "the place of sale is the point at which goods ordered are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him;" and that, under the circumstances, the sale was made in the city of Erie, and not in Mercer county. Again, in the case of *Pilgreen v. State*, 71 Ala. 368, where whiskey was shipped from Calera to Columbiana, C. O. D., the court held the place of sale to be Calera, the beginning of the route. The court said: "All the dealings between the buyer and the seller were at Calera. There the offer of the buyer was received, accepted, and acted upon, and there every act was done which it was intended the seller should do. The general property in this thing sold there passed to the buyers by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. . . . The general property, however, passed to the buyer by the delivery to the express company at Calera. The risk of the loss then passed to him, though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property and to the actual possession." The same doctrine is laid down in the case of *Kruidler v. Ellison*, 47 N. Y. 36, 7 Am. Rep. 402, where "plaintiff, a merchant in New York, received from N. & T., of Rochester, an order in writing for certain goods to be sent by canal. The goods were delivered to defendant's common carriers upon the canal, consigned to N. & T.,

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pursuant to the order. The goods were lost en route. It was held that upon the delivery to the carrier the title passed absolutely to the consignees, subject only to the right of stoppage *in transitu*; and the plaintiff, the consignor, could not maintain an action for their loss." In *Benjamin on Sales*, (sec. 362,) the author says: "In 1803, in the case of *Dutton v. Solomonson*, 8 Bos. & P. 582, it was treated as already settled law that, where a vendor delivered goods to a carrier by order of the purchaser, the appropriation is determined, the delivery to the carrier is a delivery to the vendee, and the property vests immediately." This question was before this court in the case of *State v. Hughes*, 22 W. Va. 744, above referred to, and it was held in that case that, where orders for whiskey were solicited by defendant, who resided in Wood county, in the county of Taylor, and the whiskey to fill these orders was delivered in jugs to an express agent in Wood county for transportation to the purchaser in Taylor county, who received the whiskey in Taylor county, and paid the express charges, and subsequently paid the purchase money to one of the firm in Taylor county, the seller could not be indicted in Taylor county for selling spirituous liquors without license, as the sales were made in Wood county, when the jugs were delivered to the express agent. Until then there was only an executory contract for the sale of the whiskey, and the sale became complete and the property in the whiskey was transferred to the purchaser when it was delivered to the express agent for transportation, and not when it was received of the express agent by the purchaser. Other cases might be cited to show that this sale was made in Wood county, but these are regarded as sufficient. In Wood county the proposition was made to purchase the whiskey; it was there accepted; and the goods were packed and delivered to the expressman, the appointed agent of McCally, in Wood county; so that every element necessary to constitute a valid and complete sale was present in the county of Wood, and all of the elements were wanting in the county of Doddridge, so far as the defendant, Flanagan, was concerned. To hold otherwise would prevent a wholesale merchant in Wheeling, Parkersburg, or Charleston from shipping liquors in response to a letter or telegram from a neighboring county, although he had fully complied with the law licensing him as a wholesale dealer, and would confine his wholesale business almost exclusively to the limits of his own county. Such a construction does not, in our opinion, accord with either the letter or spirit of the law, and, entertaining these views upon the statement of facts presented, our conclusion is that the circuit court committed no error in refusing to give the instruction asked for by the state, or in giving the instruction asked for on behalf of the defendant, or in refusing to set aside the verdict and grant a new trial.

For these reasons the judgment complained of must be affirmed.

NEW YORK COURT OF APPEALS.

Mary L. TRIPPE, Admr. etc., of Frederic W. Trippe, Deceased, Resp.,
v.

PROVIDENT FUND SOCIETY, Appt.

(140 N. Y. 23.)

1. The "ten days from the date of either injury or death" within which notice of the death of a person insured by an accident policy must be given does not begin to run from the date of his death occasioned by the fall of a building which he occupied, if the fact of his death is not known until the discovery of his body, but begins to run when the fact of death is known,—especially where the notice of death is required to contain full particulars of the accident and injury.
2. Receiving and retaining notice of death without objection and call for further information, besides furnishing blanks for proofs of loss, waives the objection that the notice was not served in time.
3. The sufficiency of the notice of death is a question of law, where it depends upon the construction of an accident policy to determine whether the time runs from the date of death, or of the discovery of the fact of death.

(November 23, 1893.)

APPEAL by defendant from a judgment of a General Term of the Superior Court for the City of New York affirming a judgment of a trial term in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. John L. Hill, with Mr. Arthur M. Sanders, for appellant:

Where the policy provides a definite time for the presentation of notice of accident or injury or death, and that such presentation shall be a condition precedent to liability, the failure to perform the condition defeats all recourse on the policy, no matter whether death was instantaneous or not.

Cawley v. National Employers Assur. Asso. 1 Cab. & El. 597; *Gamble v. Accident Ins. Co.* 4 Ir. C. L. Rep. 204; *Patton v. Employers Liability Assur. Co.* L. R. 20 Ir. 93; *Quinlan v. Provident Washington Ins. Co.* 138 N. Y. 862; *Stoneham v. Ocean, R. & G. A. Ins. Co.* L. R. 19 Q. B. Div. 287.

The fact of death having been ascertained on August 25, it must be that the rights and privileges of both parties relate back and become fixed as of the day of the actual death,

NOTE.—As to forfeiture of insurance by failure to furnish proofs of loss within time stipulated, see *Steele v. German Ins. Co.* (Mich.) 18 L. R. A. 85, and note.

On the question when the stipulated time for furnishing proofs of loss begins to run the above case is novel and important.

For a somewhat similar construction of a clause as to time for furnishing proofs of loss, see *Cooper v. United States Mut. Acc. Asso.* (N. Y.) 16 L. R. A. 138.

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and the time of both parties under his contract begin to run from that date.

Allemania Ins. Co. v. Little, 20 Ill. App. 481.

Mr. Trippe accepted the policy with all its provisions and conditions. His estate was his beneficiary. Neither Mr. Trippe nor his beneficiary could accept a part of the contract favorable to them and reject the balance. The contract was entire.

Palmer v. Commercial Travelers Mut. Acc. Asso. 68 Hun, 601.

It would not be unjust or unconscionable to sustain a defense predicated on a delay of but one day in giving notice, when the time for action was fixed by the policy.

Roehner v. Knickerbocker L. Ins. Co. 63 N. Y. 161; *Allemania Ins. Co. v. Little*, *supra*; 11 Am. & Eng. Encyclop. Law, pp. 849, 850.

The time of death was a material question of fact, and should have been submitted to the jury.

Travelers Ins. Co. v. McKonkey (U. S. S. C.) 20 Chicago Legal News, 835; Abbott, Trial Ev. 73-488; *Oppenheim v. Wolf*, 8 Sandf. Ch. 571, 7 L. ed. 961.

There was no waiver of the breach of the condition respecting notice. No such question can be predicated on this case.

Waiver, except in cases which depend on some theory of estoppel, is matter of intent. If there is no intent to waive, there can be no waiver.

Robertson v. Metropolitan L. Ins. Co. 88 N. Y. 541; *Weed v. London & L. F. Ins. Co.* 116 N. Y. 118; *Armstrong v. Agricultural Ins. Co.* 180 N. Y. 560; *Ronald v. Mutual Reserve Fund L. Asso.* 132 N. Y. 168.

There can be no waiver, except in cases of estoppel, without knowledge of the facts.

Robertson v. Metropolitan L. Ins. Co. *Weed v. London & L. F. Ins. Co.* and *Armstrong v. Agricultural Ins. Co.* *supra*.

The defendant was sued before it had taken any position with reference to the case; hence, every defense under its policy was open to it. The retention of the proofs, of itself, does not create any presumption of waiver. Neither does mere silence.

Titus v. Glens Falls Ins. Co. 81 N. Y. 410; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 109.

Mr. William H. Arnoux, for respondent:

The notice was duly given. The courts construe the provisions of insurance policies with reference to the meaning and intent, and they extend or annul the same as justice may require. Thus, if Mr. Trippe had been rendered insane and so had been rendered legally incapable of giving notice, the court would read the policy, "Notice shall be given in ten days providing the insured is in a mental condition so to do."

Germania F. Ins. Co. v. Boykin, 79 U. S. 13 Wall. 438, 20 L. ed. 442.

If, however, there had been any failure to give the notice required by the ten-day provision of the policy, such failure was waived by the defendant and it is now estopped from claiming the benefit of any forfeiture based thereon.

Retaining the notice when delivered, even if it were after the time, was a waiver of default.

Wright v. Forbes, 1 How. Pr. 240; *Knickerbocker v. Loucks*, 8 How. Pr. 64; *Georgia Lumber Co. v. Strong*, 8 How. Pr. 246; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108.

By furnishing blank proofs of loss the company waived the default if any had been made. *Travelers Ins. Co. of Hartford v. Edwards*, 122 U. S. 457, 80 L. ed. 1178.

The acceptance of the proofs of loss was a waiver of any and all previous defaults, if there had been any.

Unthank v. Travelers Ins. Co. 4 Biss. 857; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 480; *Brink v. Hanover F. Ins. Co. supra*; *Jones v. Howard Ins. Co.* 117 N. Y. 108.

By requiring further proofs and information the company waived the forfeiture.

Armstrong v. Agricultural Ins. Co. 180 N. Y. 560; *Pratt v. Dwelling House Mut. Ins. Co.* 41 N. Y. S. R. 808; *Roby v. American Cent. Ins. Co.* 120 N. Y. 510; *Titus v. Glen Falls Ins. Co.* 81 N. Y. 410.

O'Brien, J., delivered the opinion of the court:

The defendant is an accident insurance company, upon the co-operative or assessment plan, and on the 18th day of March, 1891, issued its policy or certificate to Frederick W. Trippe, the plaintiff's intestate, whereby it agreed, upon the considerations referred to in the instrument, to pay to him certain sums specified as a weekly indemnity on account of disability from accidents within the terms of the contract, and also the sum of \$5,000 in case of death "through external, violent and accidental means." The place of business of the insured was in a building near Park place, in the city of New York, which, on the 22d of August, 1891, fell, crushing to death in the ruins several of the occupants, and among them the insured. The destruction of this building, and the consequent loss of life, is known in the events of that year as the "Park Place Disaster." The claim is resisted by the defendant upon the ground that certain conditions expressed in the certificate, which were warranties or conditions precedent to liability, have not been complied with. The most important question, and that most strenuously insisted upon by the defendant, arises upon the following condition: "Notice of any accidental injury, for which claim is to be made under this certificate, shall be given in writing, addressed to the president of the society at New York, stating the full name, occupation, and address of the injured member, with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate."

There is nothing in the case to create any doubt as to the fact that the insured was killed on the day of the accident, but the fact was not known until the 25th, when the body was found among the ruins, and identified. Notice of the death was given to the defendant on the 2d day of September, which was within the ten days from the discovery

of the body, but not within ten days from the day of the accident, when, as the defendant insists, the death must have occurred. The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries under the contract. *McNally v. Phoenix Ins. Co.* 187 N. Y. 839. The provision requires not only notice of the death, but "full particulars of the accident and injury." It is quite conceivable that in many cases of death by accident the fact cannot be, and is not, known until days, or even weeks, after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable and practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. The object of the notice was to enable the defendant, within a reasonable time after the death or injury, to inquire into all the facts and circumstances while they were fresh in the memory of witnesses, in order to determine whether it was liable, or not, upon its contract. The full particulars of the death, which the condition requires, cannot, ordinarily, be furnished until the fact of death, and the manner in which it occurred, are ascertained. In this case, all that was known prior to the 25th of August, when the body was found, was the fact that the deceased had his place of business in the building, and that it had been destroyed. But it did not follow from these facts that the insured was dead, as he might have been absent from the building at the time, or in some way escaped from the result of the accident; that a notice served upon the defendant prior to the time when the body was found, and the fact of death ascertained, would not be within the object or terms of the condition. The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred, and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the ten days within which the notice is to be given did not begin to run from the date of the accident, or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. This construction secures to the defendant every benefit and advantage that was intended by this provision of the policy, and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a condition subsequent is rejected. The plaintiff was the widow of the deceased, and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract, and who could give the notice; and she could not give it, within the meaning of the condition, until she had knowledge of the

facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made. *Germania F. Ins. Co. v. Boykin*, 79 U. S. 13 Wall. 433, 20 L. ed. 442.

But, even if the defendant's construction of this condition was correct, we think, by its acts, the objection has been waived, and cannot now be urged as a defense. The notice served on the 2d of September was retained, without objection, and another served on the 15th of October, after the plaintiff had been appointed administratrix. On the 12th day of October, upon written application to the defendant, it furnished the necessary blanks for proofs of loss. These proofs were made and forwarded to the defendant, in compliance with the terms of the contract, and were retained without objection. On the 19th of March following, the defendant called for further information, which was given. It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured, by virtue of the contract, to do some act, or incur some expense or trouble, inconsistent with the claim that the contract had become inoperative in consequence of a breach of some of the conditions. *McNally v. Phenix Ins. Co. supra*; *Roby v. American Cent. Ins. Co.* 120 N. Y. 510; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 410, 419; *Benninghoff v. Agricultural Ins. Co.* 93 N. Y. 495; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 480; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108; *Jones v. Howard Ins. Co.* 117 N. Y. 103; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560; *Travelers Ins. Co. of Hartford v. Edwards*, 123 U. S. 457, 30 L. ed. 1170. The acts of the defendant in receiving and retaining these papers, without objection, and calling for others, are consistent only with the theory that the contract was still considered in force;

and as the plaintiff acted accordingly in performance of its conditions, subsequent to the loss, the defendant ought not to be permitted now to change its position, and assert that after ten days from the accident the obligations of the policy virtually ceased, by reason of failure within that time to serve notice of death.

The deceased stated in his application, which is part of the policy, and a warranty, that his business was that of a "wholesale drug merchant." It is now urged that the contract is avoided for the reason that this statement or representation was untrue. This point is based upon evidence tending to show that some of the articles that the deceased kept in his store, and dealt in, were of such a character as to deprive him of the right to be classified for accidental insurance as a wholesale druggist. Without further reference to the merits of this objection, it is sufficient to say that it is not available to the defendant in this court, for the reason that the testimony introduced did not conclusively establish any breach of warranty in this respect. At best, the question was one of fact, and the disposition made of it by the learned trial judge was sufficiently favorable to the defendant, when he submitted it to the jury. No exception was taken by the defendant to this course, or to the instructions given by the court to the jury upon the submission of the question, and, obviously, none could have been. In fact, the only question submitted to the jury was whether this statement was true. The only objection that the defendant made to this disposition of the case was to request a submission, also, of the question as to the date of the death of the insured, which request was properly refused, as the sufficiency of the notice of death served presented a question of law.

The other exceptions in the record have been examined, and, as they disclose no error prejudicial to the defendant, *the judgment should be affirmed.*

All concur.

FLORIDA SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

Appt.,
v.

Charles M. WILSON.

(32 Fla. 537.)

***The following rule formulated in Hadley v. Baxendale, 9 Exch. 341:** "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as

may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."—*Held*, to be applicable to the contracts of telegraph companies for the transmission and delivery of telegraphic messages; and, consequently, that for its breach of a contract to transmit or deliver an unexplained cipher, or otherwise unintelligible message, such company is liable only for nominal damages, or, at most, for the sum paid it for the transmission and delivery thereof.

(*Mabry, J., dissents.*)

(November 8, 1893.)

NOTE.—The above decision as to the measure of damages for breach of contract to transmit a cipher or unintelligible telegram is noteworthy as 22 L. R. A.

an express overruling of a former decision of the court. The opinions of the court very fully present the state of the authorities on the question.

A PPEAL by defendant from a judgment of the Circuit Court for Escambia County in favor of plaintiff in an action brought to recover damages for the alleged negligent failure of defendant to promptly transmit and deliver a message in compliance with its contract. *Reversed.*

The facts are stated in the opinion.

Messrs. Mallory & Maxwell, for appellant.

The damages allowed by the jury, in their verdict, were not such as were properly allowable, in that they were remote and not within the contemplation of the parties to this action, at the time of alleged making of contract for transmission.

The rule that the measure of a contracting party's liability, in event of breach by him of contract, will be those damages only, which "may reasonable be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," while now known as the rule in the case of *Hadley v. Barendale*, 9 Exch. 341, a decision of comparatively recent date, is one of the oldest and most firmly rooted principles known to the law.

Pothier, *Obligation*, 1, 159; Code Napoleon, § 1150; La. Civ. Code, art. 1928, § 1824; *Horne v. Midland R. Co.* L. R. 8 C. P. 131; 8 Sutherland, *Damages*, 298, 299; *Camp v. Western U. Teleg. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 472; *Western U. Teleg. Co. v. Hyer Bros.* 22 Fla. 687.

A few of the state courts refuse to recognize this like application of the rule to telegraph companies.

Daughtery v. American U. Teleg. Co. 75 Ala. 168, 51 Am. Rep. 435; affirmed by a divided court in *Western U. Teleg. Co. v. Way*, 83 Ala. 542; *Western U. Teleg. Co. v. Reynolds*, 77 Va. 173, 40 Am. Rep. 715; *Western U. Teleg. Co. v. Hyer Bros.* *supra*; both by divided courts.

That the damages in this case be held properly allowed against the telegraph company, it must be shown that they were or should properly have been within the contemplation of the company at the time of receiving the message for transmission.

Horne v. Midland R. Co. *supra*.

Many courts, recognizing the difficulty under which they labor, hold that a stricter rule should apply to carriers than to telegraph companies, and that mere error in a telegram is not prima facie evidence of negligence on the part of the company.

Breeze v. United States Teleg. Co. 45 Barb. 274, 48 N. Y. 132, 8 Am. Rep. 526; *Sweetland v. Illinois & M. Teleg. Co.* 27 Iowa, 433, 1 Am. Rep. 285; *Birney v. New York & W. P. Teleg. Co.* 18 Md. 341, 81 Am. Dec. 607; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Ellis v. American Teleg. Co.* 13 Allen, 226; *Western U. Teleg. Co. v. Edsall*, 63 Tex. 668; *Western U. Teleg. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Jones v. Western U. Teleg. Co.* 18 Fed. Rep. 717; *White v. Western U. Teleg. Co.* 24 Fed. Rep. 710, and others.

Mr. John C. Avery, for appellee:

The rule of *stare decisis* will deter this court from changing its position. Appellant is presumed to have made its charge and appellee to

have paid it and refrained from communicating the importance of his message with reference to the decision of this court, on the point involved. In such cases, changes of construction should be only prospective.

Douglass v. Pike County of Missouri, 101 U. S. 677, 25 L. ed. 968; *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 631, note 677; 1 Kent, Com. 475.

This is a case that the appellant admits that it never sent or attempted to send the message which the jury by its verdict has said was delivered to and received by the company. It is a case of downright and gross negligence, in which the company stands before the court in the worst possible attitude in which to invoke the protection of a technical and often fanciful rule for the measure of damages resulting from negligence or willful breach of contract.

The supreme court of Alabama in *Daughtery v. American U. Teleg. Co.*, 75 Ala. 168, 51 Am. Rep. 435, says with reference to the supposed distinction between cipher messages and those so briefly and obscurely expressed that no one can understand them but the sender and receiver; we can perceive no reason for a different rule as applicable to the two classes.

Recently an effort was made to induce the Alabama court to review its decisions in above case, (*Western U. Teleg. Co. v. Way*, 83 Ala. 542,) but the court adhered to its former decision.

See also *Alexander v. Western U. Teleg. Co.* 3 L. R. A. 71, 66 Miss. 161; *Hart v. Western U. Teleg. Co.* 66 Cal. 579, 55 Am. Rep. 119; *Western U. Teleg. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715; *Western U. Teleg. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Western U. Teleg. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 490.

Taylor, J., delivered the opinion of the court:

The appellee sued the appellant in the circuit court of Escambia county, in case, for damages for its failure to transmit and deliver a telegraphic message in cipher. The suit resulted in a judgment for the plaintiff in the sum of \$688.88, and therefrom the defendant telegraph company appeals.

The declaration alleges as follows: "That the Western Union Telegraph Company, a corporation, the defendant, on the 12th day of December, 1887, was engaged in the business of transmitting telegraphic messages between Pensacola, Florida, and New York, in the state of New York, and in the delivery thereof to other cable and telegraph companies for transmission to Liverpool, England, where the said plaintiff had a regular merchant-broker or agent, to wit: one A. Dobell, through whom the plaintiff negotiated, by means of such messages, the sale in Europe of cargoes of lumber and timber, the plaintiff being then and there a timber and lumber merchant at the city of Pensacola. That on said day the plaintiff delivered to the defendant, and the defendant received from him at its office in the city of Pensacola, and undertook to transmit, and cause to be transmitted, and it was its duty to transmit, and cause to be transmitted, to the said A. Dobell the following cipher message: 'Do-

bell, Liverpool: Gladfulness—shipment—ross—bonheur—luciform—hanewort—margin,' which the said Dobell would have understood, and the plaintiff intended to be an offer of a cargo of lumber and timber from said port of Pensacola for sale through the said Dobell in Europe, and the said Dobell would have sold the same for the plaintiff on the terms of said offer at a profit to the plaintiff of \$1,200, but the defendant failed and neglected to send the said message in violation of its duty to the plaintiff, and to the plaintiff's loss of \$1,200," and therefore he sues, etc.

At the trial the plaintiff, over the defendant's objection, was permitted to testify, in establishment of the damages claimed, that he had to sell his cargo of lumber in Europe upon the market for the best price he could get, which was fifty-two shillings a load, and which amounted to \$630.84 less than the price at which he offered same for sale in the message failed to be sent. The overruled objection of the defendant to this testimony was, that the damage sought to be shown thereby was too remote, and was not in the contemplation of the parties at the time of the alleged making of the contract for the transmission of said message. To this ruling the defendant excepted, and it is assigned as error. The question presented is, What is the proper measure of damages to be recovered of a telegraph company holding itself out to the service of the public for hire as the transmitter of messages by electricity, upon its failure to transmit or deliver a message written in cipher, or in language unintelligible except to those having a key to its hidden meaning. As this question has heretofore been passed upon by this court contrary to the views we find it impossible to become divested of, and, as we think, contrary to the great weight of the well-reasoned adjudications, both in this country and in England, we take it up with diffidence that finds no palliative in the fact that the decision heretofore was by a divided court. *Western U. Teleg. Co. v. Hyer Bros.* 23 Fla. 637. In that case the majority of the court, while approving the following well-established rule first formulated in reference to carriers of goods in the *cause celebre* of *Hadley v. Baxendale*, 9 Exch. 341; "Where two parties have made a contract which one of them has broken, the damage which the other party ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it," hold that it has no applicability to the contracts of telegraph companies for the transmission of messages, and that such companies may be justly considered and treated as standing alone a system unto itself. The reasoning leading to this conclusion is as follows: "The common carrier charges different rates of freight for different articles according to their bulk and value and their respective

risks of transportation, and provides different methods for the transportation of each. It is not shown here that the defendant company had any scale of prices which were higher or lower as the importance of the dispatch was great or small. It cannot be said, then, that for this reason the operator should be informed of its importance, when it made no difference in the charge of transmission. It is not shown that if its importance had been disclosed to the operator that he was required by the rules of the company to send the message out of the order in which it came to the office, with reference to other messages awaiting transmission, that he was to use any extra degree of skill, any different method or agency for sending it, from the time, the skill used, the agencies employed, or the compensation demanded, for sending an unimportant dispatch, or that it would aid the operator in its transmission. For what reason, then, could he demand information that was in no way whatever to affect his manner of action or impose on him any additional obligation? It could only operate on him persuasively to perform a duty for which he had been paid the price he demanded, which in consideration thereof he had agreed to perform, and which the law in consideration of his promise and the reception of the consideration therefor had already enjoined on him." The answer to all this is, that the same argument is equally applicable as a reason why the rule in *Hadley v. Baxendale* should not apply to carriers of goods for hire. The carrier of goods in contracting to carry and deliver deals with the tangible; when he contracts he has in his mind's eye from the visible, tangible subject of his contract what will be the probable damage resulting directly from a breach of it on his part, and so has the other party to the contract with the carrier, therefore, the damage likely to flow from a breach by the carrier can properly be said to enter mutually into the contemplation of both parties to the contract, and it is this mutuality in the contemplation of both parties to the contract of the results that will be likely to flow directly from its breach that really furnishes that equitable feature of the rule that the damages thus mutually contemplated are in fact the damages that the law will impose for the breach. Why? Because, in the eye of the law, the parties having mutually contemplated such damages in going into such contract, those damages can alone be inferred as having entered into their contract as a silent element thereof. The rule in *Hadley v. Baxendale* is applicable alone to breaches of contract, and formulates concisely the measure of damages for the breach of those contracts that do not within themselves in express terms fix the penalty to follow their breach. In other words, this rule does nothing more than to give expression to that part of the contract which in the eye of the law has been mutually agreed upon between the parties, but concerning which their contract itself is silent. This essential leading feature of the rule, we think, was wholly lost sight of in the discussion of the question in *Western U. Teleg. Co. v. Hyer Bros.* *supra*, *i. e.*, that the

damages provided for under the rule arise *ex contractu*, and that unless there is mutuality in all the essential elements that enter into or grow out of the contract the whole fabric becomes unilateral and abhorrent in the eyes of the law. The assertion, as a rule of law, that one party to a contract shall alone have knowledge that a breach of that contract will directly result in the loss of thousands of dollars, and that upon such breach he can recover of the other party to the contract all of such, to him, unforeseen, unexpected, unanticipated, non-consented-to damages, seems to us to be a complete upheaval of all the old land-marks in reference to damages upon broken contracts, and the establishment of a new rule that is neither fair, just, nor equitable; and which, if it is to be applied to the broken contracts of telegraph companies, must also, according to every principle of consistency, be applied, under like conditions, to every violated contract where individuals are the contracting parties. The argument in *Western U. Teleg. Co. v. Hyer Bros.*, *supra*, that it was not shown that the telegraph company would have charged more, or used more dispatch, or taken more care, or been aided in any way in the performance of its duty if it had been informed of the contents or purport of the message contracted to be sent in that case, is entirely foreign to the question. In arriving at the rule of law as to the damage that parties to contracts are entitled to, as matter of legal right, upon breach thereof, a consideration of anything that might or might not in fact have prevented the wrongful breach, has nothing to do with the subject whatever. But we are to look to and consider the mutual rights of the parties from the inception of the contractual relations between them down through the contract itself to the breach complained of. One of the primary rights that each party has who is about to enter into a contract with another, a breach of which may result in damage, is to be so situated that he may foresee what direct probable results will reasonably and in the usual course of events follow bad faith, neglect, or other breach upon his part. Why? Not that it will or will not in fact deter him from being delinquent, but that he may, if he will, so act as to guard against and avoid, for his own benefit, the foreseen calamitous consequence, or, that he may, if he does not, be held to have knowingly and willingly subjected himself to the contemplated consequences of his wrong, that, from being foreseen and contemplated, the law will impute his consent thereto.

That the rule in *Hadley v. Bazendale*, *supra*, is the one properly applicable to the contracts of telegraph companies for the transmission of messages, has the support of the overwhelming weight of the decided cases, not only as to the numerical strength of the decisions concurring therein, but in the logical soundness of the reasoning upon which their conclusions rest, as will be seen from the following authorities: *Western U. Teleg. Co. v. Hall*, 124 U. S. 444, 81 L. ed. 479; *Sanders v. Stuart*, L. R. 1 C. P. Div. 826; *Behm v. Western U. Teleg. Co.* 8 Biss. 181; 23 L. R. A.

White v. Western U. Teleg. Co. 14 Fed. Rep. 710; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Western U. Teleg. Co. v. Graham*, 1 Colo. 280, 9 Am. Rep. 186; *First Nat. Bank of Barnesville v. Western U. Teleg. Co.* 80 Ohio St. 555, 27 Am. Rep. 486; *Candee v. Western U. Teleg. Co.* 84 Wis. 471, 17 Am. Rep. 452; *Daniel v. Western U. Teleg. Co.* 61 Tex. 452, 48 Am. Rep. 805; *Beaupre v. Pacific & A. Teleg. Co.* 21 Minn. 155; *True v. International Teleg. Co.* 60 Me. 9, 11 Am. Rep. 156; *Squire v. Western U. Teleg. Co.* 98 Mass. 232, 98 Am. Dec. 157; *United States Teleg. Co. v. Wenger*, 55 Pa. 262, 93 Am. Dec. 751; *Tyler v. Western U. Teleg. Co.* 60 Ill. 421, 14 Am. Rep. 88; *United States Teleg. Co. v. Gilderlove*, 29 Md. 232, 96 Am. Dec. 519; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 217; *Cannon v. Western U. Teleg. Co.* 100 N. C. 800; *Landberger v. Magnetic Teleg. Co.* 32 Barb. 580; *Manville v. Western U. Teleg. Co.* 37 Iowa, 214, 18 Am. Rep. 8; *Western U. Teleg. Co. v. Edsall*, 63 Tex. 668; *Hibbard v. Western U. Teleg. Co.* 33 Wis. 558; *Thompson v. Western U. Teleg. Co.* 64 Wis. 531, 54 Am. Rep. 644; *Abeles v. Western U. Teleg. Co.* 87 Mo. App. 554; *Western U. Teleg. Co. v. Cornwell*, 2 Colo. App. 491; 3 Sutherland, Damages, 298; Wood's Mayne, Damages, 40; Thompson, Electricity, §§ 311-316, 346, 358-375.

Opposed to this array of authorities are the following decisions by divided courts, with the exception of the Georgia and Mississippi cases: *Western U. Teleg. Co. v. Hyer Bros.*, *supra*; *Daughtery v. American U. Teleg. Co.* 75 Ala. 163, 51 Am. Rep. 435; *American U. Teleg. Co. v. Daughtery*, 89 Ala. 191; *Western U. Teleg. Co. v. Way*, 88 Ala. 542; *Western U. Teleg. Co. v. Fatman*, 78 Ga. 285, 54 Am. Rep. 877; *Alexander v. Western U. Teleg. Co.* 66 Miss. 161, 8 L. R. A. 71.

The case of *Western U. Teleg. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, is also cited as sustaining a contrary rule, but a careful reading of that case will disclose the fact that the conclusions reached are predicated upon a statutory provision in their code. In the case at bar the message that it is alleged the defendant company failed to send was in cipher and contained nothing that would indicate to the defendant's operator whether it contained a criticism upon the "Horse Fair" painting by the great artist Rosa Bonheur named in the message, or whether it related to a matter of dollars and cents. There was no explanation made to the operator as to its meaning or importance, except that the plaintiff said that the word "gladfulness" in the message had a special meaning. What that special meaning was he did not disclose. Under these circumstances all that the plaintiff could rightfully recover for the defendant's failure to send or deliver the message would be nominal damages, or, at most, the sum paid by him as the price of its transmission. It was error, therefore, for the court to admit testimony as to the damage sustained by the plaintiff by the loss of sale of a cargo of timber consequent upon the failure to forward the message.

There is another feature presented in the

proofs, aside from all that has been said upon the rule of damages in such cases, that would prevent the recovery had in this case. The plaintiff himself testifies that he received from his agent Dobell in Europe an offer for the cargo of timber. What that offer was is nowhere stated or shown. Then he says: "I decided to make a final proposition, which I did by taking the message to the telegraph office that was not sent, which message when translated was an offer by me of said cargo of timber for sale at fifty-four shillings per load." Then he says that he missed the sale of the cargo at the terms offered by him in his message in consequence of the defendant's failure to send it, and, consequently, had to sell on the market for the best price he could get, which was fifty-two shillings per load. There is not a word of proof in the record to show that his offer contained in the unsent message would ever have been accepted, or that he could ever at any time have sold the timber at the price at which he so offered it, or that it could ever have been sold at any greater price than the one he actually received for same, whether his message had been sent or not. Yet in the face of this state of the proofs damages have been allowed to the plaintiff equal to the difference between a price at which he simply offered his timber for sale, and the price actually received by him for it, without a word of proof to show whether the higher price at which he offered it for sale could ever have been obtained for it or not.

The appellee contends that because of the decision in *Western U. Teleg. Co. v. Hyer Bros.*, *supra*, the question of damages cannot be considered, that, as to this case, it is *stare decisis*. This doctrine, as we understand it, is properly applicable to decisions furnishing rules of property, and those construing statutes, and to those passing upon the validity of contracts in which investments have or may have been made upon the faith of the adjudication as to their validity, in which cases former decisions upon the same questions will be adhered to, but we do not think this case falls within the rule.

In reversing the former ruling of the court in *Hyer Bros.* we do not interfere with any vested right, acquired upon the faith of that adjudication, but pass upon the rule of damages, as upon an abstract proposition, to follow the breach of such contracts. Of the erroneousness of the rule as laid down in that case, we are perfectly and clearly satisfied; and, in such case, in determining the propriety of overruling it as a solemn adjudication, we are to be governed largely by a consideration of the results that will likely flow from the enunciation and establishment of the one or the other of the two rules. If, in such case, we conclude that the affirmation of what we deem to be the erroneous rule in that case, will be productive of more far-reaching and harmful results than would follow the disaffirmance thereof, then it becomes our duty to overturn it. And such we think would be the result here. Besides being unilateral and wholly unfair, as we have before stated, we cannot see why, if the protection of the rule in *Hadley v. Bazendale*, 22 L. R. A.

is to be withheld from contracts with telegraph companies, it should not also be denied in the daily recurring contractual controversies between individuals. To overturn the rule in controversies as between man and man would be such an uprooting of the old land-marks as to make it impracticable to surmise the harmful results that would follow. Entertaining these views, we do not think that the doctrine of *stare decisis* constrains us to adhere to the rule in *Hyer Bros.*, but think that less harm will follow our return to the well-beaten and familiar track, that furnishes a plain and easily comprehended rule for all contracting parties, be they corporate or individual.

The judgment appealed from is reversed, and a new trial ordered.

Raney, Ch. J., concurring:

A reconsideration of the question of the measure of damages involved here confirms the correctness of the view expressed in my dissenting opinion in *Western U. Teleg. Co. v. Hyer Bros.*, 22 Fla. 649 *et seq.*, and I concur in the opinion of Judge Taylor, that the rule followed in the case mentioned is unfair and ought not to be perpetuated; and, without committing myself further upon the question of *stare decisis*, my conclusion is that more injury will result in the future from adhering to the rule of the *Hyer Case* than will accrue to parties to past transactions from changing it, and that the judgment should be reversed. Cooley, Const. Lim. 5th ed. 65, and note 1; Wells, *Stare Decisis*, § 624 *et seq.*; Chamberlain, *Stare Decisis*, 19.

Mabry, J., dissenting:

The question of liability to damage for a failure on the part of a telegraph company to send a cipher message is not a new one in this court. Over six years ago this question was deliberately settled here by the decision in the case of *Western U. Teleg. Co. v. Hyer Bros.*, 22 Fla. 682. It is proposed now to reverse this case and my view is that it should not be done. Every question in reference to cipher messages entering into the case now before us was fully discussed and maturely considered in the *Hyer Case*, and this case has the support of decisions in Alabama, Mississippi, Georgia and Virginia. Under the decision in the *Hyer Case*, there was a remedy for damages for a failure on the part of a telegraph company to send a cipher message when it had for compensation agreed to do so. There is much merit in the rule that where the company holds itself out to the public as a transmitter of cipher messages for pay, it should not be allowed, after receiving the money and agreeing to send the message, to deny its liability for damages resulting from its own violation of duty, on the ground that the message was in cipher and its contents not known to the company when it agreed to send it. This court having planted itself in favor of this rule over six years ago I do not think we should disturb it. I do not see how greater harm will result from adhering to the decision than overruling it.

Rehearing denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.

Walter L. GILBERT.

(.....Mass.....)

1. The penalty for selling or offering for sale, or having in possession, any trout which is not alive during the close season, which is imposed by Stat. 1884, chap. 171, § 53, extends to trout artificially propagated on one's own premises, in view of § 26, which declares that such trout may be sold at all times for purposes of culture and maintenance, but not for food during close seasons.
2. The legislature may forbid the sale, offering for sale, or possession during the close season of trout which are not alive, although they were artificially propagated on one's own premises, if such close season is not unreasonable.

(November 26, 1893.)

R EPORT by the Superior Court for Plymouth County for the opinion of the Supreme Judicial Court of an indictment charging defendant with the unlawful sale of trout. *Judgment for the Commonwealth.*

This was an indictment found by the grand jury, charging that the defendant, on the 29th day of March, in the year 1893, did have in his possession, and did offer and expose for sale and did sell one trout, said trout having been taken in this commonwealth, and not then and there being alive.

To this indictment the defendant pleaded not guilty. It was admitted, however, that the defendant did, on the day charged in the complaint, sell one dead trout as therein alleged. The defendant claimed that said trout was one which had been artificially raised, propagated, and maintained by him, and offered to prove facts as to the method of hatching, raising, and maintaining said trout, which also applied to all other trout owned by him, claiming that if he did prove these facts to the satisfaction of the jury, he was entitled to an acquittal on the ground that the statute against selling trout between certain dates applied only to wild trout, or trout that are hatched and grow in a state of nature, without artificial aid in propagating and maintaining them.

The facts which he offered to prove are as follows:

That he is now and for a long time past has been, the owner in fee simple of a tract of land in Plymouth in said county; that a brook runs through this land, and that by means of this brook, he has raised artificial ponds; that he is engaged in the business of artificially cultivating and propagating brook trout for sale; that these trout are his property, and that for several years past he has been taxed for them by the town of Plymouth, upon an assessed value from \$2,000 to \$5,000 and that the trout sold by him was

one artificially cultivated and propagated by him for the purpose of sale.

He further offers to prove that he has been engaged in said business since September, 1869, and was the first person in this commonwealth to engage in artificially cultivating and propagating brook trout for sale as a business.

The defendant further offers to prove that trout cultivated and propagated by him are cultivated, propagated, and maintained by taking the spawn or egg, called ova, artificially from the trout, and placing the egg so obtained in shallow boxes, which have a fine wire netting in the bottom, upon which the ova are laid. These boxes containing the ova are placed in a trough in a hatching house, through which a shallow stream of water, kept at a uniform temperature, is allowed to run; that trout begin spawning by October 15 of each year, and are through spawning by the middle of December; that the eggs hatch in about sixty days from the time of setting the spawn, during which they require daily care to remove all unimpregnated eggs, to prevent the destruction of the fertile spawn; that a further time of about sixty days is required for the yolk sack, upon which the young fish called fry at first subsist to become absorbed, before they need other food, during which time they need constant care and attention; that they are then put in the rearing ponds, where for the first two months they have to be fed four times daily, for the next two months three times, for the next two months twice daily, and from that time once daily, as long as they are kept. When a year old they require to be removed into deeper and larger ponds, where they are grown until they are large enough for the market, which is about January 15 of the following year.

The trout for which the defendant is indicted for selling was one raised and maintained in the way above described.

In the month of January of this year, and for several years past, the defendant has had from five to six tons of trout artificially cultivated and maintained.

During all the time these trout are kept, and until they are disposed of, they are fed upon sheep haslets, minnows, and herring chopped up and prepared for them.

By the process of artificial cultivation and propagation, 95 per cent of the eggs are hatched, while in a state of nature not over 3 per cent hatch; and that trout raised artificially are equal or superior as an article of food to wild trout, and are after the middle of January to the time of spawning a good and wholesome article of food.

The defendant offers to prove that trout will not inhabit water of a higher temperature than sixty-five degrees Fahrenheit; that there are no trout waters open to the public except by consent of riparian owners, and that there is no great pond in this commonwealth in which the public have any fishery rights, which brook trout can inhabit, and that all waters which brook trout inhabit are owned by private persons, or corporations.

NOTE.—See, in connection with the above case, *State v. Lewis* (Ind.) 20 L. R. A. 52, and note, 22 L. R. A.

The commonwealth did not contest the truth of the facts offered to be proved by the defendant, but claimed that such evidence would furnish no defense against the indictment, and was inadmissible for that purpose. The presiding judge so ruled and excluded the evidence.

The defendant also asked the court to rule, the statutes of this commonwealth provide no penalty against a person for having in his possession and offering and exposing for sale and selling dead brook trout artificially cultivated, propagated and maintained by him in this commonwealth.

If the statutes of this commonwealth impose any penalty upon the defendant for having in his possession and offering and exposing for sale and selling dead brook trout which were kept and confined in artificial ponds upon his premises, and which were artificially cultivated, propagated, and maintained in the manner the defendant offered to prove that his were confined, cultivated, propagated, and maintained, then the statute, so far as it applies or relates to such trout, is unconstitutional.

The court refused to give the rulings as requested. The defendant submitted to having a verdict of guilty returned against him, and the presiding judge reported the case for the determination of the supreme judicial court. If there was error in the ruling of the court, the verdict is to be set aside, otherwise the verdict is to stand.

Mr. Robert O. Harris, for the Commonwealth:

In the case of rivers and streams not navigable riparian owners have the exclusive right of fishing in front of their land to the middle of the stream.

Com. v. Chapin, 5 Pick. 199, 16 Am. Dec. 886; *Vinton v. Welsh*, 9 Pick. 87; *McFarlin v. Essex Co.* 10 Cush. 804; *Cole v. Eastham*, 138 Mass. 65; *Com. v. Look*, 108 Mass. 452.

The right is, however, subject to the control of the legislature, and statutes made in the exercise of such control are constitutional.

Stoughton v. Baker, 4 Mass. 522, 8 Am. Dec. 236; *Vinton v. Welsh*, and *McFarlin v. Essex Co.* *supra*; *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446; *Burnham v. Webster*, 5 Mass. 266; *Com. v. McCurdy*, 5 Mass. 324; *Com. v. Essex Co.* 13 Gray, 239; *Cole v. Eastham*, and *Com. v. Look*, *supra*.

Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

Com. v. Alger, 7 Cush. 53; *Com. v. Certain Intoxicating Liquors*, 115 Mass. 153; *Com. v. Blackington*, 24 Pick. 352.

We have statutes prescribing the hours and times in which certain sorts of places of amusement may be kept open, and they have been held to be constitutional.
22 L. R. A.

Com. v. Colton, 8 Gray, 488.

The statutes prohibiting the keeping of places of business open on Sunday have always been sustained.

Com. v. Has, 123 Mass. 40; *Com. v. Starr*, 144 Mass. 861.

A statute prohibiting the taking of gravel and sand from beaches has been held to prohibit the owner of the beach as well as any other person and to be constitutional even as against the owner.

Com. v. Tewksbury, 11 Met. 55.

A statute forbidding the employment of women more than a certain number of hours per week is constitutional, and is not an unconstitutional invasion of a woman's right to sell her labor.

Com. v. Hamilton Mfg. Co. 120 Mass. 883.

As was said by the court in *Com. v. Colton*, *supra*, "The reasons which induced the legislature to make it penal . . . are not for us to inquire."

In *Bancroft v. Cambridge*, 126 Mass. 438, the court says: "The legislature is ordinarily the proper judge of the necessity for the exercise of the power."

The statute, under which the defendant claims to make a defense, will not be declared unconstitutional, even if the government is in error on all preceding points and though this statute bears more heavily on him than may seem needful.

Com. v. Clapp, 5 Gray, 97.

Mr. T. E. Grover, for defendant:

A legislative act is to be construed according to the intent of the legislature. The intent is the essential, the vital part of a statute, and to reach the intent, its meaning may be extended beyond the precise words used, to the reason or motive upon which the legislature proceeded.

Cleveland v. Norton, 6 Cush. 384; *Stanield v. Raymond*, 4 Cush. 816; *United States v. Fisher*, 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

The statute is a penal one, and in derogation of a common-law right, and should, therefore, for both reasons, be construed strictly, and so, if possible, as not to interfere with that right.

The statute was passed, not to impair or destroy the right of property, but to protect it, by "encouraging the cultivation of useful fishes."

Title to Stat. 1869, chap. 384.

It sought to increase the fish supply so that the public might obtain a cheap and healthful article of food.

Burnham v. Webster, 5 Mass. 268; *Turner v. Nye*, 14 L. R. A. 487, 164 Mass. 579; *Com. v. McCurdy*, 5 Mass. 324; *Com. v. Essex Co.* 13 Gray, 249; *Turner v. Nye*, 14 L. R. A. 487, 164 Mass. 585.

Preventing the defendant from selling his trout for a portion of the year does not increase the supply, or benefit the public, although that may be the result with those of natural cultivation and growth.

When the Statute of 1869, chap. 384, went into effect, which was July 12 of that year, there was no one engaged in artificially raising trout as a business, for the defendant, who was the first to engage therein, did not begin until the September following, and

consequently such a case as is here presented could not have been in the mind of the legislature, for the facts which distinguish it from any case which could then have arisen did not exist. To hold that even section 53 above cited was intended to apply to such case as this would reverse its intent, and instead of encouraging the cultivation of useful fishes, its effect would be to restrain it.

Hall v. State, 20 Ohio, 14; *Platt v. Union Pac. R. Co.* 99 U. S. 48, 25 L. ed. 424; *Sewall v. Jones*, 9 Pick. 414.

Defendant's property in his trout exists independent of the statute. He holds them by a common-law right as he holds other property. They are kept confined upon his own premises and within his immediate power. They are his property as the fowls kept in his yard are his property. The distinction as to ownership between his trout and the unconfined trout, although such trout may have a legal owner under the statute, is the same as that between the duck he raises and the wild duck that is found in the waters upon his land.

Fleet v. Hegeman, 14 Wend. 46; *Decker v. Fisher*, 4 Barb. 592; *Post v. Kreisler*, 108 N. Y. 112.

A statute of New York provides that "no person shall catch or take any oysters," etc. The court of appeals held that that act did not apply to persons taking their own oysters out of their private lots or beds.

People v. Hazen, 121 N. Y. 813. See also *People v. Fishbough*, 184 N. Y. 598; *United States v. Sheldon*, 15 U. S. 2 Wheat. 119, 4 L. ed. 199; *Wales v. Stetson*, 2 Mass. 146, 3 Am. Dec. 89; *State v. Lovell*, 23 Iowa, 804; *People v. Utica Ins. Co.* 15 Johns. 390, 8 Am. Dec. 243; *Jackson v. Collins*, 3 Cow. 89; *Cheapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 152; *Keith v. Quinney*, 1 Or. 364.

If it should be held that the defendant, under the facts he offered to prove, committed a criminal offense within the intent of the statute, then the question is presented,—Is the statute creating that offense, so far as it applies to this case, constitutional?

Declaration of Rights, arts. 1, 10, 12.

As applied to this case, the statute under which the defendant is indicted may be declared constitutional when applied to the protection of fishes in which the public have a common right or interest, as distinguished from private ownership, and unconstitutional when applied to the private property of a citizen in which the public have no such right or interest.

Wellington, Petitioner, 16 Pick. 95, 26 Am. Dec. 631; *Fisher v. McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Com. v. Clapp*, 5 Gray, 100; *Com. v. Hitchings*, Id. 482; *Warren v. Charlestown*, 2 Gray, 84; *Cargill v. Power*, 1 Mich. 359.

Within what limits does the constitution permit the legislature to interfere with, restrict, or regulate the use of private property? This power may be divided into three general classes: (1) The power of taxation; (2) the right of eminent domain; (3) the police power.

The legislature might require the defendant to put upon the trout he sells, or offers

for sale, during the prohibited time, some mark or device, so they could be distinguished from wild trout, while, it would be an excess of power to prevent their sale during that time altogether. If the legislature has the power to prevent the defendant from selling his trout during a part of the year, it may, upon the same principle, prevent their sale for the entire year, and thus its power would extend to total prohibition.

Com. v. Huntley, 15 L. R. A. 839, 156 Mass. 236; *Com. v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Miller v. Horton*, 10 L. R. A. 116, 152 Mass. 547; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117; *Com. v. Alger*, 7 Cush. 53.

The constitutional limit of interference with private property is this: private property, when employed in business, only comes within the control of the police power, if the question of public protection is not involved, when that property is affected with a public interest. Judge Cooley divides these cases into four classes:

1. Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise.

2. Where the state on public grounds renders to the business special assistance by taxation or otherwise.

3. Where for the accommodation of the business some special use is allowed to be made of public property, or of a public easement.

4. Where exclusive privileges are granted in consideration of some special return to be made to the public.

Cooley, Const. Lim. 4th ed. chap. 16, §§ 6, 746; *Munn v. Illinois*, 94 U. S. 113, 125, 24 L. ed. 77, 84; *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394.

Defendant's business of raising trout does not come within these enumerated cases.

Neither does it come within the police power found in the maxim of the common law, *sic utere tuo, ut alienum non ledas*.

Com. v. Alger, 7 Cush. 84; *Com. v. Teuksbury*, 11 Met. 57.

Fishery rights, like the right to use navigable streams for boating, etc., are subject to legislative regulation because they are public rights, but such regulations cannot be carried to the extent of taking away a riparian owner's right, or depriving him of the use of his own property. He has the exclusive right of fishing along the banks, the exclusive control of the land, and whatever is affixed to the soil growing in the water to the middle of the stream, if his land is bounded by the stream, is absolutely his.

Com. v. Tiffany, 119 Mass. 304; *Com. v. Vincent*, 108 Mass. 446; *Vinton v. Welsh*, 9 Pick. 91; *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

Section 26 declares that the owner of fishes artificially cultivated or maintained shall not sell them, *i. e.* fishes artificially cultivated or maintained, for food at seasons when their capture is prohibited by law; but there is no time when the capture of such fishes is prohibited by law, on the contrary, the stat-

ute expressly provides that he may take such fishes in his own waters at pleasure. There being, then, no limit as to the time of capture, there can be no limit as to the time of sale.

Denbow v. State, 18 Ohio, 11.

Allen, J., delivered the opinion of the court:

There are two questions in this case, namely, whether the defendant's act was within the true meaning of the statute forbidding the sale of trout; and, if so, whether the statute is constitutional.

1. The defendant contends that the penalty imposed by Pub. Stat., chap. 91, § 53, for selling trout, does not extend to the sale of trout which have been artificially propagated and maintained. Whatever force this contention might have if section 53 stood alone, a reference to other sections of the same chapter, and to the history of this legislation, makes it clear that such trout are not exempted. The chapter contains many provisions for the protection of trout and other useful fishes, and among them are those for the encouragement of their artificial propagation and maintenance. No question is made that section 53 is applicable to all other protected trout except such as have been artificially propagated or maintained; as, for example, to trout found in such small or great ponds and such streams as are specially protected by the provisions of sections 10, 12, 14, 23, 24, 27. By section 26 it is provided that "fishes artificially propagated or maintained shall be the property of the person propagating or maintaining them; and a person legally engaged in their culture and maintenance may take them in his own waters at pleasure, and may have them in his possession for purposes properly connected with said culture and maintenance, and may at all times sell them for these purposes, but shall not sell them for food at seasons when their capture is prohibited by law." A close season for trout was fixed by section 51, which has since been changed by Stat. 1884, chap. 171. Section 53, by its terms, imposes a penalty upon every person who "sells or offers or exposes for sale or has in his possession a trout," except alive, during the close season. Statutes have long existed restricting the modes of taking trout, but the first provision making their sale punishable is found in Stat. 1869, chap. 384, § 23. This, after modifications in Stat. 1874, chap. 186, and Stat. 1876, chap. 221, § 1, was re-enacted in Pub. Stat., chap. 91, § 53. The object of all these statutes was to protect and preserve the trout. The same statute which first forbade their sale also contained the provisions upon which the present statute is founded, to

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encourage their artificial propagation and maintenance. In order to make the protection of the trout more effectual, it was deemed necessary by the legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced. In view of the provisions of section 26, it seems to us plain that the penalty imposed by section 53 extends to artificially propagated trout.

2. Nor have we any doubt that the statute is constitutional. The importance of preserving from extinction or undue depletion the trout and other useful fishes in the waters of the commonwealth has been recognized and illustrated in many familiar statutes and decisions from an early time. Such protection has always been deemed to be for "the good and welfare of this commonwealth," and the legislature may pass reasonable laws to promote it. Such laws are not to be held unreasonable because owners of property may thereby to some extent be restricted in its use. It has often been declared that all property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community. Many illustrations might be cited where such restrictions on the use of property have been held valid. But the cases are familiar. The limitation is that the restrictions must not be unreasonable. The legislature may "make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant to this constitution, as they shall judge to be for the good and welfare of this commonwealth." Const. chap. 1, § 1, art. 4. The legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power. *Com. v. Look*, 108 Mass. 452; *Com. v. Alger*, 7 Cush. 53, 84, 85; *Com. v. Tewkesbury*, 11 Met. 55, 57; *Cole v. Eastham*, 133 Mass. 65; *Ridout v. Knor*, 143 Mass. 368, 2 L. R. A. 81; *Blair v. Forehand*, 100 Mass. 136, 1 Am. Rep. 94, 97 Am. Dec. 82; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140.

Verdict to stand.

PENNSYLVANIA SUPREME COURT.

Allen CAMERON

v.

PITTSBURGH & LAKE ERIE R. CO.,
Appt.

(157 Pa. 617.)

Condemnation of a strip of land across a farm for canal purposes does not divide the farm into two parcels for the purpose of estimating damages for the construction of a railroad across one of them although such strip is taken in fee and the canal is abandoned and the fee to such strip acquired by third persons.

(October 28, 1893.)

A PPEAL by defendant from a judgment of the Court of Common Pleas for Lawrence County, in favor of plaintiff upon an appeal from an assessment by viewers of damages for a strip of land appropriated by defendant for a right of way. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. D. B. & L. T. Kurts, for appellant:

In the compensation of damages for land taken by a railroad company, the law has regard only to the tract of land through which the railroad is located, considered as a whole, and not to the person of the owner.

Advantages accruing to an adjoining but separate tract, owned by the same person, but not cut by the railroad, cannot be taken into consideration in assessing damages for the property actually taken.

Harrisburg & P. R. Co. v. Moore, 4 W. N. C. 532.

Whenever the commonwealth took land for permanent use under the Internal Improvement Acts of April 11, 1825, February 26, 1826, April 9, 1827, and similar acts, and constructed and operated a canal on it, she acquired an estate in such land in perpetuity and may dispose of the same in fee.

Western Pennsylvania R. Co.'s App. 99 Pa. 155; *Wyoming Coal & Transp. Co. v. Price*, 81 Pa. 156, citing *Com. v. McAllister*, 2 Watts, 190; *Haldeman v. Pennsylvania R. Co.* 50 Pa. 425; *Craig v. Allegheny*, 58 Pa. 477; *Robinson v. West Pennsylvania R. Co.* 72 Pa. 816; *Potts v. Pennsylvania S. V. R. Co.* 119 Pa. 278.

We find nothing in the statutes securing or reserving to such owners, whose lands were divided by the canal, a right of way over it; and even if there was, such right would at most be an easement in the land held in fee by the commonwealth or its grantee and in this case would not avail the plaintiff in his claim, for the reason that the defendant's appropriation invades neither the parcel of land west of the canal, nor such right of way or easement in the land formerly occupied by the canal, and therefore the injury, if any, suffered by the plaintiff is but indirect and consequential—

and for which there could be no recovery in this case.

Pennsylvania R. Co. v. Lippincott, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541.

Two distinct tracts of land connected only by means of a way, whether private or public, cannot be treated as one in the assessment of damages.

Pennsylvania Co. for Ins. v. Pennsylvania S. V. R. Co. 151 Pa. 384.

Messrs. Dana & Long for appellee.

Sterrett, Ch. J., delivered the opinion of the court:

In 1891 the defendant company appropriated a strip of land for railroad purposes, extending northerly across the easterly end of plaintiff's farm. On appeal from award of viewers, this issue was formed for the purpose of determining the amount of his damages; and on the trial thereof the railroad company contended that he was not entitled to recover for the injury or depreciation of the westerly end of the farm, containing eighty-five acres, because it is a separate and distinct tract from that through which its road passes. The facts upon which this contention is based are as follows: Over sixty years ago the farm in question was bisected by the Beaver Division of the Pennsylvania canal, in the construction of which the commonwealth acquired title in fee to the strip of land taken for canal purposes. Afterwards that title passed to persons other than the plaintiff or those through whom he acquired title to his farm, so that he has never owned the strip formerly occupied by the canal bed and its banks. That improvement crossed the farm in a northerly direction, leaving about thirty-four acres on the easterly, and eighty-five acres on the westerly, side thereof. For the purpose of furnishing convenient communication between the two parts of the farm, a bridge was built over the canal, and thereafter maintained by the commonwealth and her successors in title while the canal was in operation. On the trial of the issue, testimony tending to show the extent to which the farm as a whole, including the portions east and west of the old canal, was depreciated by defendant company's appropriation of said strip for railroad purposes, was offered and received by the court under exception. The learned judge also instructed the jury, in substance, as recited in the eighth and ninth specifications, that, notwithstanding the fact that the farm was cut into two pieces by taking the strip in fee for canal purposes, its identity was not destroyed, but the two pieces of land, one on either side of the canal, continued to constitute the farm, just as they did before the commonwealth entered and appropriated the

NOTE.—The above case is an excellent illustration of the rule for determining what constitutes a single tract in estimating damages caused by condemnation.

The essential character of the property and its

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uses is clearly made the test although it consists of two parts entirely separated by property of third persons. See on this point some similar cases in *note to Leroy & W. R. Co. v. Ross* (Kan.) 2 L. R. A. 217.

strip for canal purposes; that, for the purpose of assessing the damages sustained by the plaintiff in consequence of the taking by defendant company, the two pieces are to be considered as one farm, the same as though the commonwealth had not taken the strip in fee. In brief, the single question involved in all the assignments of error is whether the learned judge was correct in taking that view of the law. There is no controversy as to the facts upon which that question depends. An outline of the principal facts has already been given. The others are in entire harmony with those already stated. They all point to the conclusion that the lands in question constitute, as they did before the construction of the canal, one single farm, the entirety of which was not affected by that improvement or anything else, except as to the quantity of land taken therefrom by the commonwealth. So far as the testimony shows, the farm has always been held, occupied, and cultivated as one tract of land. There is little, if any, significance in the fact that, in the deed by which plaintiff acquired title, the parts lying on either side of the canal are separately described by metes and bounds, one bounded on the west by the easterly line of the canal, and the other on the east by the westerly line of the canal. It was a convenient way of excluding the commonwealth's property. It was never contemplated by the legislation under which the canals were constructed that the appropriation of a strip through or across any farm should have the effect of converting one single farm into two separate and distinct farms or tracts. To hold that it had that effect would be a very narrow, as well as unwarranted, construction. Without further comment, we are clearly of opinion that the learned judge was right in holding that plaintiff was entitled to recover damages for the injury or depreciation of the entire farm, embracing the part west, as well as that east, of the old canal. The authorities relied on by the defendant stand upon their own peculiar facts. They are not applicable to the undisputed facts of this case.

Judgment affirmed.

Re Estate of Richard B. BAILY, Deceased.

Elizabeth JACKSON, *Appt.*,

v.

J. Mitchell BAKER.

(156 Pa. 634.)

1. The relation of co-sureties jointly and severally liable for the default of their principal as to each other is such that each is a principal for one half the amount recoverable for such default and a surety for the other half.
2. A legacy from a surety to his co-surety jointly and severally liable with him for the principal's default, is subject to deduction

NOTE.—The relation to each other of sureties jointly and severally liable is illustrated in an unusual way by the above case of a legacy from one to the other which has been assigned to a third

for the proportionate share of the legatee of the amount the estate of the testator is compelled to pay upon such liability although the legacy is assigned to a third person before any payment is made by the surety.

(October 2, 1893.)

APPEAL by exceptant; one of the residuary legatees of Richard B. Baily, deceased, from a decree of the Orphan's Court for Chester County overruling exceptions to the master's report, approving the action of Baily's executors and directing as to the proper distribution of the estate. *Reversed.*

The testator, Baily, and Francis Worth were sureties on the bond of Ebenezer Worth, a guardian for certain minors. The guardian became insolvent and left the state, a new guardian was appointed and a balance found to be due the estate from the old guardian, which was directed to be paid to him either by the guardian or his sureties. Meanwhile Baily had died leaving a will by which he gave a legacy to his co-surety, Francis Worth. Baily's executors paid the whole amount of the deficiency in the account of the principal in the guardian's bond, and Francis Worth assigned his legacy to defendant in this action. The exceptant to the executor's account sought to raise the question of the validity of the payment made by the executors of the amount due on the guardian's bond, and also sought to compel a contribution toward such amount from the legatee to the co-surety.

The facts and contentions of the parties fully appear from the following portion of the auditor's report:

The third exception is as follows:

"The payment of \$3,681.96 to Cloud Pyle, guardian, is erroneous and should be reduced one half."

The facts upon which the payment is based are as follows: In the year 1878 Ebenezer Worth was appointed by the orphans' court of Chester county guardian of Jesse Anna Phipps, a minor, and upon March 14, 1878, he filed his bond as guardian in the sum of \$12,000 with Francis Worth and Richard B. Baily as sureties. He subsequently became financially embarrassed; his property was sold by the sheriff; and he left the state, and now resides in Barton county, Missouri. At or about the same time, Francis Worth, his brother, and co-surety upon the bond with Mr. Baily, executed and delivered to David M. McFarland and Paschall Worth a deed of trust of all his real and personal estate and has been since that time insolvent and without property of any kind. After the insolvency of both Ebenezer and Francis Worth, Richard Baily assumed charge of the estate of the minor, became the custodian of such investments as the guardian had made, collected the money thereon and made payments to the ward. After the death of Richard B. Baily, Ebenezer Worth, on October 23, 1890, filed his final account as guardian, showing a balance due his ward of \$3,592.16 and pe-

person. See, as to set-off against legatee, *Koons v. Mellett* (Ind.) 7 L. R. A. 231, and note; also *Fiscus v. Moore* (Ind.) 7 L. R. A. 236.

tioned the court to be relieved from the trust as guardian aforesaid. On October 28, 1890, the court ordered and directed that he be discharged from the duties of his appointment "upon the money due as shown by his account being paid to his successor by him or his sureties" and on the same day, upon the petition of the minor, appointed Cloud Pyle successor of the said Ebenezer Worth as guardian of the said Jesse Anna Phipps. The balance due as shown by his account together with interest thereon, amounting to \$3,681.96 was paid by the executors of Richard B. Baily deceased, to Cloud Pyle, the new guardian, on March 25, 1891, for which payment Mr. Pyle executed a release. Before payment was made the executor required Mr. Pyle to make demand upon Francis Worth for his one half of the indebtedness on the bond, and made a similar demand themselves, which demands were refused by Worth for reasons given. Upon suit being threatened by Pyle, the executors, under the advice of their counsel, paid the full amount under protest. By a statement furnished by the executors to Francis Worth, on January 17, 1891, it appears that of the amount paid \$945.32 is the proceeds of investments left in Mr. Baily's hands by Ebenezer Worth, and that the balance or \$2,736.64 is the true amount which the sureties were called upon to make good, of which amount the one half or \$1,368.32 belongs to Francis Worth to pay. In reply to the demand of the executors Mr. Worth replied that Richard Baily had in his lifetime assumed to pay the full amount due on the bond, and had "a number of times" said to him, "Thee will never have any of it to pay." He further informed the executors that he had sold the legacy bequeathed to him by Richard B. Baily, deceased to J. Mitchell Baker. Francis Worth is entitled under the will of Mr. Baily to receive a legacy of \$4,000, bequeathed to him in the following terms: "I, Richard B. Baily, authorize the persons hereinafter named . . . paid to each in person. Francis Worth four thousand dollars." This legacy he sold and assigned on October 3, 1890, to J. Mitchell Baker, the consideration money having been paid on October 6, 1890, and on the first-named date the executors signed a written acceptance of notice of said assignment attached thereto. The consideration named in the assignment is the sum of one dollar, and other good and valuable considerations. Mr. Worth, the legatee, testifies that at the time of the execution of the assignment, Mr. Baker, the assignee, knew that he (Worth) was a co-surety with Richard B. Baily upon the bond of Ebenezer Worth. Mr. Baker, on the other hand, is equally positive that he did not. At least one of the executors knew of the existence of this bond when they signed the acceptance of notice for Mr. Baker, and those who did not, discovered the fact very soon after. The executor, who was in a position to have the earliest and best information on the subject, was called upon by Mr. Baker before he paid the money, but after the execution of the assignment, and was encouraged by that gentleman to purchase the legacy. "Said it was all right, if he had the

money would buy it himself." On the 13th of October, 1890, Mr. Baker secured from Francis Worth and Samuel P. Webb a bond of indemnity in which "they covenant and agree that the said J. Mitchell Baker shall receive, by virtue of his assignment of the legacy aforesaid, the sum of thirty-eight hundred dollars, and if the said sum shall be subject to set-off, deduction, or diminution in the hands of the executors of the said Richard B. Baily, deceased . . . they will pay and make up said deficiency to the said J. Mitchell Baker." The above constitutes a history of the facts surrounding this credit, and the auditor has been compelled to give them somewhat in detail in order that the controversy over the payment may be fully understood. That controversy raised three questions for the consideration of the auditor, viz.:

1. Was the payment by the executors a proper one?
2. Can the executors set off the one half due on the said bond by Francis Worth against his legacy of \$4,000 dollars, or
3. Is J. Mitchell Baker entitled to receive, by virtue of his assignment, the full amount of the legacy, less the collateral inheritance tax?

The last two questions will be passed upon by the auditor in his report on distribution; the first is properly raised to the exception filed, and must be determined here. Two widely different reasons were urged before the auditor in support of this payment. Counsel for the executors say that the bond being joint and several, Ebenezer Worth, the principal, and Francis Worth, the co-surety, being insolvent, demand having been made upon them, after demand upon Francis Worth for payment, and suit having been threatened against the estate of Richard B. Baily, the executors were justified and it was their duty in order to save costs to the estate to make payment. Counsel for J. Mitchell Baker, the assignee of the legacy, to guard against a conflict of interests between his client and the executors in the distribution of the legacy, urges as a reason for allowing the payment that the legacy to Francis Worth was given in lieu of all debts due from Worth to the estate, and relying upon the statements of the testator to Dr. Warren and others, argues that Mr. Baily intended to release Francis Worth from all liability on the bond, and to assume the entire indebtedness himself. Counsel for the executor views the situation with his wonted equanimity, and is satisfied that the item should be reduced one half, and so long as his clients and the other legatees under the will are not called upon to pay it, is indifferent whether the executors or J. Mitchell Baker shall lose it. The auditor adopts the first reason given, and sustains the payment on the ground presented by the counsel for the executors. There can be no doubt about the liability of this estate for the entire suretyship. The bond is joint and several; the principal and co-surety are both insolvent; the amount of the indebtedness upon the bond had become fixed by the filing of the guardian's account, and its confirmation by the court and demand having

been made by the newly appointed guardian and suit threatened, there was no possible way for the executors to avoid payment of this debt. The payment was compulsory, in that it was of a claim which they could not legally resist. "A payment is deemed to be compulsory when the party making it cannot legally resist it." 4 Am. & Eng. Encyclop. Law, p. 5, notes; *Aldrich v. Aldrich*, 56 Vt. 324, 48 Am. Rep. 791.

"A surety who has paid money for a guardian, which the latter owed upon his bond, and which the surety is bound to make good, is not obliged to wait for judgment or execution, but by paying without them, undertakes the burden of showing that he was actually bound to pay. *Fishback v. Weaver*, 84 Ark. 569." 4 Am. & Eng. Encyclop. Law, p. 5, notes.

This claim having been paid by the executors, a surcharge of one half the amount so paid would result either in throwing the responsibility of the payment upon the executors personally and making them liable for the amount of such surcharge, or in making them volunteers to the extent of the payment of Worth's one half, and thereby establishing the relation of debtor and creditor between the executors and Francis Worth in the distribution of his legacy, compelling them to become the claimants for reimbursements from the legacy, and to successfully contest their rights as against other claimants or lose the payment. The auditor is not prepared, nor do the facts require that he should go to either length in passing upon this exception. While it is true the executors should have consulted counsel before accepting notice of the assignment of the Worth legacy to Baker, and while one of the executors at least had some knowledge as to Francis Worth's liability on the bond, nothing was done or left undone by them which in any manner increased the liability of the estate upon this bond or relieved Francis Worth from the payment of his one half thereof. The signing of the acceptance of notice did not in the slightest degree change the relations of all the parties, to wit, Worth, Baker or the executors. If the assignment takes precedence of the claim for contribution, it does so not by reason of any act of the executors, but because it was executed and delivered prior to the payment by the executors to Pyle of the amount claimed to be due from Worth. The assignment was complete without the acceptance of notice, and at the time of their signing, it was not in the power of the executors to defeat it. To the auditor it seems clear that the evidence discloses no act either of omission or commission on the part of the executors which would warrant him in placing upon them personally the burden of one half of the payment of \$3,681.96, excepted to, nor does it seem right or equitable that they should be compelled to contest their right to reimbursement in the distribution. The auditor prefers rather to treat the credit as a proper payment by the executors in behalf of the estate, a payment made in the discharge of their duty, and from which there was no escape. If, therefore, the au-

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ditor is right in his conclusions the contest over the legacy of Francis Worth must be between the estate of Richard B. Bailly for contribution, and J. Mitchell Baker as assignee of that legacy; and if the estate is not entitled to contribution as against Mr. Baker, then the estate and not the executors must lose the amount. One other question only raised by this exception should be answered. It is as to the right of Francis Worth to receive this legacy over and above his indebtedness to the estate. In allowing this credit the auditor finds no facts which would justify him in saying that the testator intended to give to Francis Worth the legacy over and above his liability and indebtedness on the guardian's bond, nor in finding that a release of that indebtedness was proven.

Francis Worth is entitled to a legacy of \$4,000 under the will of Mr. Bailly. This legacy he sold and assigned to J. Mitchell Baker, on October 3, 1890, and upon the same day the executors accepted notice of the assignment. On the 18th of October, 1890, Mr. Baker secured a bond of indemnity from Francis Worth, with Samuel P. Webb as surety, on which they covenant to pay and make up any deficiency, to Mr. Baker, which may exist or arise with said legacy by reason of any deduction or diminution in the hands of the executors.

On March 25, 1891, the executors paid to Cloud Pyle, guardian of Jesse Anna Phipps, the sum of \$3,681.96, being the amount due upon a bond given by Ebenezer Worth, a former guardian, and upon which Richard B. Bailly and Francis Worth were co-sureties, and jointly and severally both. The executors claim the right to set off the one half due on said bond by Francis Worth against his legacy of \$4,000 in their hands, and J. Mitchell Baker claims the legacy by virtue of his assignment.

The right of the executors to set-off claimed must depend upon the proper application of the principles relating to contribution, and the time when that contribution can be enforced.

"The right of contribution arises between sureties when one has been called upon to make good the principal's default, and has paid more than his share of the entire liability, and the right does not arise until that surety has paid more than his share of the debt." Adams, Eq. *269; *Wood v. Leland*, 1 Met. 387; Bispham, Eq. §§ 328-330; 1 Lead. Cas. Eq. pt. 1, (text-book series) *120.

Payment must have been compulsory; that is one which the surety could not resist. 4 Am. & Eng. Encyclop. Law, p. 5, note.

Payment in the case was made by the executors to Cloud Pyle on March 25, 1891, and in that payment was included the one half due by Francis Worth upon the bond. The right of contribution, therefore, arose at that time, and the set-off was complete against Francis Worth's claim for his legacy. If this were a claim by Worth himself, or by his creditors, this set-off would be effectual, for the creditors of Worth would be in no better situation than Worth himself. But can the interest of a prior bona fide purchaser

for value, without knowledge or notice of this set-off, be affected by it? It seems clear to the auditor that it cannot.

It is a fact not seriously controverted, and the auditor so finds, that Baker was a bona fide purchaser for value of this legacy prior to March 25, 1891, and without notice of any claim for defalcation or set-off, everything in the testimony points to an honest and fair assignment of the legacy to an innocent party for value. Whatever Francis Worth may have known, or feared, or suspected in regard to his right to claim this legacy as against his contingent liability on the guardian's bond, there is no evidence that he communicated these fears or suspicions to Mr. Baker, or gave the latter cause to doubt the merit of his claim. It is true Mr. Worth testifies that at the time of the execution of the assignment, Mr. Baker knew that he (Worth) was a co-surety with Richard Baily upon the bond of Ebenezer Worth. This is denied by Mr. Baker, but whether true or false, such knowledge was not sufficient to put Mr. Baker upon guard or inquiry, particularly in the light of the subsequent acts and silence of the executors themselves. The mere fact that Baker knew of the existence of the bond, if true, could not raise a presumption against the bona fides of the assignment to him, because it was not the bond, but its payment of more than their share by the executors, that created the right of set-off against Worth.

Worth's title in the legacy was complete and perfect at the time of the assignment. He had an absolute, indefeasible interest, capable of assignment, and liable for seizure for his debts. Whatever rights Worth and the executors had in this legacy were fixed and determined by the assignment of the legacy to Baker and notice thereof to the executors. Baker's interest in the legacy is exactly that of the legatee himself, as it stood affected by countervailing equities at the time of the assignment. He took it subject to every defense that would be valid between the original parties, but to no defense that was not valid and subsisting at the time the executors received notice of the assignment. It would be most inequitable and unjust to permit the executors to make any defense against the assignee, which, at the time of the assignment of the legacy or notice of it, they could not have made against Worth himself.

Another fact not to be lost sight of in adjusting the rights of these parties is that no negligence nor default appears in the conduct of Baker. He took every precaution to inform himself of the real situation by the original parties, and their relations to each other. His course was that of a prudent, cautious man, desirous of ascertaining all the facts relating to the legacy, and of protecting himself from all loss. Before he paid the money on the assignment he called upon Mr. McFarland, the executor, who was in a position to have the best information upon matters pertaining to the estate, and was told by that gentleman "it (the legacy) was all right," if he had the money "would buy it himself." All three of the executors signed

an acceptance of notice of the assignment before Baker paid the money, and no intimation was given by any of them that the full amount of the legacy was not due from the estate of Worth; in fact, those of the executors who knew of the guardians' bond did not believe that Worth's liability thereon could be set off against his legacy, and acted upon that presumption. Advice of counsel, if asked, might or might not have changed their views, but as the advice was not asked these views remain firmly fixed. No warning reached Mr. Baker from them that Worth was co-surety upon a bond with Richard B. Baily, that that bond would eventually have to be paid by the estate, and that when paid the executors would claim to set off the one half thereof against Francis Worth's legacy. This silence on the subject, whether proceeding from ignorance of the fact, or mistake as to their legal rights, would effectually bar them from setting up that defense after the assignee had parted with his money on the faith of that silence.

The silence of two of the executors and the language of one was in effect a declaration to Baker of no set-off and they are estopped from setting up any defense which existed at the date of such declaration. Baker had a right to rely upon the statement of one of the executors that "the legacy was all right," and upon the silence of all of them as to any defalcation or defense. If he was misled thereby in purchasing this legacy; if he took it upon the faith of these representations and loss occurs,—it must fall upon those whose acts occasioned the loss, for it is a well-established principle that where a loss must fall upon one of two innocent persons it shall be borne by him whose act occasioned it.

Mr. Baker, therefore, being a bona fide purchaser for value, prior to the right of contribution, and without notice of any defalcation or defense upon the part of the executors is entitled to take this legacy by virtue of his assignment and it will be awarded to him in the distribution.

Exceptions were taken to this report which were overruled by the court, and the exceptant appealed with the following assignments of error:

1. In dismissing the exception that the auditor erred in allowing the payment to Cloud Pyle, guardian, as a proper credit.

2. In dismissing the exception that the auditor erred in awarding to J. Mitchell Baker, assignee of Francis Worth, the full amount of the legacy bequeathed to Francis Worth.

3. In dismissing the exception that the auditor erred in awarding any sum whatever to Baker.

4. In dismissing the exception that the auditor having awarded Baker \$3,914, should have surcharged the executor with that amount.

5. In not reducing the sum awarded to Baker to the extent of Francis Worth's share of the amount due on the guardian's bond.

6. In not treating the claim made by Baker as the claim of Francis Worth.

Messrs. Charles H. Pennypacker, Warren W. Hole and Butler & Windle, for appellant:

The executors had no right to pay the demand of Cloud Pyle, guardian, at the time and under the circumstances they did pay it.

This estate should have been protected against any liability whether contingent or absolute.

Ross v. McKinny, 2 Rawle, 227.

Although his right to call for the interpolation of equity does not arise until his principal is in default by neglecting to pay the claim at maturity it is founded upon a contract which existed before, and while he has a claim against the decedent so equitable as this it is unjust that the representative of the latter should deprive him of the security already in his hands.

Beaver v. Beaver, 23 Pa. 170.

The obligation of a surety under a statutory bond is determined by the law under which it is given.

Crawley v. Com. 123 Pa. 275.

The legal construction of a will in writing cannot be explained or altered by the parol declarations of the testator, of his understanding of the meaning of the will, or of his intentions to do something else.

Comfort v. Mather, 2 Watts & S. 453, 37 Am. Dec. 523; *Kelley v. Kelley*, 25 Pa. 460.

We should go far beyond the province of interpretation, if we make a legacy good for its amount, and also good for the extinguishment of any amount of debt.

Strong v. Bass, 35 Pa. 334; *Bouslough v. Bouslough*, 68 Pa. 498.

If Worth was bound to pay unto this estate the results of his undertaking of suretyship, then Baker is likewise bound.

Frantz v. Brown, 17 Serg. & R. 287; *Frantz v. Brown*, 1 Penr. & W. 257; *Bredin v. Neal*, 3 Penr. & W. 190; *Thompson's App.* 42 Pa. 348.

A legatee who is indebted to the estate of his testator is not entitled to recover his legacy, nor that which he holds by assignment in right of another legatee, so long as any part of his debt to the estate equal to the amount of the legacies claimed, remains due and unpaid, and the assignee of such legatee can be in no better situation than the legatee himself.

Keim v. Muhlenberg, 7 Watts, 79; *Adams*, Eq. 8th ed. p. 223; *Story*, Eq. Jur. 18th ed. p. 63; *Wms. Exrs.* p. 960.

Mr. Thomas W. Pierce, for appellee:

The right of one co-surety to demand contribution does not arise out of the obligation, by which they are bound for the principal, but upon an equity that he should not pay more than a proper share of the joint burden, and such right dates from the time of the payment.

Campbell v. Meier, 4 Johns. Ch. 339, 1 L. ed. 860, 8 Am. Dec. 570.

The right of contribution arises between sureties when one has been called upon to make good the principal's default, and has paid more than his share of the debt.

Adams, Eq. 269; *Biapham*, Eq. §§ 828-830; *Baylies, Sureties & Guarantors*, 327.

The right of action for contribution does not arise until payment of more than a due proportion.

Martin v. Frantz, 127 Pa. 389.
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The legacy and the claim for contribution are not due in the same right. While Mr. Baker, as assignee of the legacy, would be liable to such abatements as the legacy was subject to at the time of assignment, he could not be made liable for debts of the assignor, created or accruing after the assignment was made and notice given.

Thompson v. McClelland, 29 Pa. 475; *Rider v. Johnson*, 20 Pa. 190; *Thompson's App.* 42 Pa. 345; *Ammon's App.* 63 Pa. 284; *Filbert v. Hawk*, 8 Watts, 443; *Strong v. Bass*, 35 Pa. 333.

The failure of Mr. Worth to pay such claims as might arise between him and the executors, after he had parted with his right to the legacy, cannot affect the assignee, whose rights are determined as of the time of the assignment.

Keim v. Muhlenberg, 7 Watts, 79.

McCollum, J., delivered the opinion of the court:

Richard B. Bailly and Francis Worth were cosureties, jointly and severally liable for the default of their principal, and in their relation to each other each was a principal for one half the amount recoverable for such default, and a surety for one half of it. If either was compelled to pay the whole amount, his rights and remedies against his cosurety for the half were the same as against their principal for the whole. *Croft v. Moore*, 9 Watts, 451; *Mosier's App.* 56 Pa. 76, 93 Am. Dec. 783; *Hess's Estate*, 69 Pa. 272; and *Wright v. Grover & Baker Sewing Mach. Co.* 32 Pa. 80. If a surety gives a legacy to his principal, the latter cannot recover it from the estate of the former until he has satisfied, or furnished indemnity against, the demand for which the testator was his surety. *Ross v. McKinny*, 2 Rawle, 226. If the debt of the principal has been paid by the surety or his estate, such payment may be relied on to satisfy or reduce the amount of the legacy, and this is so although the payment was made by the estate after proceedings for the recovery of the legacy were instituted. *Beaver v. Beaver*, 23 Pa. 167. It is clear, therefore, that in a proceeding by Worth for the collection of the legacy to which he was entitled under and by virtue of the will of Richard B. Bailly the estate could deduct therefrom the amount it was compelled to pay by reason of his default as the testator's cosurety. It was thought, however, by the learned court below that, as Baker purchased the legacy before the payment was made by the estate, such payment was not available as a partial defense to his claim for the whole of it, and in accordance with this view it, less the collateral inheritance tax, was awarded to him. In support of this decree it is urged that when Worth transferred the legacy the estate had no demand against him which was applicable to it, nor equity for the protection of which the executors could withhold from him the whole or a part of it, until indemnity was furnished, or his liability as cosurety was discharged. We think this contention, to the extent that it denies the existence of such an equity in the estate at the time of the transfer, is unsound. It fails to

give proper effect to the relation between co-sureties, and to duly consider the rights and liabilities which spring from it. Prima facie this relation is established between two persons when they unite with a third in an obligation for the payment of his debt, and by this act they become, as we have already seen, his sureties for the whole debt, and sureties of each other for half of it. If their principal fails to pay his debt, and the co-sureties pay it in equal proportions, he becomes their debtor, and their liabilities to each other as such are discharged; but if one of them is compelled to pay the whole debt he is entitled to contribution from his co-surety, and may enforce it by an action of assumpsit, or by subrogation to the rights of the creditor. While the action for it cannot be maintained until default and payment, as above stated, it is nevertheless true that the right to have and the liability to make contribution inhere in the transaction by which the sureties were jointly and severally bound for the debt of their principal. In *Agnew v. Bell*, 4 Watts, 31, Kennedy, J., in delivering the opinion of the court, said: "It is certainly too well established now to be questioned that where any one or more of those who are cosureties have had to pay, as such, the debt of their principal, or any part thereof, and he is unable to reimburse it, the loss arising therefrom must be borne equally by all of them. Hence has arisen the right to contribution. This right has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation, for although generally there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community that from the circumstance alone of their agreeing to be and becoming accordingly cosureties of the principal they mutually become bound to each other to divide and equalize any loss that may arise therefrom to either or any of them, it may with great propriety be said that there is at least an implied contract. *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Craythorne v. Swinburne*, 14 Ves. Jr. 160. This liability between sureties to contribution in case of loss through the inability of their

principal to pay being known to them at the time of their becoming sureties, may well be considered a great, if not the main, inducement in many instances to their becoming such." It is therefore incorrect to say that the estate, before payment of the principal's debt, had no equity against the testator's cosurety and legatees which would enable it to withhold payment of the legacy until it was indemnified, or the inability of such co-surety to pay one half of that debt in case of the principal's inability to pay it was discharged. It clearly had such an equity which in a suit by Worth for the legacy would have been to the extent mentioned available as a defense. This equity was not destroyed, nor the defense founded upon it affected, by the assignment of the legacy to Baker. He acquired by his purchase such right to the legacy as his assignor had, and this right, as we have seen, was qualified by the estate's equity against the latter as co-surety of the testator. The learned counsel for the appellee concedes in his printed argument that "if the decedent was surety for Worth, and that relation existed at the time of the transfer, the legacy would be abatable by the amount subsequently paid by the estate, or the legacy might be held to await the determination of the liability of the estate." It seems to us that this concession is fatal to the appellee's claim, because in the relation of cosureties established between Baily and Worth there was an implied promise by each to the other to pay one half of their principal's debt in case of his inability to pay it, and, as they were jointly and severally bound for such debt, their relation to each other for half of it was that of principal and surety. In the acceptance by the executors of notice of the assignment there is nothing prejudicial to the interests of the estate, and we fail to discover anything in the evidence which prevents the residuary legatees from successfully asserting on distribution its rights to the deduction claimed. We therefore sustain the second, fifth, and sixth specifications of error, and overrule the first, third, and fourth.

Decree reversed, and record remitted to the court below, with instructions to enter a decree in accordance with this opinion.

COLORADO SUPREME COURT.

John WILSON *et al.*, *Appts.*,
v.

PEOPLE of the State of Colorado, to the
Use of PUEBLO & ARKANSAS VAL-
LEY R. CO.

(.....Colo.....)

1. A bond given by an officer does not extend the obligation imposed upon

NOTE—*Liability on official bond for loss of money by theft or bank failure.*

The main case holds that in the absence of statute, the clerk of a court is not liable on his bond for loss of money through failure of the bank, where it was deposited, if he used due care.

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him by law, unless by force of constitutional or legislative provisions; but his duty and liability as to moneys coming into his hands is measured by the law of bailment.

2. The loss of money deposited by a clerk of court in a bank of reputed solvency, acting as a prudent man would, will not make him liable on his bond to pay over moneys that come into his hands.

(November 22, 1893.)

There appears to be some conflict of authority as to the liability on an official bond for loss of money, some cases holding that there is no liability for money lost through failure of the bank in which the money was deposited by the officer where there was no negligence on his part; as where a surr-

APPEAL by defendants from a judgment of the District Court for Fremont County in favor of plaintiff in an action brought to enforce defendant's alleged liability on the official bond of the clerk of the district court for the loss of money which had been placed in his possession pending condemnation proceedings, and by him deposited in a bank which became insolvent. *Reversed.*

Statement by **Goddard, J.:**

This case was submitted without suit upon the following agreed statement of facts: "(1) The defendant John Wilson was, during the time hereinafter stated, and is now, the duly appointed and acting clerk of the district court of Fremont county, Colorado, and the defendants S. W. Humphrey, C. S. Topping, and J. H. Harrison are the sureties on his official bond as such clerk, a true copy of which, with the indorsements thereon, is herewith attached. (2) At various times during the year 1887 the plaintiff, the Pueblo & Arkansas Valley Railroad Company, a corporation organized under the laws of the state of Colorado, and then constructing a line of railroad through Fremont county, paid over

to the defendant Wilson, as such clerk, various sums of money fixed and determined by the judge of the said court by rules entered in certain condemnation proceedings for right of way then pending in the said district court, as deposits pending the ascertainment of damages, and to authorize the company to take possession of the right of way pending the proceedings, as provided by section 6 of the Eminent Domain Law (Code Civ. Proc. p. 77). These moneys were deposited by the defendant Wilson, as received, to his credit as clerk of said court, in the Exchange Bank of Canon City, a private, unincorporated banking institution then doing business at said Canon City, in said county, and reputed to be solvent. (3) The said Exchange Bank has failed in business, and its depositors have not been paid. The condemnation proceedings referred to have all been concluded by final decree vesting title in the railroad company, and, of the moneys so paid by the railroad company to the said clerk as deposits, the company is entitled to receive back as an excess of the amount so deposited, over and above the amounts finally awarded as damages, the sum of \$2,997.20, which has not

gate lost private money paid into court and deposited by him in a bank that failed, where his bond only required faithful performance of his duties. *People v. Faulkner*, 107 N. Y. 477, reversing 88 Hun, 607.

And in *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 575, which was an action against a county treasurer for accounting, he was not liable for loss of money through failure of the bank where he had deposited the same. The common-law doctrine of liability only applies as his bond is, "that the duties shall be well and truly performed." See *State v. Moore*, *infra*, and cases following holding the bond to strict liability in bank cases.

So where money was stolen from a county treasurer's office, and the bond was, "shall faithfully execute the duties of the said office," and, "shall pay," the latter clause was held to be only one of the enumerated duties. *Albany County Supra v. Dorr*, 25 Wend. 440, affirmed in 7 Hill, 588, by a divided court.

But a collector's bond "for the faithful execution of his duties" where the statute made it his duty "to pay," and also made the bond a lien on all the property of the obligors, and the statutory provisions seemed clearly to regard him as a debtor for the amount to be collected, is not released because money is stolen from his dwelling without fault. In this case the plea failed to allege the identity of the money lost and this was regarded as another ground of the decision. *Muzzy v. Shattuck*, 1 Denio, 238.

And in a similar case a bond "to pay over promptly" and "exercise all reasonable diligence and care in the presentation and lawful disposal of all money" was held not to make the treasurer liable. *Ross v. Hatch*, 5 Iowa, 149. See *Taylor Dist. Twp. v. Morton*, *infra*, for other cases of failure of bank.

And the same was held, where a county treasurer was assaulted and robbed in his office, the bond being, "shall well and faithfully attend to the duties of said office and perform all things required." *Cumberland v. Pennell*, 69 Me. 357, 81 Am. Rep. 284.

And where a tax collector was robbed while on the road to pay over money that he had collected, and the bond was "well and truly and faithfully keep safely," he was held to be more than a mere

bailee for hire but that it was a question for the jury whether he was negligent or not in going unarmed; and if he used the highest care, vigilance, and diligence and was robbed by irresistible force, it would be a valid defense. *State v. Houston*, 79 Ala. 576, 56 Am. Rep. 59, 83 Ala. 361.

So where a receiver of public money was robbed by confederate forces without fault on his part, the liability on his bond was only that of bailee, and he was only required to use due diligence, as against a public enemy. *United States v. Thomas*, 82 U. S. 15 Wall. 337, 21 L. ed. 89.

Now under Act 1868, 14 Stat. at L. 44, Rev. Stat. §§ 1059, 1062, the court of claims may determine the claim of any disbursing officer for loss of funds while in the line of his duty.

Cases holding liability to be absolute in loss by robbery and theft.

The prior decisions of the United States courts, however, held the law of bailment does not apply, and that a bond to "keep safely" is not discharged by theft from the officer without his fault. *United States v. Prescott*, 44 U. S. 3 How. 578, 11 L. ed. 784.

So where the bond was "to pay over and account," *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319.

So where the bond was to "discharge all the duties" and an act of congress made it his duty to pay it over. *Boyden v. United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527.

So on a similar bond where notes received for duties were canceled but were stolen before being put in the postoffice for return, the liability still existed for whatever loss might be sustained by the government through danger of their being put in circulation again, and damages for inconvenience as lost vouchers. *United States v. Morgan*, 52 U. S. 11 How. 154, 13 L. ed. 643.

And the liability on an official bond is not released by reason of confederate agents taking the money from the officer where his delay in transmitting occasioned the loss. *Bevans v. United States*, 80 U. S. 13 Wall. 58, 20 L. ed. 531.

So a postmaster's bond is not discharged where he turned over the money in his hands to the confederate government, and no force was used. *United States v. Keebler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574.

been paid. (4) Query, are the clerk and the sureties on his bond liable to the railroad company for the payment of this money? If yes, let judgment be entered in favor of the plaintiff against the defendants for the amount aforesaid, with interest from date of suit; if no, let judgment be entered for the defendants for costs."

The bond above referred to and indorsed upon this statement is as follows:

"Know all men by these presents, that we, John Wilson, as principal, and S. W. Humphrey, C. S. Topping, and J. H. Harrison, are held and firmly bound unto the people of the state of Colorado in the penal sum of five thousand (\$5,000) dollars, for the payment of which sum of money we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed and dated this twenty-fourth day of May, 1886. The condition of the above obligation is such that, whereas, the above-bounden John Wilson has been appointed clerk of the district court of the third (3d) judicial district of the state of Colorado,

within and for the county of Fremont, now, therefore, if the said John Wilson shall faithfully perform all the duties of said office as prescribed by law, that he will punctually pay over to the person legally authorized to receive the same all moneys that may come into his hands by virtue of the said office, and shall deliver to his successor in office all records, books, papers, and other things belonging to his said office, then the above obligation to be null and void; otherwise, to remain in full force and effect. John Wilson. [Seal.] S. W. Humphrey. [Seal.] C. S. Topping. [Seal.] J. H. Harrison. [Seal.]"

The court below rendered judgment upon this agreed statement of facts in favor of appellees, and against the appellants, for the sum of \$3,180.36 and costs. To reverse this judgment the defendants bring the case here on appeal.

Messrs. Macon & Macon and D. P. Wilson for appellants.

Mr. Charles E. Gast, for appellee:

And where a receiver of public money was murdered and robbed, his bond was held bound for the loss, as he is not a bailee, but an insurer. *United States v. Watts*, 1 N. M. 563.

It should be noticed that *United States v. Thomas*, 35 U. S. 15 Wall. 327, 21 L. ed. 89, makes an important exception to these federal cases and seems to weaken their authority, while the Act of Congress of 1866 above cited changes the law as to federal officers.

The liability on an official bond is also held in many of the states to be not that of bailee, but that it is fixed by the bond or by the bond taken in connection with the statutes imposing liability and is not released by robbery of the officer. *State v. Nevin*, 19 Nev. 162; *State v. Lanier*, 31 La. Ann. 423.

So where the money was stolen from a safe furnished by the county. *Jefferson County Comrs. v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Halbert v. State*, 22 Ind. 125; *Hennepin County Comrs. v. Jones*, 18 Minn. 199; *Redwood County Comrs. v. Tower*, 23 Minn. 45.

So when the money was stolen from a safe in which it had been placed by the officer. *State v. Clarke*, 73 N. C. 255; *State v. Blair*, 76 N. C. 78; *Thompson v. Trustees of Township 16*, 30 Ill. 90; *Morbeck v. State*, 23 Ind. 88; *Pine Island Board of Education v. Jewell*, 44 Minn. 427.

Or stolen from his house or office. *New Providence v. McEachron*, 38 N. J. L. 339; *McEachron v. New Providence*, 35 N. J. L. 522; *Hancock v. Hazard*, 12 Cush. 112, 59 Am. Dec. 171; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Com. v. Comly*, 3 Pa. 372.

And the same was held in *Taylor Dist. Twp. v. Morton*, 37 Iowa, 550, in which the bond was to "discharge the duties of said office" and the statute made it his duty "to hold all moneys" "and pay out the same," differing in the form of the bond from *Ross v. Hatch*, 5 Iowa, 149.

And the same was held in *Linville v. Leininger Twp. Trustees*, 72 Ind. 494, and *Rock v. Stinger*, 38 Ind. 346, but was not the point involved in these cases.

And in *Chicago, B. & Q. R. Co. v. Bartlett*, 120 Ill. 606, it was held that a bond of a township treasurer is not released on account of theft of the money without his fault, but that case was one on a bond of an officer of a corporation.

See also *Muzzy v. Shattuck*, 1 Denio, 233.
Cases holding liability to be absolute in loss by bank failure.

And the same rule of liability has been applied 22 L. R. A.

where an officer deposited money as treasurer in a bank that failed, and the bond was "to perform all the duties," and the statute made it his duty to "deliver to successor all money." *State v. Moore*, 74 Mo. 418, 41 Am. Rep. 322.

And the same degree of liability was imposed, but the bond is not disclosed in the case. *State v. Powell*, 67 Mo. 395, 29 Am. Rep. 612; *Nason v. Directors of the Poor*, 123 Pa. 445.

So where the statute provides the only way in which funds shall be disbursed and deposit was made individually instead. *Ward v. Colfax County School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477.

So where the bond was for "lawful disposal" a deposit was held unlawful as contrary to statute forbidding a loan, and the record does not disclose whether the deposit was in his name or as treasurer. *Lowry v. Polk County*, 51 Iowa, 50, 38 Am. Rep. 118.

So an officer who deposits as treasurer money in a bank that fails is liable on a bond "to faithfully discharge the duties" and "properly and legally disburse or pay all moneys." *Omro Supra. v. Kaime*, 39 Wis. 466.

And the same was held on a similar bond where the statute required the officer "to account" and the deposit was made in the name of the commonwealth. *Bally v. Com.*, 20 W. N. C. 221.

And the liability is fixed by a bond providing "to account for and pay over" where a clerk of a court deposited money received by him on sale of land. *Havens v. Lathene*, 75 N. C. 505.

So when the bond is in ordinary form. *Inglis v. State*, 61 Ind. 212.

And *State v. Croft*, 34 Ark. 550, holds that the "failure to keep the money" is a breach of the bond, where the money is lost through failure of the bank.

And the liability on the bond is absolute where a receiver deposited in a bank that failed, and the deposit was made through an arrangement to obtain surety on his bond, divesting him of the sole power of drawing the funds. *White v. Baugh*, 3 Clark & F. 44, 2 Bligh, N. S. 181.

So in *Rowley v. Fair*, 104 Ind. 189, it is held that a township trustee is required to account to the township, irrespective of any casualty by which the money may be lost, but that question was not involved in the case. L. L.

A bond with an unqualified condition to account for and pay over moneys enlarges the implied obligation of the receiving officer, and deprives him of offenses which are available to an ordinary bailee.

The performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control.

Paradine v. Jane, Aleyn, 26; *Ford v. Coleworth*, L. R. 4 Q. B. 134.

The bond in this case has the effect of such a special contract.

United States v. Prescott, 44 U. S. 3 How. 578, 11 L. ed. 734; *United States v. Morgan*, 52 U. S. 11 How. 154, 13 L. ed. 643; *United States v. Dashiell*, 71 U. S. 4 Wall. 182, 18 L. ed. 319; *Boyden v. United States*, 80 U. S. 13 Wall. 17, 20 L. ed. 527; *Com. v. Comly*, 8 Pa. 372; *Thompson v. Trustees of Township 16*, 80 Ill. 99; *State v. Harper*, 6 Ohio St. 611, 67 Am. Dec. 368; *New Providence v. McEachron*, 33 N. J. L. 340; *Omro Supra. v. Kaine*, 39 Wis. 468. See also *Muzzy v. Shattuck*, 1 Denio, 238; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

Goddard, J., delivered the opinion of the court:

From the agreed facts it appears that the money was lost through no fault of the clerk. He deposited the money in a bank of reputed solvency, as clerk of the court, and in doing so acted as prudent men ordinarily do with their own funds. The judgment of the court below must therefore be upheld, if at all, upon the principle that the conditions of his official bond imposed upon him an absolute obligation to pay the money when required, and that no exercise of diligence on his part will exonerate him from such obligation. Such is the contention of counsel for appellee, and for its support he relies on the case of *United States v. Prescott*, 44 U. S. 3 How. 578, 11 L. ed. 734, decided by the Supreme Court of the United States in 1844, as the leading case, and several other cases in that court, as well as some decisions by state courts, which approve and follow the doctrine therein announced. In these cases in which the rule contended for was sustained, the court had under consideration the liability imposed by the official bond of receivers of public money, and the conclusions arrived at were influenced largely by considerations of public policy. Whether the case at bar is sufficiently analogous to these cases to bring it within the rule therein announced it is unnecessary to decide, since the Supreme Court of the United States, in a later case, has very much modified, if it has not in effect overruled, the extreme doctrine laid down in its earlier decisions. In the case of *United States v. Thomas*, 82 U. S. 15 Wall. 387, 21 L. ed. 89, *Justice Bradley*, in speaking of the leading case of *United States v. Prescott*, *supra*, said: "After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required: 'The obligation to keep safely the public money is absolute, without any condition, express or implied;

and nothing but the payment of it, when required, can discharge the bond.' This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events. . . . And as the money in the hands of a receiver is not his, as he is only custodian of it, it would seem to be going very far to say that his engagement to have it forthcoming was so absolute as to be qualified by no condition whatever, not even a condition implied in law." And after reviewing the principal cases relied on by appellee he further said: "So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring from such an instrument. The learned judges in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case. . . . The condition of his [an official] bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes."

While the majority opinion distinguished the case under consideration from those preceding it, we think the reasoning of the learned justice who wrote the opinion logically and necessarily overrules the doctrine laid down in the former cases. If, as therein announced, the obligation imposed by the bond is absolute, and the officer was an insurer of the money received by him, how could the manner or cause of its loss affect his liability? Wherein is he more at fault when overpowered by one or two robbers than he is when intimidated by an army? *Justice Miller* refused to concur in the majority opinion because it did not frankly overrule those cases and abandon the doctrine on which they rested, and in his dissenting opinion stated his personal views upon the question as follows: "When the case of *United States v. Dashiell* [71 U. S. 4 Wall. 182, 18 L. ed. 319], came before the court I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary

beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver, if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that, prior to these decisions there was any principle of public policy recognized by the courts, or imposed by the law, which made a depository of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping."

We believe the true rule is that a public officer who receives money by virtue of his office is a bailee, and that the extent of his obligation is that imposed by law. That, when unaffected by constitutional or legislative provisions, his duty and liability is measured by the law of bailment. If a more stringent obligation is desired, it must be prescribed by statute. That his official bond does not extend such obligation, but its office is to secure the faithful and prompt performance of his legal duties. Instances where the constitution and statutes of this state have increased the common law liability of certain officers were recognized by this court in two cases, at least. In the case of *State v. Walen*, 17 Colo. 170, it was held that by constitutional provisions the state treasurer was made absolutely liable for state moneys received by him; and in the case of *McClure v. La Plata County Comrs.* (Colo.) 84 Pac. Rep. 768 (recently decided), it was held that a county treasurer, by virtue of the statute regulating the duties of his office, was a bailee with express and extraordinary liability. No constitutional or statutory provision in

this state imposes a more stringent obligation upon a clerk of the district court than that imposed by the common law. This rule of common law, as laid down by *Justice Story*, is as follows: "In respect to property in the custody of the officers of a court, pending process and proceedings, such officers are undoubtedly responsible for good faith and reasonable diligence. If the property is lost or injured by any negligent or dishonest execution of the trust, they are liable in damages. . . . The degree of diligence which officers of the court are bound to exert in the custody of the property seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services." *Story, Bailm. § 620*. It is insisted in argument that its doctrine refers only to specific property, and does not apply to money deposited with the clerk, because it is assumed that he holds the relation of debtor to the fund, and therefore may use it as his own. To this we cannot agree. The money received by him is a trust fund, and a conversion of it to his own use would constitute embezzlement, and subject him to a criminal prosecution. The defendant *Willson*, as appears from the agreed facts, did not mix the money in question with his own funds, or in any manner treat it as his own. He deposited it in the bank as clerk, and the bank had notice thereby that the money so deposited was held by him in his official capacity. At the time of the deposit the bank was in good standing. We think, under the circumstances, he is not chargeable with any fault that should render him or his sureties liable for the loss.

The judgment of the court below will be reversed, with directions to enter judgment for defendants.

FLORIDA SUPREME COURT.*

L. W. SPRATT et al., Appts.,

v.

O. O. LIVINGSTON.

(32 Fla. 507.)

*1. By the Act of Congress passed in 1891, chapter 64, United States Statutes at Large, amending the original and Amendatory Act creating the Freedman's Savings & Trust Company, the secretary of the treasury was authorized and directed to appoint the comptroller of the currency a commissioner of said company

*Headnotes by MARRY, J.

NOTE.—The powers and the relation to the corporation of a statutory liquidator substituted for the corporation in order to wind it up are presented above in a somewhat unusual illustration of the sale of the property on execution against the liquidator.

For note on execution or judicial sale of corporate franchise or property necessary to its enjoyment, see *Brady v. Johnson* (Md.) 20 L. R. A. 737. 22 L. R. A.

for the purpose of disposing of its property and winding up its business. Upon his qualifying by taking the oath and giving the bond prescribed in the Act, the comptroller of the currency, as such commissioner, became invested with the legal title and possession of all the property of said company, and clothed with all the rights and privileges, and required to perform all the duties of the three commissioners appointed under the Amendatory Act of 1874, chapter 349, whose functions ceased upon the appointment and qualification of the comptroller as such commissioner.

2. The purpose, as well as the effect, of the Amendatory Act of Congress making the comptroller of the currency a commissioner of the Freedman's Savings & Trust Company, was to invest him, as such commissioner, with the property, management, and disposition of the affairs of said company for the purposes of liquidation, and he thereby became the statutory substitute and successor of the corporation itself, and not a mere trustee of the bare legal title of its property.

3. G. Instituted a suit of attachment in the state circuit court against the comptroller of the currency, as commissioner

of the Freedman's Savings & Trust Company, to recover for services rendered and money expended by him as agent of said commissioner in winding up a branch business of said company in the state; the commissioner appeared and interposed pleas to the merits of the suit, and after trial, judgment was rendered in favor of G., and real estate in possession of the commissioner was sold under execution emanating from the judgment, and L. became the purchaser at said sale; no objection was made by any depositor or beneficiary of the company to the legal proceedings against the commissioner, and after paying the judgment in favor of G., a balance of the purchase money arising from the execution sale was paid to the commissioner. Held, that L. acquired the legal title to said real estate at said sale, and could recover the same in an action of ejectment against S., who had gone into possession of the property under a contract of purchase from the commissioner, but had refused to comply with the terms of his purchase, and was not entitled to a specific performance of his contract.

4. **The possession of real estate by one who enters under an agreement to purchase** from the owner, but without paying the consideration price, cannot be adverse until he repudiates the seller's title and asserts his own title to the property.

(November 8, 1898.)

APPEAL by defendants from a judgment of the Circuit Court for Duval County in favor of plaintiff, in an action brought to recover possession of certain real estate in the city of Jacksonville. *Affirmed.*

The facts are fully stated in the opinion.

Mr. W. B. Young, for appellants:

The only title that the defendant in execution had was as trustee, and the trust property could not be seized and sold under an execution against the trustee so as to vest the purchaser with the fee-simple title.

Lewin, Tr. 8th ed. 212, 213; Perry, Tr. §§ 768, 769; *Taylor v. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605; *Sullivan v. Bruhling*, 66 Wis. 472; *Hollingsworth v. Trueblood*, 59 Ind. 542.

The record shows that the judgment upon which the execution issued was for services rendered by Greeley to the trustee, and it was the personal debt of the trustee.

L'Engle v. L'Engle, 19 Fla. 714; *Hackman v. Maguire*, 20 Mo. App. 286.

Trust property cannot be seized and sold for the personal debt of the trustee.

Hollingsworth v. Trueblood, *supra*.

He cannot even delegate his power of sale.

Gillespie v. Smith, 28 Ill. 478, 81 Am. Dec. 328; *Fuller v. O'Neil*, 69 Tex. 349.

Where the vendor himself repudiates the contract, tries to get the tenant of part of the premises sold to attorn to him, and forcibly ejects the purchaser from another portion and commences divers proceedings and suits to oust the vendee and his tenant, it amounts to the same thing in its legal effect as if the purchaser had repudiated the holding under his vendor and brought home to him knowledge that he was claiming adversely to him.

Tyler, Ejectment, 877; *Hart v. Bostwick*, 14 Fla. 178.

Mr. L. W. Spratt, in *propria persona*, also for appellants.

Mr. H. Bisbee, for appellee:

22 L. R. A.

The defendant, as commissioner, in this case, stands in the same relation to the depositors of the bank that the board of directors of a corporation do to the stockholders.

He is specially empowered to sell and convey at his discretion, and to make conveyances to purchasers. He is specially empowered to employ agents and to pay them for their services and to pay himself, out of the funds arising from the sale of property, before any distribution is made to depositors.

See Acts of Congress 1873-74, p. 132, and later act now before the court.

The commissioner himself could sell this property voluntarily and pay this judgment out of the proceeds of sale. This being so, it must logically follow that if he don't do it, it could be sold under judgment at law.

Every judgment rendered in this state "shall create a lien and be binding upon the real estate of the defendant or defendants."

McClellan's Dig. pp. 618, 619.

The purchaser under an execution sale takes all the legal title and right of possession and all the interest of the judgment debtor, and he takes it subject to the equities of third parties.

Bird v. Earle, 15 Fla. 453.

An execution sale may transfer a legal title which the defendant held as trustee.

Freem. Executions, § 335, bottom page 554, note 7 citing authorities. See also *Montgomery & W. P. R. Co. v. Branch*, 59 Ala. 139.

In *Giles v. Palmer*, 49 N. C. 386, 69 Am. Dec. 756, it was held that on a judgment against the husband, real estate held by him as trustee for his wife could be sold on execution, and that the purchaser on such title could maintain ejectment.

When the judgment debtor can sell and convey a title, then it may be sold on execution at law against him. "It is a statutory conveyance from debtor to creditor."

Bartlet v. Harlow, 12 Mass. 350; 1 Perry, Tr. § 321; 2 Perry, Tr. § 843; *Cooper v. Galbraith*, 8 Wash. C. C. 546; *Shalley v. Spillman*, 19 Fla. 516; 2 Morawetz, Priv. Corp. § 864, pp. 837, 838; *Angell & A. Priv. Corp.* §§ 640, 641.

Mabry, J., delivered the opinion of the court:

C. O. Livingston brought a suit of ejectment in the circuit court for Duval county, in March A. D. 1889, against L. W. Spratt and W. B. Barnett, to recover possession of a certain lot of land described in the declaration and situated in the city of Jacksonville, Duval county, Florida. A trial of the cause before the court without a jury resulted in a finding and judgment for the plaintiff and the defendants appealed.

To maintain his action the plaintiff first introduced a deed from J. P. Sanderson and wife bearing date February 7, A. D. 1870, conveying to the Freedman's Savings & Trust Company lot eight (8) in block thirty-one (31) as described on the plan of the said city of Jacksonville. This lot embraces the land in controversy in this suit. Next a certified copy of the record of a certain cause in the Duval circuit court where Jonathan C. Greeley was plaintiff and William L. Trenholm, the comptroller of the currency, as

commissioner of the Freedman's Savings & Trust Company was defendant. This suit was commenced by attachment, the affidavit therein alleging that the defendant Trenholm, comptroller of the currency of the United States, as commissioner of the Freedman's Savings & Trust Company, was justly indebted to the affiant, Greeley, in the sum of \$7,678.88, which sum was actually due from said Trenholm as such commissioner, and that he resided beyond the limits of the state of Florida.

The defendant appeared by attorneys, and filed pleas to the merits of the cause, which, after issue joined, was referred to a referee for decision. After hearing the testimony offered and argument of counsel the referee rendered judgment in favor of the plaintiff, Greeley, against the defendant, William L. Trenholm, comptroller of the currency, as commissioner of the Freedman's Savings & Trust Company, for the sum of \$5,186.77, and costs of suit.

The record shows that Greeley's suit was for moneys paid out by him for costs and expenses incident to litigation over the property held by the defendant, and known as the "Freedman's Savings Bank Building" situated in Jacksonville, Florida, and also for compensation to Greeley for services rendered by him as agent for defendant at Jacksonville.

Following the introduction of this record plaintiff put in evidence a certified copy of an execution emanating from the judgment rendered, and a deed from the sheriff of Duval county on a sale under said execution conveying the said lot eight (8) block thirty-one (81), to the plaintiff in this suit.

A notice of the sale of the Freedman's Bank building at auction by the commissioner was shown, and J. C. Greeley for the plaintiff testified that the Freedman's Savings & Trust Company went into possession of the property sued for in this suit in 1870 and remained in possession until the failure of the bank, and then the commissioners appointed under the Act of Congress went into possession and remained in possession until about the 25th day of March, 1880, when L. W. Spratt became the purchaser at the auction sale; that Spratt got into possession of the portion of the property sued for in this action by the attornment to him of the then tenant and who is his codefendant in this suit, and that he, Spratt, afterwards refused to comply with the terms of sale and refused to surrender possession. He also stated that he was the agent of the commissioners of the Freedman's Bank in the management of its real estate in Jacksonville from March, 1880, to the time of the trial of this suit.

Defendants did not offer to show any paper title to the lot in question but testified that they were present at the sale of lot eight (8), in block thirty-one (81), known as the "Freedman's Bank property," and at this sale and before the bidding began it was announced by the agent of the vendor that there was some defect in the chain of title which the vendor would have corrected in a few days, thirty being named as a limit in which this was to be done and a sufficient title to

be made to the purchaser; that the purchaser at the sale was required to make a cash payment of \$500 and was then to be let into possession of the premises, the balance of the purchase money to be paid when good title was tendered; that Spratt became the purchaser of said lot and paid in cash the \$500, and Greeley, who as agent for the commissioners had been renting the building and collecting the rents, directed the tenants to attorn to him, Spratt, and gave him a key to a vacant room in the building; that Barnett did attorn to Spratt and has ever since recognized him as landlord.

Further, that shortly after the purchase by Spratt, Greeley, as the agent of the commissioners, tried to get Barnett to refuse to recognize Spratt as landlord, and to pay rent to the commissioners, and asserted that Spratt had no right to the possession. Also that said commissioners caused suits to be instituted against Barnett before the county judge of Duval county in August, 1880, to oust him of possession of said lot, and several suits were commenced by said commissioners against Barnett in the circuit court for Duval county in relation to said premises. Certified copies of the record of proceedings in both the county and circuit courts for Duval were offered in evidence by defendants. One was a proceeding in the county court by the commissioners of the Freedman's Savings & Trust Company against W. B. Barnett, delinquent tenant, August 11, 1880, and the decision was favorable to Barnett. Another was by Knox, commissioner, against Barnett, assumpsit for rent, commenced on July 8, 1880, and resulted in a judgment for defendant Barnett. Another was an action of ejectment commenced by Knox, commissioner of the Freedman's Savings & Trust Company in September, 1882, against Barnett. This action it seems was dismissed on the plaintiff's motion.

Barnett further testified that he had been in the exclusive and continuous occupation of the premises sued for since the 25th of March, 1880, as the tenant of his codefendant, Spratt, and Spratt testified that he had been furnished by the agent of the commissioners of the Freedman's Savings & Trust Company, at the time of his purchase, with a list of the tenants and the amount of their rent, and the key to a vacant room in the building, and that he renewed the lease to Barnett and took possession of the vacant room; that sometime in the summer of 1880 Greeley acting as the agent of the commissioners forcibly entered said room and ejected him therefrom; also that the commissioners of the Freedman's Savings & Trust Company had never tendered or caused to be tendered to him a good and sufficient deed to said property.

In rebuttal plaintiff put in evidence a bill filed by Spratt and Barnett on the 6th day of November, 1882, against John J. Knox, commissioner of the said Freedman's Savings & Trust Company, and George Wheaton Deans as administrator of the estate of Jacob Foreman, deceased. The purpose for which this bill was introduced was to show that Spratt and Barnett recognized the relation of purchaser of the property on the part of Spratt

and that he was thereby seeking as such purchaser to have the commissioner of the Freedman's Savings & Trust Company to execute a deed to said property by virtue of his said purchase. The allegations of this bill are set out in the case of *Knox v. Spratt*, 19 Fla. 817. The mandate of this court in the case referred to on a reversal of the decision of the circuit court in refusing to dissolve an injunction therein granted, was also introduced in evidence. An affidavit of Spratt filed May 2, 1884, in a suit then pending in the circuit court for Duval county wherein he was complainant and George Wheaton Deans and John J. Knox, as commissioner of the Freedman's Savings & Trust Company were defendants, was also put in evidence. The purpose being to further show that Spratt still recognized his status as purchaser of the property from the Freedman's Savings & Trust Company.

The plaintiff also showed by the sheriff of Duval county that he had paid the balance of the proceeds arising from the sale of the property at execution sale, after satisfying the judgment obtained by Greeley, to the commissioner of the Freedman's Savings & Trust Company.

Counsel for appellants insists here as grounds for reversing the judgment appealed from that the appellee, Livingston, acquired no title whatever at the execution sale under the judgment of Greeley against Trenholm, as commissioner of the Freedman's Savings & Trust Company, or that he did not acquire from this source such title as will sustain a recovery in ejectment, and conceding such to be the case that Spratt had been in actual, continuous and adverse possession of the parcel of land in controversy for seven years before the institution of the suit.

It is contended, first, that Trenholm was the mere trustee and holder of the bare legal title of the lot, and its sale under execution against him transferred no beneficial interest whatever to Livingston. To understand Trenholm's status to the lot in question at the date of sale a reference to the Act of Congress creating the Freedman's Savings & Trust Company, and the amendments thereto is necessary. By Act of Congress approved March 3, A. D. 1865, certain named individuals fifty in number and their successors were constituted a body corporate by the name of "The Freedman's Savings & Trust Company" and by that name could sue and be sued in any court of the United States. The corporations named were the first trustees of the corporation and its business was to be managed and directed by the board of trustees with authority and direction to elect from their number a president and two vice-presidents, and also to appoint such other officers as might be deemed fit. The general business of this corporation was to receive on deposit such sums of money as might be offered by, or on account of, persons who had before the passage of the act been held in slavery in the United States, or their descendants, and to invest the same in stocks, bonds, treasury notes, or other securities of the United States. Provisions were made for the investment of

the deposits to be made, and also for the repayment of the same, with interest thereon to the depositors. One of the provisions in the 12th section of the Act is "that no president, vice president, trustee, officer, or servant of the corporation shall, directly or indirectly, borrow the funds of the corporation or its deposits, or in any manner use the same, or any part thereof, except to pay necessary expenses, under the direction of the board of trustees." The board of trustees was authorized to fix the salaries of the president, vice-presidents, subordinate officers and agents of the corporation.

The original Act was amended in 1874, chapter 849, United States Statutes at Large.

The only provisions of this amendatory act necessary to be referred to here are those contained in the seventh section. This section provides "that whenever it shall be deemed advisable by the trustees of said corporation to close up its entire business, then they shall select three competent men, not connected with the previous management of the institution and approved by the secretary of the treasury, to be known and styled commissioners, whose duty it shall be to take charge of all the property and effects of said Freedman's Savings & Trust Company, close up the principal and subordinate branches, collect from the branches all the deposits they have on hand, and proceed to collect all sums due said company, and dispose of all the property owned by said company, as speedily as the interests of the corporation require, and to distribute the proceeds among the creditors *pro rata*, according to their respective amounts; they shall make a *pro rata* dividend whenever they have funds enough to pay twenty per centum of the claims of depositors. Said commissioners, before they proceed to act, shall execute a joint bond to the United States, with good sureties, in the penal sum of \$100,000, conditioned for the faithful discharge of their duties as commissioners aforesaid, and shall take an oath to faithfully and honestly perform their duties as such, which bonds shall be executed in the presence of the secretary of the treasury, be approved by him, and by him safely kept; and whenever said trustees shall file with the secretary of the treasury a certified copy of the order appointing said commissioners, and they shall have executed the bonds and taken the oath aforesaid, then said commissioners shall be invested with the legal title to all of said property of said company, for the purposes of this act, and shall have full power and authority to sell the same, and make deeds of conveyance to any and all of the estate sold by them to the purchasers. Said commissioners may employ such agents as are necessary to assist them in closing up said company, and pay them a reasonable compensation for their services out of the funds of said company; and the said commissioners shall retain out of said funds a reasonable compensation for their trouble, to be fixed by the secretary of the treasury and the comptroller of the currency and not exceeding three thousand dollars each per annum. Said commissioners shall deposit all

sums collected by them in the treasury of the United States until they make a *pro rata* distribution of the same."

There was still a further amendment to the chapter of the Freedman's Savings & Trust Company passed in 1881, chapter 64, United States Statutes at Large.

By this Act section 7 of the Amendatory Act of 1874 was repealed, and the secretary of the treasury was authorized and directed to appoint the comptroller of the currency a commissioner who was required to give bond and take an oath faithfully to perform his duties and when the bond was given and oath taken, said commissioner was invested with the possession and legal title of all the property of the Freedman's Savings & Trust Company for the purposes of this Act and the Act of 1874, chapter 349, United States Statutes at Large. Said commissioner was also invested with all the rights, prerogatives, and privileges, and required to perform all the duties, that were conferred and enjoined upon the three commissioners under the said Act of 1874, and from and after his qualification as such commissioner, the duties, rights, and authority of said three commissioners should cease and determine; provided, that nothing in the act should in any way impede or delay any case or cases instituted in any court by or against the said three commissioners appointed under the Act of 1874, but every such case should, upon the suggestion of the appointment of the comptroller as commissioner aforesaid, and due entry of the change on the docket of the court in which such cause was pending, be proceeded with in the name of such comptroller in the same manner as if such charge had not been made.

The Act of 1881, chapter 64, also provides "that said commissioner, with the approval of the secretary of the treasury, shall have the right and authority to sell any of the real and personal property of said company at public or private sale, as in his judgment he may deem best, and to buy in for the benefit of the company any property which may be offered for sale to pay debts and liabilities of said company, if in his judgment said property is being sacrificed by such sale, and to make to the purchasers of property sold by him deeds of conveyance for their respective purchases."

Such was the relation of William L. Trenholm, comptroller of the currency, to the Freedman's Savings & Trust Company and its property at the time Greeley obtained judgment against him as commissioner of said company. By Act of Congress, the same power that created the Freedman's Savings & Trust Company, he, by virtue of his office of comptroller of the currency, was made a commissioner for this institution with the concurrence of the corporators, and as such was invested with the full title and possession of all of its property for the purpose of closing up its entire business. To this end he had express power and authority to dispose of all the property of the company and to employ such agents as were necessary to assist him in winding up its affairs, and to pay them reasonable compensation for their

services out of the corporate funds. The evident design and effect of the Act of Congress in making the comptroller of the currency a commissioner for the institution named were to confer upon him as such the entire and complete management and disposition of the affairs of said company for the purpose of liquidation. He was the statutory substitute and successor of the company for the purpose mentioned. The record discloses the fact that Greeley's suit was to recover for expenditures of money and services rendered by him as agent for such commissioner in winding up a branch business of the company at Jacksonville, Florida, the principal office being in Washington, D. C., and the commissioner residing there.

It is not denied that the title of the Freedman's Savings & Trust Company to the property involved in the case before us was vested in the said commissioner at the time Greeley commenced his suit of attachment against him. Spratt had gone into possession of this property under a contract of purchase from the commissioner, and as a consequence is not in a situation to deny his title. The commissioner, when sued at law by Greeley, did not object to the jurisdiction of the court, but interposed pleas to the merits of the cause, and when the property had been sold under execution, accepted the surplus arising from the sale after paying Greeley's judgment. Furthermore, it does not appear that any effort was ever made by any beneficiary of the company to arrest the proceedings at law against the commissioner, nor is the title to the property now called in question by any such person. The question then is, Could the legal title held by the commissioner be sold under execution at law and transferred to the purchaser? It cannot be denied that the title held by the commissioner was coupled with a trust, but that trust was the winding up of the entire business of the corporation. It included the collection of all debts due the company, a sale of all of its property, the payment of all of its debts and necessary expenses in closing up the business, and the disbursement of the remaining funds to the depositors.

Mr. Perry, in his book on Trusts, section 331, says: "As a general rule, the legal estate in the hands of a trustee has at common law precisely the same properties, characteristics, and incidents, as if the trustee were the absolute beneficial owner," and he also states that the trustee may sell and devise the estate held by him, and it may be taken in execution. This is qualified, however, as follows: "But these incidents do not generally interfere with the proper execution of the trust, for all conveyances and all incumbrances made or imposed upon the estate by the trustee, for other purposes than those of the trust, or in breach of the trust, are entirely disregarded by a court of equity, whatever may be the effect of such conveyances or incumbrances in a court of common law." There are authorities maintaining the view urged by counsel for appellee here, that a bare legal title in trust can be sold under execution against the trustee, and that a purchaser at such sale will acquire the title of

the trustee, whatever it may be. The cases cited by counsel go to this extent. But there is a conflict in the law on this point, and many authorities hold that if one is the mere holder of a bare legal title for the benefit of another, an execution sale of such an estate against him transfers no interest whatever. If the estate and title of the commissioner in and to the property in question in this suit come within the character of the estates just mentioned, there is serious difficulty in holding upon the weight of authority that it can be taken in execution at law.

But it is further insisted for appellee that as the Freedman's Savings & Trust Company was a foreign corporation doing business in this state, the commissioner, appointed by authority of law to represent and act for it in winding up its business, came within the provisions and spirit of our attachment statutes, and suits could be instituted against him as against the corporation itself on all liabilities properly incurred by him in closing up the business of the corporation, and that for this purpose, to the extent of the powers conferred, the commissioner stood as a corporation sole liable to be sued as a nonresident corporation. Our Statute (chapter 1637, sec. 29; McClellan's Dig. § 22, p. 233), provides that "any company incorporated by any other state or country, or by law of Congress, and having property in this state, shall be liable to be sued, and the property of the same shall be liable to attachment in the same manner as individuals, residents of other states or countries, and having property in this state." If suit of attachment had been instituted in this state against the Freedman's Savings & Trust Company, on a valid claim against it while it was the owner of property here, no doubt could exist as to the applicability of this statute to such suit. The supposed difficulty in the case before us is that Greeley's suit was not against the Freedman's Savings & Trust Company, but against the commissioner appointed to wind up its business, and for a debt incurred by him in the performance of his duties as such commissioner. We are satisfied from an examination of the Act of Congress and the amendments thereto that the comptroller of the currency, as commissioner of the Freedman's Savings & Trust Company, did not sustain to said company and its depositors the relation of a trustee of a mere naked title for the benefit of the depositors. The original incorporators of this company, denominated trustees, occupied a trust relation to the depositors, yet it is evident that said trustees represented and stood for the corporation itself, and in this respect could sue, and were liable to be sued in the corporate name on all matters connected with the legitimate business of the company. By the amendments to the original act, congress substituted the comptroller of the currency in place of the original trustees for the purpose of winding up the affairs of the institution. As we have before said, he was the statutory substitute and successor of the company for the purposes of liquidation. His status was not that of a receiver of such company under the appointment of a court,

nor does the office of an administrator conferred in a foreign jurisdiction properly illustrate his attitude. The views expressed by Chief Justice Waite, in speaking for the court in the case of *Relfe v. Rundle* [*Life Assn. of America v. Rundle*], 103 U. S. 222, 26 L. ed. 387, in reference to the status of a statutory successor of a dissolved corporation, aptly describe, we think, the office and functions of the commissioner in reference to the corporation named and its property. By the laws of Missouri the superintendent of the insurance department of the state government was authorized under certain circumstances to commence proceedings to dissolve insurance corporations organized under the laws of that state. A statute provided that "upon the rendition of a final judgment dissolving a company or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the superintendent of the insurance department of this state, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policy-holders of such company, and such other persons as may be interested in such assets." A certain insurance company was dissolved by a decree of the Missouri court, and Rundle and wife, policy-holders of the company, commenced suit in the state of Louisiana against said company, its local agent in the city of New Orleans, and a party who had recovered a judgment against it, for the purpose of having the assets in Louisiana of the dissolved corporation declared a trust fund to be applied to the payment of claims of Louisiana creditors and policy-holders. Relfe, who was the superintendent of the insurance department of the state of Missouri, was made a party to the suit in Louisiana on his own motion and then petitioned for the removal of the cause to the circuit court of the United States for the district of Louisiana, and also filed within time in that court a copy of the record in the state court and gave the security required by act of congress. A motion was sustained to strike the cause from the docket of the circuit court on the ground, among others, that Relfe had no standing in the court, he being a creature of the state of Missouri, without capacity to sue or defend causes in the state of Louisiana. The opinion referred to says that "Relfe is not an officer of the Missouri state court, but the person designated by law to take the property of any dissolved life insurance corporation of that state, and hold and dispose of it in trust for the uses and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position. He is an officer of the state, and as such represents the state in its sovereignty while performing its public duties connected with the winding up of the affairs of one of

its insolvent and dissolved corporations. His authority does not come from the decrees of the court, but from the statute. He appeared in Louisiana not by virtue of any appointment from the court, but as the statutory successor of a corporation which the court had in a legitimate way dissolved and put out of existence. He was in fact the corporation itself for all the purposes of winding up its affairs." It is further said in the opinion: "We are aware that, except by virtue of some statutory authority an administrator appointed in one state cannot generally sue in another, and that a receiver appointed by a state court has no extra-territorial power; but a corporation is the creature of legislation and may be endowed with such powers as its creator sees fit to give. Necessarily it must act through agents, and the state which creates it may say who those agents shall be." So in the case before us congress has vested in the comptroller of the currency as a commissioner all the rights, powers, property, and liabilities of the Freedman's Savings & Trust Company for the purposes of liquidation and the estate which he has is commensurate with the powers conferred. He represents the corporation at all times and places in all matters connected with his trust. That the corporation itself was liable to be sued and its property here attached is clear and we think it equally clear that the property in the hands of the commissioner appointed by authority of law to stand for and represent the corporation in matters connected with his duties as such is liable to be reached by attachment. Our attachment laws furnish a remedy against nonresident debtors owning property in this state, and the right of the state through the process of the courts to so appropriate property within its jurisdiction is beyond question. The discussion in the case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, on this subject is exhaustive.

The case before us is to be distinguished from one of an ordinary trustee holding the bare legal title in trust for another in this, that the commissioner is invested by legislative authority with all the rights, powers, and liabilities, for the purposes of liquidation, that the original corporation had, and to this extent he is just as liable to suit on matters within the scope of his authority as the corporation itself would have been had it acted, and is made so by legislative authority. No law of trusts is violated by this construction. A general rule applicable to such estates is, that the trustee takes a legal interest and estate commensurate in extent and duration with the object and extent of the trust itself, and a legal interest and estate in him will, if possible, be declared sufficient for the purposes of the trust.

23 L. R. A.

Zabriskie v. Morris & E. R. Co. 33 N. J. Eq. 23; *West v. Fitz*, 109 Ill. 425; *Neilson v. Lagow*, 53 U. S. 12 How. 98, 18 L. ed. 909; *Packard v. Marshall*, 138 Mass. 301; *Wilcox v. Wheeler*, 47 N. H. 488; *Williman v. Holmes*, 4 Rich. Eq. 475. Oftentimes the estate in the trustee has been enlarged or curtailed without regard to the terms of its duration to him in order that the trust created may be accomplished, and in the case before us, although the office of the commissioner is coupled with a trust, this will not conflict with the powers, liabilities, and estate conferred on him by the act of congress.

The other ground of defense relied upon in the trial court, of adverse possession, cannot be maintained. It is clearly shown and not denied that Spratt went into possession of the property sued for under an agreement to purchase it from the commissioner of the Freedman's Savings & Trust Company. The record before us shows that Spratt has persisted in the possession of the property under a claim of right as vendee from said commissioner and has sought in the courts a partial specific performance of the agreement to convey the property to him. It seems that a deed was tendered to him by the commissioner but was declined on the ground that there was a partial failure of title. The right of Spratt to a specific performance was settled adversely to him in 1887 in the decision reported in 23 Fla. 64. From the date of his purchase up to the time of this decision there is no question but that Spratt recognized his possession as that of vendee under his contract to buy from the commissioner. Such a possession was irreconcilable with an adverse holding on his part. *Petty v. Mays*, 19 Fla. 652; *Knox v. Spratt*, *supra*; *Hart v. Bostwick*, 14 Fla. 167. Counsel for appellants concedes that a vendee in possession under a contract to purchase does not hold adversely to the vendor until there is a repudiation of such a relation between them, but he insists that the efforts of the commissioner and his agents to oust Spratt of his possession converted it into an adverse holding and he can now rely upon it as a defense. The difficulty about this position is that Spratt was unwilling to accept the view that his possession was adverse, but persistently resisted the demands of the commissioner on the ground that such possession was rightful under the agreement to purchase. There is nothing to show that Spratt himself repudiated the relation of vendor and vendee certainly up to the time of the decision in this court in 1887, and the present suit was commenced in 1889.

Upon a review of the entire record we think the decision rendered in this case was correct and the judgment is therefore affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

PENNSYLVANIA R. CO., *Pf in Err.*,
v.
William GOODENOUGH and Wife.

(.....N. J.....)

***In an action by a husband and wife for a personal injury to the wife his contributory negligence will defeat the suit.**

(Dixon, J., *dissenta.*)

(December 4, 1898.)

ERROR to the Supreme Court to review a judgment in favor of plaintiffs in an action brought to recover damages for personal injuries to Mrs. Goodenough which were alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinions.

Mr. William S. Gummere, for plaintiff in error:

In all cases where the wife is injured by the joint negligence of her husband and of a third party, the husband's negligence should be imputed to the wife by reason of their marital relationship, and should bar a recovery.

Shearm. & Redf. Neg. § 46; *Carlisle v. Sheldon*, 38 Vt. 440; *Peck v. New York, N. H. & H. R. Co.* 50 Conn. 379; *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35; *Yahn v. Ottumwa*, 60 Iowa, 429

*Headnote by REED, J.

NOTE.—*Husband's negligence as bar to recovery for wife's personal injuries.*

There is apparently some conflict as to the contributory negligence of the husband being imputed to his wife. Some of the cases impute his negligence to her where she is riding in a vehicle with him as driver and is injured, and this is held on the ground of the relation of occupant, and driver and not of husband and wife. *Morris v. Chicago, M. & St. P. R. Co.* 26 Fed. Rep. 22; *Carlisle v. Sheldon*, 38 Vt. 440; *Yahn v. Ottumwa*, 60 Iowa, 429.

And where both are guilty of negligence which barred a recovery, it was said that if he was alone guilty his negligence would be imputed to her, in an action by the husband and wife. *Peck v. New York, N. H. & H. R. Co.* 50 Conn. 379, 14 Am. & Eng. R. Cas. 633.

Other cases, however, hold that the negligence of the husband as driver will not be imputed to the wife as occupant of the same vehicle. *Louisville, N. A. & C. R. Co. v. Creek*, 14 L. R. A. 733, 130 Ind. 139, 49 Am. & Eng. R. Cas. 451; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97; *Chicago, St. L. & P. R. Co. v. Spilker* (Ind.) 55 Am. & Eng. R. Cas. 200.

And where the husband and wife were riding in a wagon driven by another and she was killed by the cars, and it was contended that the husband and driver were both negligent, the court held that the contributory negligence of the driver will not be imputed to the wife. *Galveston, H. & S. A. R. Co. v. Kutao*, 73 Tex. 643.

But the doctrine of imputing the negligence of the driver to the occupant of the vehicle is not within the scope and purpose of this note. The leading case of *Thorogood v. Bryan*, 8 C. B. 115, affirming the right to impute such negligence has 23 L. R. A.

At common law, a right of action for a personal tort was not property. It did not pass under the English Bankrupt Acts, which vested all the property of the bankrupt, both real and personal, in his assignee.

Howard v. Crouther, 8 Mees. & W. 602.

It is a mere personal right, has no elements of property, and is not assignable.

Rice v. Stone, 1 Allen, 566; *Gardner v. Adams*, 12 Wend. 297; *North v. Turner*, 9 Serg. & R. 244.

Whatever may be the case elsewhere, it was not the intention of the legislature of New Jersey to make a right of action of this kind property; or, at least, it did not intend to make such a right of action the property of the wife.

Married Women's Act (Rev. pp. 636, 637), §§ 1-8.

Can, then, a married woman maintain an action in her own name, without joining her husband therein, for an injury done to her?

The Practice Act, § 22 (Rev. p. 851) declares that "in any action by a husband and his wife, for an injury done to the wife in respect of which she is necessarily joined as coplaintiff, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*."

Two things clearly appear from this section:

1. That, in suits of this kind, both the husband and wife must be joined as coplaintiffs; in other words, that the common law still governs such cases, the common-law rule being that "when an injury is committed to the person of the wife, during coverture, the wife

been frequently denied and finally overruled in *The Bernina*, L. R. 12 Prob. Div. 53.

There are some cases which impute to the wife the negligence of the husband on the ground that the damages to be recovered are community property, where the wife was hurt by the husband driving into an excavation. *McFadden v. Santa Ana, O. & F. Street R. Co.* 11 L. R. A. 252, 87 Cal. 404.

But see *Nanticoke v. Warne*, *infra*.

And the same doctrine was set forth in *Missouri Pac. R. Co. v. White*, 80 Tex. 202, when the husband had charge of convict cars, but a recovery was had in that case.

Other cases impute negligence of husband to wife without discussing whether it arises from the form of action, or relation of driver, or relation of husband,—as where a wife riding in a wagon with her husband as driver was injured by a railroad train. *Gulf, C. & S. F. R. Co. v. Greenlee*, 62 Tex. 344.

And where a wife in a carriage driven by her husband was injured by the horse being frightened by a machine in the street, the court says: "The knowledge regarding the disposition of the horse by H. (the husband) is the knowledge of the wife;" but if the husband or wife knew nothing of the vicious character of the horse, and yet his viciousness contributed to the injury, the jury should find for the defendants. *Huntoon v. Trumbull*, 2 Mo-Crary, 314.

Our conclusions from this would be that in this case the imputed negligence would not affect the case, as the recovery was made to depend alone on the viciousness or good qualities of the horse.

And in *Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35, where the wife was left holding a team by her

cannot sue alone in any case, and the husband and wife must join."

1 Chitty, Pl. * 73.

2. It also clearly appears, from the section referred to, that the husband has a personal interest in the verdict recovered for the wife's injury, because it permits him to add claims, in his own right, arising *ex delicto*.

That section, Revision, p. 851, provides that "any married woman living separate from her husband may bring suit in her own name for the recovery of damages for any injury done to her person or reputation; and it shall not be lawful for the husband of such married woman to control, discontinue, release, or in any way interfere with such action."

This is an enabling act; it confers upon married women, under certain conditions, a right which, except for this statute, they would not have.

Injuries received by married women who are living with their husbands can only be sued for by the husband and wife jointly, and the common-law right of the husband to control, discontinue, or release the same, still exists.

Beach v. Beach, 2 Hill, 260, 38 Am. Dec. 584; *Anderson v. Anderson*, 11 Bush, 327; *Coolidge v. Parris*, 8 Ohio St. 594; 1 Bishop, Married Women, §§ 706, 910-912.

If the common-law right of the husband still exists, there can be no recovery if he contributed by his negligence to bring about the accident which caused the injury sued for.

1 Bishop, Married Women, § 912; *Tibbs v. Brown*, 2 Grant, Cas. 39.

Mr. Samuel H. Grey also for plaintiff in error.

Mr. Samuel K. Robbins, with *Mr. John W. Wescott*, for defendants in error:

husband and a blast in the street caused the team to run away injuring her, it was held that if the injury was caused by the negligence of the husband she could not recover, and that question should be submitted to the jury.

The doctrine that negligence of the husband will bar recovery unless the cause of action belongs to her alone, as announced in the main case, but may not where the wife can sue alone, does not seem to have been discussed in the two preceding cases, as in Missouri the right of the wife to such damages is her separate estate. *Flori v. St. Louis*, *infra*.

And in Illinois a wife may sue alone for personal injuries. *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 300.

Other cases hold that contributory negligence of the husband driving a vehicle in which the wife is riding will not bar a recovery by her administrator for damages to the wife caused by the negligence of other parties. The question of interest in the recovery is not discussed in these cases but the fact that suit was brought by the wife's administrator shows that the cause of action belonged to the wife. *Hoag v. New York Cent. & H. R. R. Co.* 111 N. Y. 199.

The same was held in *Shaw v. Craft*, 87 Fed. Rep. 317, (Ohio) but in that state the cause of action is recognized as separate estate. See *Davis v. Guarnieri*, *infra*.

The same was held where the wife sued in her own name. *Platz v. Cohoes*, 24 Hun, 101, affirmed in 89 N. Y. 219, 42 Am. Rep. 284.

Mere knowledge by husband of defects in a sidewalk over which his wife would cross on an errand, where he failed to warn her, will not bar a 22 L. R. A.

The question of the contributory negligence of the plaintiff, Sarah Goodenough, was properly left to the jury.

Central R. Co. of N. J. v. Moore, 24 N. J. L. 824; *New Jersey R. & Transp. Co. v. West*, 33 N. J. L. 430; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Delaware, L. & W. R. Co. v. Toffey*, 38 N. J. L. 525; *Bonnell v. Delaware, L. & W. R. Co.* 39 N. J. L. 189; *Berry v. Pennsylvania R. Co.* 48 N. J. L. 141.

The contributory negligence of the husband (if any) in this case, could not be imputed to the wife.

1. Because "contributory negligence, to defeat a right of action, must be that of the party injured."

New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434; *Paulmier v. Erie R. Co.* 34 N. J. L. 151; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161; *Smith v. Irwin*, 51 N. J. L. 507.

2. Had the plaintiff, Sarah Goodenough, been riding with any other person than her husband, or one who was her servant or agent, under like circumstances, the driver's contributory negligence could not be imputed to her.

Bennett v. New Jersey R. & Transp. Co. 36 N. J. L. 225, 13 Am. Rep. 435; *New York, L. E. & W. R. Co. v. Steinbrenner*, *supra*; *Robinson v. New York Cent. & H. R. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Michigan City v. Boeckling*, 122 Ind. 39; *Dean v. Pennsylvania R. Co.* 6 L. R. A. 143, 129 Pa. 514; *Elliott, Roads & Streets* (1890), pp. 631, 632, and cases cited.

3. That the driver of the vehicle was her husband, can make no difference in the application of the principle.

None of the authorities, or cases, holding

recovery in an action by the husband and wife, as it was not necessarily negligent to cross even with knowledge of the defects. *Street v. Holyoke*, 105 Mass. 62, 7 Am. Rep. 500.

And the same was held where the cause of action was vested in the husband who sued to recover for loss of time and services of his wife, the court saying that as an abstract proposition it should not be said that it was negligence for a husband to fail to warn his wife of danger in going on a sidewalk, but that he cannot recover for any damages that may result to her if he sees her going to a place where he knows she will probably be hurt and does not warn her. *Nanticoke v. Warner*, 106 Pa. 373.

And where the right to damages was recognized as separate estate in the wife, the contributory negligence of the husband knowing a building is unsafe will not be imputed to the wife who is injured by the fall thereof. *Flori v. St. Louis*, 3 Mo. App. 231, affirmed in 69 Mo. 341, 33 Am. Rep. 504.

And contributory negligence of husband in use of drugs purchased for his wife, will not bar an action by her administrator against the druggist causing death; but in this case the cause of action was recognized as separate estate. *Davis v. Guarnieri*, 45 Ohio St. 470.

And attempting to cross a river about dark in a boat sculled by a blind husband, where there is a lantern on board and they were accustomed to cross the river in that way, the wife acting as guide in directing the course, is not such contributory negligence as will bar a recovery by her administrator where a tug caused her death by negligence. *Harris v. Uebelhoefer*, 75 N. Y. 169. L. T.

that the contributory negligence of the husband, driving the vehicle in which she was hurt, should be imputed to the wife, in bar of the action, are based upon the relationship existing between them, or on the fact that they were coplaintiffs in the action; while all of the cases assigning any reason for so holding are in direct antagonism to the *Bennett* and *Steinbrenner* Cases.

Beach, Contrib. Neg. (1885), pp. 113, 114, and cases cited.

The cases holding that the contributory negligence of the husband should not be imputed to the wife are in harmony with the decisions in this state.

Hoag v. New York Cent. & H. R. R. Co. 111 N. Y. 199; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97; *Louisville, N. A. & C. R. Co. v. Creek*, 14 L. R. A. 733, 180 Ind. 139; *Flori v. St. Louis*, 8 Mo. App. 231.

The husband's being joined as coplaintiff in this action can have no possible weight in the solution of this question.

The right of the husband to the wife's choses in action, as well as to her other property, real and personal, was extinguished by the Act of 1862 (Rev. "Married Women," pp. 636, 637, § 1-3).

Vreeland v. Schoonmaker, 16 N. J. Eq. 512.

The husband, by virtue of the act, was deprived of the control which he had by the common law. He was prevented from recovering possession of and acquiring title to the personal property of the wife during coverture.

Compton v. Pierson, 28 N. J. Eq. 229; *Van Cleave v. Rook*, 40 N. J. L. 35.

A right of action growing out of a personal tort to a married woman, is held to come within the description of "property acquired in any manner."

Stewart, Husb. & W. (1885), §§ 219, 230, 447; *Chicago, B. & Q. R. Co. v. Dunn*, 52 Ill. 260; *Berger v. Jacobs*, 21 Mich. 215; *Leonard v. Pope*, 27 Mich. 145; *Stevenson v. Morris*, 37 Ohio St. 10, 41 Am. Rep. 481.

Nor does the husband acquire any substantial interest in the judgment recovered in this suit by reason of being joined as coplaintiff.

Stewart, Husb. & W. § 447; *Vreeland v. Schoonmaker* and *Compton v. Pierson*, *supra*; *Klein v. Jewett*, 26 N. J. Eq. 474.

There are no facts in this case which would warrant the court in holding that the husband was the servant or agent of the wife, and that his negligent conduct, if any, could be imputed to her on that ground.

The driver cannot be converted into the servant of the passenger, for the single purpose of preventing the passenger from bringing suit against a third party whose negligence has co-operated with that of the driver in the production of the injury. The identification must be so complete that the passenger would not only be debarred from a suit against the proprietor of the coach for the driver's negligence, but would also be responsible to third persons for injuries sustained by the carelessness of the driver in the course of the journey.

Bennett v. New Jersey R. & Transp. Co. 38 N. J. L. 225, 18 Am. Rep. 435; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161. And see also *Newman v. Phillipsburg* 22 L. R. A.

Horse Car R. Co. 8 L. R. A. 842, 52 N. J. L. 446.

Reed, J., delivered the opinion of the court:

This action was brought by a husband and his wife to recover for an injury to the wife, caused by a collision between the wagon in which they were driving and a train on the railroad of the plaintiff in error. At the trial it was urged by the defense that the husband, who was driving, was negligent, and that his negligence contributed to the wife's injury. The trial justice, however, charged that the negligence of the husband could not be imputed to the wife. This is assigned for error. To ascertain how far the conduct of the husband affects the right to recover in an action of this kind it is essential that the posture of the husband in relation to the suit shall be ascertained. If he is a party interested in the subject-matter of the action, then it follows that he cannot be permitted to recover when his negligent conduct contributed to the creation of the cause of the action. The rule at common law is entirely settled that for a tort to the wife, either ante or post nuptial, the husband must be joined with the wife in an action. Dicey, *Parties to Actions*, p. 409; 1 Chitty, Pl. 73; Comyns, Dig. title, *Baron and Feme* (V); Schouler, Husb. & W. 141. Upon the rendition of judgment, the husband has the right to receive the money. Bishop, *Married Women*, § 913. So completely is the husband identified with the prosecution of the action that he can release the cause of action. *Beach v. Beach*, 2 Hill, 260, 38 Am. Dec. 584; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620; *Southworth v. Packard*, 7 Mass. 95; *Anderson v. Anderson*, 11 Bush, 327; Bishop, *Married Women*, § 912. If the wrong to the wife is inflicted through the connivance of the husband, his conduct is an answer to the action, although he may press the suit. *Tybbe v. Brown*, 2 Grant, Cas. 39. So his power over the action, and the effect of his conduct upon the result, are entirely settled at common law. There can be no doubt that if his negligence assisted to create the cause of action it would, at common law, be a complete defense to the action. Has this been changed by any legislation in this state? I think it quite clear that it has not. On referring to the act relating to the property of married women (Revision, p. 636), we find that the real and personal property of every married woman, and the rents, issues, and profits thereof, shall be her sole and separate property. Personal torts do not create rights of property. The right to sue for such is not assignable. They do not survive the death of the injured person, because, in the language of Lord Ellenborough in *Chamberlain v. Williamson*, 2 Maule & S. 408: "Executors are the representatives of the temporal property,—that is, the debts and goods of the deceased,—but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate." The language of the section itself is inapplicable to a right to sue for a tort, for no rent, issue,

or profit, in the sense of the statute, can arise out of a tort. Section 11 of the Act provides that she may maintain an action in her own name, and without joining her husband therein, for all breaches of contract, or for the recovery of all debts, wages, earnings, money, and all property which by this act is declared to be her separate property, and she shall have in her own name the same remedies for the recovery and protection of such property as if she were an unmarried woman. If a right to sue for a tort is property, then, by force of this section, the husband was an unnecessary party to this action. Yet section 22 of the Practice Act obviously refers to this class of personal torts, in an action for which both must join. This section provides that in any action by a husband and wife for an injury to the wife in respect of which she is necessarily joined as coplaintiff, it shall be lawful for the husband to add thereto claims in his own right arising *ex delicto*. This is a copy of section 40 of the common-law Procedure Act of 1852 (15 & 16 Vict. chap. 76), which undoubtedly refers to personal injuries to the wife, in actions to recover damages for which husband and wife must sue jointly.

If any doubt remained in respect to the general rule in this state that the husband must join with the wife in actions for personal injuries to the wife, it would be dissipated by section 24 of the Practice Act, which states the exception to the rule in such terms as to show the existence of the rule itself. This section provides thus: "Any married woman being in a state of separation from her husband, may bring suit in her own name for the recovery of damages for any injury done to her person or reputation; and it shall not be lawful for the husband of such married woman to control, discontinue, release, or in any way interfere with such action, but the same shall proceed and be under the control and direction of said married woman, as if she were a *feme sole*." So it is perceived that in all instances except when the *feme covert* is living in a state of separation from her husband he retains his common-law power of control over and interest in the action. The husband has not a mere power to sue for the wife, but he has a power coupled with an interest in the suit. Retaining this control over the suit, and this right to release, and consequently to compromise it for money, he cannot be permitted to create the cause of action by his negligent or fraudulent conduct, and then reap the benefit which this interest in the action confers.

We think the charge in this respect was erroneous, and the judgment must be reversed.

Dixon, J., dissenting:

The plaintiff, William Goodenough, and Sarah, his wife, were riding along a public street across the railroad of the defendant, in a wagon drawn by a horse which was driven by the husband, when a collision between the vehicle and a train of the defendant occurred, and the wife received severe bodily injury. This suit was brought to recover compensation for the injury thus suffered by 22 L. R. A.

the wife, and a verdict was obtained assessing her damages at \$2,700, upon which a judgment was rendered that she recover that sum against the defendant. On writ of error to review this judgment, the only serious question presented on the record is whether the trial justice erred in charging the jury that, unless the husband was acting as agent of the wife, his negligence was not imputable to her. It is insisted by the defendant that such negligence should be so imputed, because of the marriage relation, and the legal necessity therefrom arising of joining the husband as a plaintiff in the suit. The argument rests upon the premise that the husband has a legal interest in the cause of action, and in whatever compensation may be recovered, and thence is deduced the conclusion that the husband's contributory negligence must preclude any recovery. I deny the premise.

It must, of course, be remembered that we are not dealing with the damages which a husband sustains by the physical injury of his wife, such as the expenses of her cure, and the loss of her service and society. These must be sued for by the husband alone (except as our statute permits them to be joined with such a cause of action as is now before us). Against the husband's claim for those damages no doubt his contributory negligence would be a defense. But the cause of action now under consideration is the direct injury to the wife's person, and the loss which she as an individual thereby suffers. In such a cause of action, and in any recovery at law thereupon, the husband, I think, has no legal interest. It may be assumed that such a cause of action, before it is merged in a judgment, does not come within the legal notion of "property." In Blackstone's classification of the various kinds of property (2 Bl. Com. 438) he ranges damages for injury sustained as property acquired and lost by suit and judgment at law, saying that, although the injured party has a right to damages the instant he receives the injury, and this right is given by the law of nature, yet a judgment is necessary to convert this right into "property." So far as this classification excludes from the legal definition of property a right to damages for an injury to property, it has been criticised, but with regard to an injury to the person it seems to be generally accepted as correct. Assuming its correctness, our married women's acts, which relate to a wife's property only, do not affect the right to these damages before judgment, and therefore we must consider whether the husband had a legal interest in such damages at common law.

It must be admitted that the husband was a necessary party to be joined with his wife in a suit for the recovery of such damages. But this was not because of his legal interest in the damages. He was a necessary coplaintiff with his wife in all suits at law for the vindication of her rights. Even when he had relinquished his power over his wife's rights, he was so joined. *Innell v. Newman*, 4 Barn. & Ald. 419. And after our statute had terminated the husband's interest in his wife's property, but before the latter statute

authorizing a married woman to sue alone for her property, it was necessary that her husband should be joined as a coplaintiff; so that the necessity of joining him in the suit is not indicative of any legal interest in the cause of action. As is frequently stated in the books, he is joined for the sake of conformity. It may also be admitted that, unless he had surrendered his power, the husband could settle for the damages, or could release the wrongdoer from responsibility to the wife. *Southworth v. Packard*, 7 Mass. 95; *Anderson v. Anderson*, 11 Bush, 327; *Beach v. Beach*, 2 Hill, 260, 38 Am. Dec. 584; *Ballard v. Russell*, 33 Me. 196, 54 Am. Dec. 620. This, however, arose, not from the theory that the damages belonged to the husband, but from the power which he had over all rights of action belonging to his wife. He could make them his by reducing them to his own possession. Settling for the damages was so reducing them, and releasing the wrongdoer was deemed equivalent to settlement. The distinction between a husband's power over his wife's rights in action and a legal interest in them forms the basis of decision in *Stall v. Fulton*, 30 N. J. L. 430, and *Peterson v. Mulford*, 36 N. J. L. 481, where it was held that the husband's creditors had no claim on such rights of the wife, unless the husband had chosen to exercise his power over them so as to make them his own. If, without the exercise of such power, those rights were the property of the husband, the claims of his creditors could not have been denied. Having thus noticed those rules of the common law which might seem to favor the contention of the defendant, and having shown that they presuppose nothing antagonistic to the dictate of nature that compensation for a personal injury should belong to the person injured, it must further be noticed that there are rules of common law which clearly recognize this natural claim as legally subsisting in the case of married women. In an action for a battery or other personal tort done to the wife the wife must join. Bacon, Abr. title, *Baron & Feme*, p. 306. She must join because she is the meritorious cause of action, the husband joining for conformity only. *Dengate v. Gardiner*, 4 Mees. & W. 6. If the husband dies before or pending the suit, the right of action survives to the wife. Bacon, Abr. title, *Baron & Feme*, p. 304. But if the wife dies before or pending suit, the right of action is extinguished. Id. p. 306; *Stroop v. Searts*, 12 Serg. & R. 76. In view of the common-law maxim, *actio personalis moritur cum persona*, these rules plainly indicate to whom the right of action belongs. Because it survives the husband, it is not his; it dies with the wife, because it is hers. I conclude, then, that at common law the husband has no legal interest in the right or cause of action which accrues to a married woman for a tort to her person. He has some power over it, but no legal interest in it.

I have said that our married women's acts do not seem to affect this right of action; yet it would be entirely in accord with the spirit of those laws if by judicial construction their terms were made to embrace it.

22 L. R. A.

That the legislature should have placed all a wife's real and personal property, and the rents, issues, and profits thereof, beyond her husband's power of disposal, and made them her sole and separate property, as though she were a single woman, and should have left this most intimate right, which concerns her very existence, unsecured to her, can be reasonably accounted for only on the ground of inadvertence. But the defendant's argument is rested also upon the supposition that the husband has a legal interest in the compensation recovered in a suit for his wife's personal injury. This support likewise, in my opinion, fails. When a recovery has taken place, when the cause of action has become merged in a judgment, then I think our married women's acts become operative upon it. As already stated, the judgment is property, and all property received or obtained by a married woman, in any manner whatsoever, belongs by force of the statute to her alone, as if she were a single woman. It may be suggested that, the judgment being recovered by the husband and wife together, the property is not received or obtained by the wife, within the meaning of the statute. The same thing might be urged with respect to a chattel given by a third person to the wife, but delivered to the husband for her. At common law it would have been absolutely his. But now, I presume he would be deemed a mere agent in the transaction, and the chattel would be hers. Similarly, in this case, the husband appears with his wife in obtaining the property, but it is obtained on her account, and for her; and within any just view of the statute it is obtained by her, and not by her husband. Reason seems, therefore, to lead to the conclusion that the husband has no legal interest in such a judgment as is now before us.

Turning to previous judicial decisions, they appear to tend in the direction above pointed out. Counsel for the defendant relies upon *Carlisle v. Sheldon*, 33 Vt. 440; *Perk v. New York, N. H. & H. R. Co.* 50 Conn. 379; *Joliet v. Seward*, 36 Ill. 402, 29 Am. Rep. 35; and *Yahn v. Ottumwa*, 60 Iowa, 429. While in these cases it was said that the negligence of a husband driving would be imputed to the wife riding with him, yet in every case the imputability was placed, not on the relation of husband and wife, but on that of driver and passenger. This will be seen by a quotation from the opinion in *Carlisle v. Sheldon*, which is the only case of husband and wife cited in the other decisions. The Vermont court said: The wife stands in no different position from that which she would occupy if the driver of the vehicle in which she was carried had been, instead of her husband, one employed for that purpose. . . . If she had been a passenger in a stage coach on this occasion, and had received the same injury, . . . the driver would be treated as being her agent. . . . There is nothing in the marital relation which would change the situation of the wife in respect to her husband's negligence under such circumstances, for the same consequences would have followed if the relation, instead of being that of husband

and wife, had been that of parent and child, or master and servant, or if she had been an entire stranger." This is substantially the doctrine of *Thorogood v. Bryan*, 8 C. B. 115; and, if that doctrine had been repudiated in Vermont, as it has been in New Jersey (*New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161), it may fairly be inferred from the language above quoted that *Carlisle v. Sheldon* and the cases following it would have been decided differently. I have found only two cases where the decision rested on the mere relation between husband and wife, and only one of these is directly on the point presented by the case in hand. Both, however, tend to corroborate the opinion which I have formed. In *Everts v. Everts*, 8 Mich. 580, it was held, in an action by husband and wife for an assault upon the wife, that no act or words of the husband, unless the wife was privy to or participant in them, could be

proved in mitigation of damages. In *Hoag v. New York Cent. & H. R. R. Co.*, 111 N. Y. 199, an action by an administrator of a married woman to recover damages for her death, caused by the negligence of the defendant, it was adjudged that the contributory negligence of the husband in carelessly driving across the railroad track, whereby his wife, a passenger in his vehicle, was killed, was not imputable to the wife, and so did not bar the suit of her administrator. Yet, under the New York statute, as under ours, what would have defeated the action of the injured person in case death had not ensued would defeat the action of the administrator. Both upon reason and authority, then, I think the jury in the trial of this case were properly instructed that the contributory negligence of the husband constituted no defense. The judgment below should be affirmed.

KANSAS SUPREME COURT.

N. T. GREENWOOD *et al.*, *Piffs. in Err.*,
v.

Thomas A. BUTLER *et al.*

(.....Kan.....)

*Chapter 109 of the Laws of 1893, concerning the sale and redemption of real estate, does not have the effect to change or nullify any of the terms of a judgment duly rendered before the passage of that act, directing the sale of lands, or any interest therein, for the purpose stated in said judgment.

/ (December 9, 1898.)

ERROR to the District Court for Rice County to review an order made in certain foreclosure proceedings, which extended the time for redemption, in accordance with a statute passed after the final judgment of foreclosure, beyond what the mortgagor was entitled to at the time the mortgage was given and foreclosed. *Reversed.*

The facts are stated in the opinion.

Mr. Owen A. Bassett for plaintiffs in error.

Messrs. A. M. Lasley and John Guthrie, for defendant in error:

The state cannot pass laws that "impair the obligation of a contract," but the state "may regulate at pleasure the modes of procedure in courts in relation to past contracts, as well as future."

Bronson v. Kinzie, 42 U. S. 1 How. 311, 11 L. ed. 143; *Cusick v. Douglass*, 3 Kan. 128, 97 Am. Dec. 458; *Weaver v. Sells*, 10 Kan. 619; *Hathorn v. Caley*, 69 U. S. 2 Wall. 10, 17 L. ed. 776; *Jackson v. Lamphire*, 28 U. S. 3 Pet. 290, 7 L. ed. 668; *Breitenbach v. Bush*, 44 Pa. 318, 84 Am. Dec. 442; *Bunn v. Gorgas*, 41 Pa. 441.

*Headnote by ALLEN, J.

NOTE.—On the subject of the impairment of the obligation of a judgment as a contract, see note to *Rockwell v. Butler* (Colo.) 17 L. R. A. 611.

32 L. R. A.

Whatever belongs merely to the remedy may be altered according to the will of the state.

The discussion in all cases of this character arises out of the distinction that exists between the doctrine of *lex loci contractus*, *lex domicilii*, etc., on the one hand, and *lex fori* on the other; for it is universally conceded that the latter must govern the remedy.

Andrews v. Herriot, 4 Cow. 510, and note.

I. The *lex loci contractus*—the law of the place where the contract is made, or is to be performed—is to govern as to the nature, validity, construction, and effect, of such contract.

II. The *lex loci rei sita* governs real property, the title to which can be acquired and lost only in the manner prescribed by the laws of the country where it is situated.

United States v. Crosby, 11 U. S. 7 Cranch, 115, 8 L. ed. 287.

III. The *lex fori*—the forms of the remedy and the order of judicial proceedings—are to be according to the law of the place where the action is instituted, without any regard to the domicil of the parties, the origin of the right, or the country of the act.

Story, Confli. L. § 558.

It is in this state an undisputed proposition of law that a mortgagee acquires no title or estate in the mortgaged premises, and only acquires a lien on the property.

Chick v. Willetts, 2 Kan. 390; *Vanderslice v. Knapp*, 20 Kan. 647; *Alexander v. Shonyo*, Id. 705; *Winston v. Burnell*, 44 Kan. 367.

Cox v. Martin, 44 Pa. 322, was an action to foreclose a mortgage. The legislature of Pennsylvania had passed an act which provided that "no civil process shall issue or be enforced against any person mustered into the service of this state, or of the United States, during the term he shall be engaged in such service."

The question was squarely presented in this case whether this act of the legislature was in contravention of section 10, article 1 of the Federal Constitution. The court

said nothing is said about the legal remedies to enforce payment in case of default. The *scire facias* is given by our old Act of 1705, no allusion to which is contained in the mortgage. This remedy does not arise out of contract; it is conferred upon it by the legislature, and because conferred by the legislative power of the state, it may be suspended by the same power under pressure of public exigencies for a term that is neither indefinite nor unreasonable. This mortgage was made subject to that power; all contracts within the state are so made. The power permeates them all, if not expressly excluded by the contracting parties. No such contract, therefore, is violated, when the power acts, unless it transcends its constitutional limits.

Breitenbach v. Bush, supra; Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 288.

What rights had the mortgagee in the case at bar, either under his contract or decree, that were impaired or affected, or how was the obligation of the mortgagor with reference to the mortgage impaired or affected?

The new law did not postpone the sale a moment; it did not impair his right to sell to the highest and best bidder and get all of the proceeds of the sale and apply it to the satisfaction of the judgment; and it did not prevent him from causing a general execution to issue for any remainder of the judgment, as he might have done before.

See *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Robertson v. Van Cleave*, 15 L. R. A. 68, 129 Ind. 217; *Davis v. Rupe*, 114 Ind. 588; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925; *Wood v. Kennedy*, 19 Ind. 68; *Bank of Hamilton v. Dudley*, 27 U. S. 2 Pet. 492, 7 L. ed. 496; *United States v. Conway*, 1 Hemp. 813; *Cooley, Const. Lim.* 196-347; *Smith v. McCarthy*, 56 Pa. 362; *Robinson v. Schenck*, 102 Ind. 320; *Antoni v. Wright*, 22 Gratt. 857; *Robinson v. Howe*, 13 Wis. 347; *Moore v. Martin*, 88 Cal. 428; *Stone v. Bassett*, 4 Minn. 298; *Heywood v. Judd*, Id. 492; *Von Baumbach v. Bade, supra; Read v. Frankfort Bank*, 28 Me. 818; *Lockett v. Urry*, 28 Ga. 845; *Berthold v. Fox*, 13 Minn. 506, 97 Am. Dec. 243; *Conkey v. Hart*, 14 N. Y. 81.

Allen, J., delivered the opinion of the court:

This action was commenced in the district court of Rice county on the 25th day of May, 1891, by N. T. Greenwood, to foreclose a mortgage executed by Thomas A. Butler and wife on certain lots in the city of Lyons. Other parties, claiming liens on the land, were made defendants. Issues were joined, and on the 22d day of September, 1891, a judgment was rendered in favor of the plaintiff for \$861.86, directing a sale of the premises without appraisal, subject to a mortgage for \$6,000, and ordering execution to issue in six months in case the defendant failed for that time to pay the amount of the judgment, interest and costs. The decree concludes as follows: "And it is further adjudged and decreed by the court that the said defendants, and each of them, and all persons claiming, or to claim, by, through,

or under them, or any of them, upon the confirmation of any sale of said lands or tenements hereunder, be barred and forever foreclosed of all title to, lien upon, or equity of redemption in said lands and tenements, or any part thereof, and that upon confirmation of any sale made as herein provided the sheriff be directed to put the purchaser of said lands or tenements in possession thereof." Afterwards, on the 7th day of April, 1892, on the application of the plaintiff for a supplemental judgment against certain other defendants, who were brought in by publication, a further decree was rendered, barring them also. Again, on the 22d day of April, 1892, a further order was made to supply omissions from the record, and a further and final decree was rendered, which concludes with an order barring the claims of all defendants in the same language as that contained in the original decree. On the 28d of March, 1893, an order of sale was duly issued on this judgment by the clerk of the court and on the 24th day of April 1893, the lots were sold to J. E. Putnam for \$2,000 subject to the \$6,000, mortgage. On the 25th day of May, 1893, the motion of the plaintiff to confirm the sale came on to be heard, and the sale was confirmed. The journal entry then proceeds as follows: "And it is further ordered and adjudged that so much of said motion as relates to directing the sheriff to make a deed to said purchaser of said lands and tenements, and put him in possession of said premises, be denied; to which last order and decision of the court the plaintiff and the said purchaser then and there excepted. And it is further ordered by the court that the said sheriff execute to the purchaser a certificate containing a description of the property sold, and the amount of money paid by said purchaser, together with the amount of costs up to this date, stating that, unless redemption is made within eighteen months thereafter according to law, said purchaser, his heirs and assigns, will be entitled to a deed for the same; to which last order of the court the said plaintiff and the said purchaser then and there excepted."

The question presented in this case is as to the correctness of the decisions of the court last quoted. The plaintiff in error contends that on the confirmation of the sale of the premises he was entitled to a deed and to the possession of the property. Elaborate briefs are filed, and the case has been fully and ably argued by counsel. For the defendants in error it is urged that chapter 109 of the Laws of 1893, known as the "Redemption Act," applies to this case; that the order made by the district court is in compliance therewith, and is valid. On the part of the plaintiff in error it is contended that this act does not and cannot affect the rights of the parties to and purchasers under judgments rendered before the passage of the law; and, further, that the act can have no application to contracts made before its passage; that as to such contracts it would be in contravention of the 10th section of article 1 of the Constitution of the United States, because it would impair the obligation of contracts. Chapter 109 of the Laws of 1893 went into effect on

the 17th of March, 1898. The twenty-fifth section reads: "The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanic's lien, or other lien, whether special or general, and the terms of redemption shall be the same." The statute in terms contains no exception of past contracts, or judgments already entered. The question as to the effect of this act on judgments already entered is necessarily involved in the decision of this case, and therefore should be first considered.

Speaking generally, it is the province of the legislature to establish within constitutional limits the rules, not only of procedure, but for the determination of rights, by which the courts shall be governed. These rules must, in the very nature of things, precede the action of the courts in the orderly determination of the rights of parties. Those interested in any controversy are given their day in court. At the appointed time the court hears their proofs, the presentation of their views as to the law fixing their rights, and thereupon proceeds to determine all questions, both of fact and of law, presented. This determination is entered of record, and becomes a final settlement and determination of the controversy. It hardly seems necessary to cite authorities to support the proposition that a final judgment so entered is not to be changed or set aside by the lawmaking power. Our form of government does not contemplate an appeal from the judgment of the courts to the legislature, nor does it contemplate nor authorize by a sweeping act of the legislature a change in the force and effect of a great class of judgments already entered. The precise question involved in this case was determined in the case of *Mills v. Ralston*, 10 Kan. 206. From the opinion in that case, delivered by Mr. Justice Brewer, we quote: "The purchaser at a sheriff's sale looks to the decree for the measure of interest and title he will acquire by his purchase. He knows he can get no more interest than the defendant possesses and the decree orders sold; but he bids, rightfully expecting to obtain all that. It is that interest which the sheriff offers; it is that he bids for; it is that which is struck down to him; and it is that which, if the sale be confirmed, he should then receive. . . . The proceedings on the sale were regular. The plaintiffs, defendants, and purchaser agreed in seeking a confirmation. The confirmation then followed as a matter of course. The decree barred redemption. The sale followed the decree. All the interest of the mortgagors (not an interest subject to the right to possess and redeem for two years) was offered by the sheriff, and was bid for by the purchaser. The confirmation closed that sale. The sale as made was the sale confirmed, and that by consent. The legal effect of that confirmation was to give the party a right to a deed, and the defendant could not, by objecting to a deed, deprive the purchaser of a right which flows from the confirmation. It is said that this carries the consent of the defendant to a point beyond that to which he intended it should go, and that the limit he intended is clearly indicated by his objecting

to a deed. It is plain he wished only the confirmation of a sale of an interest subject to possession and redemption; but the trouble is, no such sale was made. It may be that, by consent of plaintiffs, defendant, and purchaser, the decree might have been modified, and the sale confirmed as of an estate subject to redemption; but nothing of the kind was done. Plaintiffs and purchaser were seeking a confirmation of the sale made, and might not have cared for a confirmation of a different one. This is not in the nature of a contract in which, unless the minds of the parties agree, there is no contract. The order and decree of a court is not simply the record of an agreement. It establishes rights founded upon past transactions. The law, and not the will of the parties, determines its effect. For instance, A. brings suit against B. B. enters his appearance, and consents to judgment, but objects to the judgment being a lien on his realty in the county. The judgment is entered, A. making no consent. The lien would follow. The law attaches it to the judgment. Just so here. The confirmation of a sale under a decree barring redemption entitles the purchaser to a deed. Neither plaintiffs nor purchaser made any consent. They asked affirmative relief; relief they were entitled to under a decree. They asked confirmation of a sale. The defendant consented to it. It was ordered. Then followed the right to a deed; a right resting upon decree, sale, and confirmation." *Ogden v. Walters*, 12 Kan. 282.

We have considered the case of *Morley v. Lake Shore & M. S. R. Co.*, 146 U. S. 162, 38 L. ed. 925, which holds, where a judgment for money is entered, and by law bears 7 per cent interest, no rate being specified in the judgment, and a law is subsequently passed reducing the rate of interest on all judgments to 6 per cent, that such law operates on judgments rendered prior to its passage. The decision is put upon the ground that the interest in such case is in the nature of a penalty, or liquidated damages for the nonpayment of the judgment, and is a matter wholly within the discretion of the legislature, not being a part of the contract between the parties, nor fixed or established by the judgment of the court. From this decision *Justices Harlan, Field, and Brewer* dissented. We do not think that case directly in point. The subject of interest was not there a matter of judicial determination. It followed as a legal incident, as would accruing costs attending the enforcement of a judgment. In this case the parties to the suit were to have the amount of the plaintiff's recovery determined by the court, and to have an adjudication as to the rights of all the parties claiming an interest in or lien upon the mortgaged property. The plaintiff then sought a sale of the property, and the application of the proceeds to the payment of his claim. It was absolutely necessary that the decree should determine what interest should be sold, and whose rights should be barred. It directed a sale without appraisal of the interests of the mortgagors, but allowed them, in accordance with the law as it then stood, a stay of six months in which

to redeem. In case of a failure to pay within that time it directed a sale of the interest of the mortgagors subject to the prior mortgage for \$6,000, and decreed that on the confirmation of such sale the rights of all the defendants should be barred and foreclosed of all equity of redemption, and that the sheriff should be directed to put the purchaser into possession. The original judgment was entered almost a year and a half before the Act of 1898 was passed, and the final supplemental decree more than eleven months before its passage. It cannot be said that a sale of lands with a right of possession remaining in the judgment debtor for a year and a half thereafter is the same thing as a sale with a right to immediate possession on confirmation of the sale. It is simply the carving out and taking away from the estate originally decreed to be sold another estate limited for a year and a half. It diminishes the value of the lands to be sold by just ex-

actly the value of the tenure, rent free, for a year and a half. The fact that the judgment would still draw interest does not affect the question as to the value of the security to be sold for its satisfaction. We conclude, then, that judgments rendered prior to the passage of the act are not affected by it, and that all sales of land under such judgments must be made in accordance with their terms, and will pass such estates as are thereby ordered to be sold. As the conclusion we have reached on this question is decisive of the case, it is unnecessary to now enter into a discussion of the constitutional question so ably presented by counsel on both sides.

The order directing that a certificate issue to the purchaser will be reversed, with the direction that the sheriff be ordered to execute a deed to the purchaser, and that he have immediate possession of the land sold.

All the Justices concur.

INDIANA SUPREME COURT.

Joseph SEGO, *Appt.*,

v.

Heber STODDARD.

(.....Ind.....)

1. A lead pencil mark across the name of a candidate is a distinguishing mark which makes the ballot invalid under Indiana statutes which prohibit any distinguishing mark or mutilation.
2. A hole in a ballot made in scratching out a stamp mark constitutes a distinguishing mark or mutilation within the prohibition of the Indiana statutes although the ballot is otherwise properly stamped.
3. A stamp at or on a square opposite a blank space left for the name of a candidate is a distinguishing mark under the Indiana statute which prohibits any stamp excepting in the square enclosing the device or in the square opposite the name of a candidate.
4. The provisions of the Indiana statutes that a ballot bearing a distinguishing mark or mutilation shall be void, and also that a stamp elsewhere than on a square prescribed by statute shall be treated as a distinguishing mark, are mandatory and not merely directory so that a corrupt intent in making such prohibited mark is not necessary to defeat the vote.

(January 24, 1894.)

APPEAL by complainant from a judgment of the Circuit Court for Porter County in favor of defendant in a proceeding brought to contest the alleged election of defendant to the office of sheriff of Porter County. *Affirmed.*

The facts are stated in the opinion.

NOTE.—For effect of marks or devices to distinguish ballots, see note to *Rutledge v. Crawford* (Cal.) 18 L. R. A. 781, also later cases, *People v. Onondaga County Canvassers* (N. Y.) 14 L. R. A. 624; *Allen v. Glynn* (Colo.) 15 L. R. A. 743; *State v. Russell* (Neb.) 15 L. R. A. 740; *Parvin v. Wimberg* (Ind.) 15 L. R. A. 775; *State v. Ellis* (N. C.) 17 L. R. A. 335; *State v. Walsh* (Conn.) 17 L. R. A. 384; *State v. Saxon* (Fla.) 18 L. R. A. 721; *Lindstrom v. Manistee County Canvassers* (Mich.) 19 L. R. A. 171.

Messrs. A. L. Jones, Cass & Weir and Kern & Bailey for appellant.

Messrs. N. L. Agnew and D. E. Kelley, with *Mr. E. D. Crumpacker*, for appellee:

It is said in the case of *State v. Black*, 16 L. R. A. 769, 54 N. J. L. 446: "So long as the ballot can be marked for identification, or the vote of the citizen can be disclosed in any way, the voter is liable to be called to an account for his conduct. The coercionist will treat his refusal to vote a marked ballot as an adverse vote. The corruptionist will have the means of assuring himself that the vote he has purchased will be delivered. The thoughts of those interested in pure elections were turned by these considerations to the device of some scheme for voting which would secure compulsory secrecy, and at the same time provide for an orderly, equal, and convenient exercise of the right of suffrage." In *Bechtel v. Albin* (Ind.) April 4, 1893, this court declared respecting our election law: "That the great underlying object was to avoid the possibility of discovery, from the ballot, of the identity of the voter."

Ballots which contained stamp marks that did not touch any square at all are expressly denounced by the statute which in this respect was declared mandatory in *Parvin v. Wimberg*, 15 L. R. A. 775, 180 Ind. 561.

McCabe, J., delivered the opinion of the court:

At the general election held on the 8th day of November, 1892, the appellant, Joseph Sego, was the democratic candidate, the appellee, Heber Stoddard, the republican candidate, one Harrison H. Williams, the people's candidate, and one William B. Gibbs the prohibition candidate, for the office of

sheriff of Porter county. At the meeting of the board of canvassers, convened in pursuance of law, there were canvassed and counted for each of said candidates, respectively, the following number of votes, viz.: for appellant, 2,020; for appellee 2,023; for Harrison H. Williams 100; and for William B. Gibbs 114 votes; whereupon appellee having been found by said board to have received the plurality of all the votes returned and canvassed, he was declared elected to said office. On the 15th day of November, 1892, within ten days after the result of said canvass was declared, appellant filed in the office of the auditor of said county his statement to contest the election of appellee to said office. Issue, trial before the board of commissioners, resulting in a judgment by the board that appellee had received a plurality of all the votes cast at said election, and had been duly elected to said office. The appellant appealed to the circuit court of said county, where there was a trial by the court, special finding and conclusions of law, whereupon there was another judgment rendered in favor of appellee, declaring that he had received a plurality of all the votes cast at such election and had been duly elected to said office, from which judgment this appeal is prosecuted.

It is assigned for error that the circuit court erred in its conclusions of law. This is the only question presented by this appeal. The finding shows that the number of votes in the aggregate with which each candidate was credited by the canvassing board were all legal votes, and that each candidate was legally entitled to be so credited in the court. The controversy arises over sixty-five other ballots that had been returned to the clerk's office in sealed bags, none of which had been counted by the board of canvassers for either candidate. The finding and conclusions of law show that the sixty-five ballots so returned to the clerk's office uncounted had been cast by legal voters at said election, and that twenty-three of them were so stamped as to indicate the intention of the voters to vote for the contestee, Stoddard, and were free from marks or mutilations whereby said ballots could be distinguished, and should have been counted for the contestee and the circuit court did so count them, making his whole vote 2,046. No question is made in appellant's brief against the correctness of this ruling.

And of the uncounted ballots returned as aforesaid, the court found as matter of fact, and stated in its legal conclusions, that nineteen of them were so stamped as to indicate the intention of the voters to vote for contestor, Joseph Sego, and that said ballots were free from any marks or mutilations by which they could be distinguished and should have been counted for said Sego, and the court so counted them for him, making his whole number of votes 2,089.

No question is made on either side as to the correctness of this conclusion. The court further finds that two of said uncounted ballots were so stamped as to indicate the intention of the voters to vote for the contestor, Sego, and were free from marks or mutila-

tions by which they could be distinguished, and were properly stamped, but that said two ballots were not protested by any member of the election board at said election whereat they were cast, and that the action of the election board in rejecting said ballots was unanimous in their decision that the same ought not to be counted, and said ballots were in no way disputed or protested and for that reason the court concluded as matter of law that they ought not to be counted and accordingly rejected them for that reason.

Whether that conclusion of law was right or wrong, as we shall hereafter see, can make no difference in the result of this case. We have left of the uncounted ballots twenty-one yet to consider. One of these was found to contain a lead-pencil mark across the name of Thomas Hammond, a candidate for congress on said ballot, another bore evidence of having been stamped in the square opposite the name of William A. Henneger for congress on said ballot, and of having the stamp erased by a knife, or some other sharp instrument, so that it made a hole clear through the ticket, and was also stamped to the left of each candidate on the republican ticket except Heber Stoddard. Five of said twenty-one ballots were stamped plainly and clearly in one of the large squares containing a device, and one of them in which the stamp was in the square containing the eagle at the head of the republican ticket also was clearly and plainly stamped between the word "republican" at the top of the ticket, and to the left of the name William Johnston on said republican ticket. Another is stamped in the square surrounding the rooster, and it is stamped in the square to the left of each of the names in the democratic ticket; another, stamped in the square surrounding the rooster, is also stamped on the square to the left of each of the names on the democratic ticket; another, stamped in the square enclosing the eagle, is also stamped to the left of the names of Allen Reynolds and Joseph Sego, on the democratic ticket, it appearing that there was a full list of candidates' names for the various offices printed on the republican ticket, including the offices for which Allen Reynolds and Joseph Sego were candidates; another, stamped in the square enclosing the rooster, is also stamped in the square to the left of the name of Allen Reynolds on the democratic ticket. Another ballot was stamped to the left of the names of Beck and Sego, in the democratic ticket, and Coats in the republican ticket, Stoner in the prohibition ticket, Yeoman, Shultz, Jones, Green, and Peck in the people's ticket, and is also stamped on the square to the left of the place for commissioner of the third district of Porter county, in a square opposite to which there is no candidate's name printed, and the ticket as to that office is left blank; another was stamped in the squares to the left of the names of Hammond, Bartholomew, and Sego on the democratic ticket, and to the left of the name of Burstram on the republican ticket, and on the squares to the left of the names of Shultz, Green, Peck, and Hamfeldt in the people's ticket; also in the squares to the left

of the places for candidates for prosecuting attorney, county surveyor, and commissioner of the third district on the prohibition ticket, there being no candidate named on that ticket for either of these offices and as to them, the said prohibition ticket being blank.

Four of these rejected ballots contained large blurred marks or blotches in the square surrounding the device, four or five times as large as the ordinary stamp mark; two of these were voted for appellant and two for appellee. This leaves for consideration but five of the twenty-one rejected votes. These all contained more than one stamp mark in the large square enclosing the device. It is further found that these twenty-one votes rejected by the circuit court bore no other marks than those above indicated and that sixteen of them were so stamped as to indicate an intention to vote for appellant, and five of them were so stamped as to indicate an intention to vote for appellee. As we have seen, without these twenty-one votes, the count stands 2046 for appellee and 2039 for appellant about which there is no disagreement. It is not contended by appellant's learned counsel, as we understand them, that these twenty-one ballots were marked or stamped in the manner provided by what is known as our Australian Ballot Law; indeed, it is virtually conceded that these ballots were not stamped and marked according to the strict letter of that law. But it is insisted that such law as to its directions for stamping and marking ballots is not mandatory, but directory simply. So much of sections 45 and 52 of said law as amended by the Act approved March 6, 1891, that is applicable, reads as follows: Sec. 45: "The voter shall then, and without leaving the room, go alone into any of the booths which may be unoccupied, and indicate the candidates for whom he desires to vote by stamping the square immediately preceding their names. . . . Provided, however, that if he shall desire to vote for all the candidates of one party or group of petitioners, he may place the stamp on the large square enclosing the device and preceding the title under which the candidates of such party or group of petitioners are printed, and the vote shall then be counted for all the candidates under that title. If the voter stamps the large square enclosing the device, he shall not stamp elsewhere on the ballot, unless there be no candidate for some office in the list printed under such stamped device, in which case he may indicate his choice for such office by stamping the square to the left of the name of any candidate for such office on any other list. A stamp on a ballot in violation of this provision shall be treated as a distinguishing mark. If a stamp touches a square, it shall be counted on the square, but a stamp that touches no square shall be treated as a distinguishing mark."

"Sec. 52. . . . Any ballot which shall bear any distinguishing mark or mutilation shall be void, and shall not be counted."

The ballot containing a lead-pencil mark across the name of Thomas Hammond was in violation of the letter of the statute just quoted, which forbids the counting of a ballot with a distinguishing mark. The one

which had been stamped in the square opposite the name of Henneeger, and that stamp mark erased so that a hole was thereby made through the ticket, though otherwise properly stamped at other places on the ballot, is in the same fix. The one stamped in the square containing the device at the head of the republican ticket, and also stamped between the word "republican" at the top of the ticket, and to the left of the name of William Johnston on said republican ticket, is in violation of section 45, which forbids a stamp anywhere else on the ticket when stamped in the square containing the device, unless there be no candidate for some office in the list printed under the stamped device. The exception could not apply, because the additional stamp here was in the republican ticket. The statute imperatively requires such additional stamp to be treated as a distinguishing mark, and the other section declares such a ticket to be void, and forbids it to be counted. The two stamped in the square surrounding the rooster, and also in the square to the left of each of the names in the democratic ticket falls in the same category as the last one above mentioned. The one stamped in the square enclosing the eagle, and also stamped to the left of the names of Allen Reynolds and Joseph Sego on the democratic ticket, there being a full list of candidates on the republican ticket for the various offices, including the offices for which Reynolds and Sego were candidates, is in violation of that part of said section 45 forbidding additional stamps on the ticket when the large square enclosing the device is stamped, where there is a full list of candidates under the device stamped, and declaring such additional stamp a distinguishing mark, and the other section 52 declaring it void and forbidding it to be counted. The one stamped in the square enclosing the rooster and also in the square to the left of the name of Allen Reynolds on the democratic ticket falls in the same category as the one before the last. The one stamped to the left of Beck and Sego in the democratic ticket, and Coats in the republican ticket, Stoner in the prohibition ticket, Yeoman, Shultz, Jones, Green and Peck in the people's ticket, and also stamped on the square to the left of the place for commissioner of the third district of Porter county in a square opposite to which there is no candidate's name printed, the ticket as to that office being left blank, is a violation of said section 45, declaring a ticket void, being a distinguishing mark to stamp at another place than on the device, and forbidding the same to be counted. There are only the squares to the left of names on the various tickets and the square enclosing the device, that can be lawfully stamped by the provisions of section 45. A stamp at or in a square opposite no candidate's name is a distinguishing mark. The one stamped in the squares to the left of the names of Hammond, Bartholomew, and Sego, on the democratic ticket, and to the left of the name of Burstram on the republican ticket, and also on the squares to the left of the names of Shultz, Green, Peck, and Hamfeldt in the people's ticket, and also in the square to the left of

the places for prosecuting attorney, county surveyor, and commissioner of the third district on the prohibition ticket, there being no candidate named on that ticket for either of these offices, said ticket being blank as to said offices, is in the same category as the last one above mentioned. We need not, and do not, pass upon the validity of the four ballots rejected, because they each contained large blurred marks or blotches in the square surrounding the device four or five times as large as the ordinary stamp mark, because two of them were for appellant and two were for appellee, making the result the same whether they are counted or not. The five remaining rejected ballots each contained more than one stamp mark in the large square enclosing the device, were stamped contrary to section 45 the literal meaning of which is that one stamp mark is to be placed in any square, and no more. It violates section 52, in that such unnecessary stamp marks are distinguishing marks, and by its terms the ballots are made void and are forbidden to be counted. It is contended that the statute is directory merely, and not mandatory, as to the method of marking ballots or stamping them. This court, in speaking of this very provision of the law in *Parvin v. Wimberg*, 180 Ind. 566, 15 L. R. A. 778, said: "If we hold this statute to be directory only, and not mandatory, we are left entirely without any fixed rule by which the officers of election are to be guided in counting the ballots." Appellant's counsel earnestly insist that though the ballot is not stamped as the statute requires, and in violation of its terms, yet unless there is proof that the unauthorized or prohibited marking was done by the voter for a corrupt motive, the ballot must be counted. Such a construction would be utterly subversive of the leading idea, thought, and purpose of the act. At the time the legislature met that passed the act, there was a general belief in the public mind that the most threatening evil to government by the people was bribery or vote buying at elections. The evil was more dangerous in our state than in many of our sisters, because the two leading political parties were so nearly matched in numbers, thus rendering it practicable to change the result by the purchase of a few thousand votes. Criminal statutes imposing severe penalties against the crime had proven but idle and powerless fulminations, at which both the buyer and seller laughed, feeling that their mutual interest would hold the secret of their crime against free government securely locked in their breasts. So that the statute was the outgrowth of the desire of all to rid the state of the burning disgrace and

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ominous danger to popular government. And the leading idea and thought of the whole act was not to afford relief against the fraud of vote buying and bribery at elections after its commission, but it was to devise a plan by which the honest voter could not only be freed from intimidation by making his vote a secret known only to himself and his God, but it was to absolutely shut the door against making merchandise of his vote by the corruptible voter as near as human ingenuity could devise such a plan. That the plan has proven eminently successful is evidenced by the fact that all political parties warmly approve the law, and that thirty odd of our sister states have since substantially adopted it. The idea was not, as appellant's counsel seem to think, to so provide as to render it impossible for the purchased or bribed voter to afterwards identify the ticket he voted by looking at and inspecting it, because the other provisions of the act provide for a destruction of the ballots after they are counted, and before anybody except the officers can see them. But it was to guard against the possibility of the vote seller indicating to the buyer in advance how his ballot would be distinguished from the other ballots in the box, so that the buyer or his agent, who may be one of the election officers, could tell when the bribed voter's ballot was reached in the count that such bribed voter had carried out his contract. It was believed that if it could be rendered impossible for the buyer or his agent to identify the ballot voted by the purchased voter from a mere indication beforehand how it should be marked, the desired end would be reached, because it was believed that, as a general thing, a vote buyer would not risk his money on a vote seller without some assurance other than the mere word of the bribed voter. To that end a stamp, the same stamp, is required to be used in marking ballots and indicating the voter's choice, instead of a pen or pencil, which could be given a peculiar turn or a peculiar mark so as to distinguish the ballot. If that is true, how much more is it true that to carry out the general intent of the act that the ballots here in question are all in violation of the act. Many of them are expressly declared by the terms of the act void, and the others are such as render it possible to identify the ballot by the person engaged in buying it. See *Bechtel v. Albin* (Ind.) at last term.

Without counting the two tickets rejected by the court because they were not protested, the appellee has a clear plurality of all the votes by five.

The judgment is therefore affirmed.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*,

T. L. MOORE.

(.....N. C.....)

1. If an occupation tax can be upheld in any case as an exercise of the taxing power, it must not violate a constitutional requirement of uniformity, and therefore a tax imposed by the legislature on the exercise of an occupation in some counties but not in others is unconstitutional.
2. The occupation of an "emigrant agent" does not belong to that class which is so inherently harmful or dangerous to the public that it may be either directly or indirectly restricted or prohibited, where the occupation consists merely in hiring laborers in the state to be employed beyond the limits of the state.
3. A license fee of \$1,000 for the occupation of an emigrant agent unaccompanied by any police regulation whatever, is unreasonable and cannot be upheld.

(November 21, 1886.)

A PPEAL by the state from a judgment of the Criminal Court for New Hanover County acquitting defendant of a violation of the Emigrant Agent Act. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Frank L. Osborne, Atty-Gen., for the State.

Mr. Junius Davis, for appellee:

The act violates the rules of uniformity prescribed by the constitution of the state for the levying and assessing of taxes.

State v. Powell, 100 N. C. 526; *Puitt v. Gaston County Comrs.* 94 N. C. 718, 55 Am. Rep. 688; *Worth v. Wilmington & W. R. Co.* 89 N. C. 295, 45 Am. Rep. 679; *Gatlin v. Tarboro*, 78 N. C. 121; *Wiley v. Salisbury Comrs.* 111 N. C. 400.

It violates articles 1 and 17 of the Bill of Rights.

1 Cooley, Const. Lim. 6th ed. p. 744; *Butcher's Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 28 L. ed. 591.

The act is leveled at the laboring class only, that great mass who earn their living in the sweat of the brow, and is a barrier to many who may wish to embrace the opportunity and means offered by agents to emigrate from the state in the hope of bettering their condition.

Ex parte Kuback, 9 L. R. A. 482, 85 Cal. 274.

It is not "the law of the land."

It is partial only in its operation. It does not embrace all pursuing the denounced calling within the state, but applies only to certain counties and makes highly penal in them, what is entirely lawful in the other counties of the state.

State v. Divine, 98 N. C. 788; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 889; *People v. Marx*, 90 N. Y. 877, 52 Am. Rep. 40; *State v. Goodwill*, 6 L. R. A. 621, 88 W. Va. 179; *State v. Fire Creek Coal & O. Co.* 6 L. R. A. 859, 38 W. Va. 188; *Baker v. Portland*, 5 Sawy. 566; *Com. v. Perry*, 14 L. R. A. 825, 153 Mass. 117; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 508.

It violates the Constitution of the United States, in that it is an attempted interference with the right of congress to regulate commerce between the states. For interstate commerce consists as well of the transit of persons from state to state, of emigration from one state to another, as of the transportation of merchandise.

McCall v. California, 186 U. S. 104, 84 L. ed. 892; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 498, 80 L. ed. 698; *Brimmer v. Rebmam*, 128 U. S. 81, 84 L. ed. 863; *Minnesota v. Barber*, 136 U. S. 826, 84 L. ed. 460.

It violates the 14th Amendment to the Constitution of the United States.

It denies to those engaged in the business of hiring, within the prescribed counties, laborers to leave the state, the equal protection of the law.

San Mateo County v. Southern Pac. R. Co. 7 Sawy. 517, 13 Fed. Rep. 145, 722; 8 Am. & Eng. R. R. Cas. 11, 13, 15; *Barbier v. Connolly*, 118 U. S. 81, 28 L. ed. 924; *Pearson v. Portland*, 69 Me. 278, 81 Am. Rep. 276; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 23, 29, 32 L. ed. 586; *Pick Wo v. Hopkins*, 118 U. S. 869-873, 30 L. ed. 226, 227; *State v. Divine*, *supra*.

The reason of the act is public history. For it is notorious that its openly avowed purpose was to prevent negro laborers from leaving the state.

It is a bold and patent attempt to accomplish an unlawful object in an alleged lawful way.

Henderson v. Wickham, 92 U. S. 268, 28 L. ed. 548; *Chy Lung v. Freeman*, 92 U. S. 275, 28 L. ed. 550; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 472, 24 L. ed. 530; *San Mateo County v. Southern Pac. R. Co.* *supra*.

Shepherd, Ch. J., delivered the opinion of the court:

This is an indictment for the violation of chapter 75, Acts 1891; and it is found in the special verdict that the defendant, "without having first procured a license therefor from the treasurer of the state of North Carolina, did hire six laborers in the county of New Hanover, in the state aforesaid, to be employed beyond the limits of the said state, and did solicit other laborers in said county to hire themselves to be so employed, and that the said defendant on the day aforesaid, and in the county aforesaid, was engaged in

NOTE.—The above is unusually important as a decision that a constitutional provision for uniformity applies to an occupation tax where that is 22 L. R. A.

imposed for revenue. This question has heretofore been but slightly touched in the decisions of the courts.

the business of hiring in the said county laborers to be employed beyond the limits of said state, and that the said county of New Hanover is east of the line, as at present established, and as so established on the 6th day of February, 1891, for the receiving of patients by the North Carolina Insane Asylum." The act referred to excludes, in express terms, from its operation, any of the counties in the state which are west of the said line, except a few, which are therein specifically named; and thus it appears that the same occupation may be lawfully and freely pursued in many of the counties of North Carolina, while in others a license fee of \$1,000 is required to be paid into the state treasury, and its pursuit without such a license is denounced as a criminal offense and punishable by a fine of "not less than five hundred dollars and not more than five thousand dollars," or by imprisonment in the county jail "not less than four months, or confinement in the state prison at hard labor not exceeding two years for each and every offense, within the discretion of the court." It must be manifest from these provisions that the principle of uniformity is entirely disregarded, and that, if the act is to be considered as an exercise of the taxing power of the legislature, it must, under the repeated decisions of this court, be declared unconstitutional and void. Const. art. 5, § 3, authorizes the legislature to tax "trades, professions, franchises," etc.; and, although it is not expressly provided that such taxes shall be uniform, "yet," says Rodman, J., speaking for the court in *Gallin v. Tarboro*, 78 N. C. 119, "a tax not uniform, as properly understood, would be so inconsistent with natural justice, and with the intent which is apparent in the section of the constitution above cited, that it may be admitted that the collection of such a tax would be restricted as unconstitutional." In *Worth v. Wilmington & W. R. Co.*, 89 N. C. 291, 45 Am. Rep. 679, the principle just stated was distinctly recognized, and declared to be within the spirit and meaning of the fundamental law. Smith, Ch. J., in delivering the opinion of the court, said: "We should be reluctant to hold, if there were no question of constitutional right involved, that this method of levying taxes was sanctioned by our own constitution, and consistent with the equality and uniformity which it contemplates. The 'uniform rule' to be observed in the exercise of the taxing power seems to be so far applicable to the taxes imposed on 'trades, professions, franchises and incomes,' as to require that no discriminating tax be imposed upon persons pursuing the same vocation, while varying amounts may be assessed upon vocations or employments of different kinds." Again, in *Pruitt v. Gaston County Comrs.*, 94 N. C. 709, 55 Am. Rep. 688, it was said: "The principle of uniformity pervades the fundamental law, and while not in the constitution applied in express terms to the tax on trades, professions, etc., necessarily underlies the power of imposing such tax." In this last case the court adopted the words of Miller, J., in the *State Railroad Tax Cases*, 92 U. S. 575, 28 L. ed. 663, "that while one

tax may be imposed upon innkeepers, another upon ferries, and a still different tax on railroads, the taxation must be the same on each class that is, the same tax upon all innkeepers, upon all ferries, and upon all railroads, in their respective classes as taxable subjects." And again, in *State v. Powell*, 100 N. C. 525, the same language was accepted as a correct definition of "uniformity," and it was repeated that "uniformity, in its legal and proper sense, is inseparably incident to the power of taxation." The act under consideration, if intended to impose a tax, in the legal signification of the term, very plainly falls within the inhibition of the organic law, as interpreted so often by this court, for it cannot, with the least show of reason, be contended that the principle of uniformity is not violated when the same occupation is heavily taxed in one county, while in an adjoining county it is entirely free and untrammelled. It is too plain for argument that if the legislature had passed an act imposing a tax upon merchants doing business in the counties of New Hanover, Pender, and Bladen, while like merchants in the counties of Brunswick, Robeson, and Richmond were not required to pay such tax, the act would be void; and yet such a discrimination in taxation would be no greater than that which is attempted to be made under the statute in question. It is not very unusual in this country for the state, either directly, or through its various municipal corporations, to require the payment of a certain amount for the privilege of prosecuting one's profession or calling; and this is required, indiscriminately, of all kinds of occupations, whatever be their character,—whether harmful or innocent; whether the license is necessary to the protection of the public, or not. "While the courts are not uniform in the presentation of the grounds upon which the general requirement of a license for all kinds of employments may be justified, on one ground or another, the right to impose the license has been very generally recognized. Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and occupations. It is either a license, strictly so called, imposed in the exercise of the ordinary police power of the state, or it is a tax laid in the exercise of the power of taxation." Tiedeman, Pol. Powers, § 101; Cooley, Taxn. 408. We have seen that under the latter view the law under consideration cannot be sustained, for the want of the uniformity required by the constitution; and this brings us to the other branch of the inquiry,—whether it can be upheld as a regulation under the police power of the state.

2. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so

far as is reasonably consistent with a like enjoyment of rights by others." Cooley, Const. Lim. 704. "The power is very broad and comprehensive, and is exercised to promote the health, comfort, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim '*salus populi suprema lex est.*' It is used to regulate the use of property by enforcing the maxim '*sic utere tuo, ut alienum non laedas.*' Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other." *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686; Tiedeman, Pol. Powers, § 1. "This power, under our federal system of government, has been left with the states, and the only limit to its exercise in the enactment of laws by their legislatures is, that they shall not prove repugnant to the provisions of the fundamental law—the state constitution and the Federal Constitution, with the laws made under its delegated powers." *State v. Moore*, 104 N. C. 714; Cooley, Const. Lim. *574. In its fair and reasonable exercise, the legislature, by reason of the very nature of the power, is not restricted by constitutional provisions in reference to uniformity, as, says Judge Cooley, "the circumstances of a particular locality, or the prevailing public sentiment in that section of the state, may require or make acceptable different police regulations from those demanded in another. These discriminations are made constantly, and the fact that the laws are of local or special operation, only, is not supposed to render them obnoxious in principle." Cooley, Const. Lim. 480. This principle has been fully recognized in this state, and is illustrated by many decisions. In *Intendant of Raleigh v. Sorrell*, 46 N. C. 49, an ordinance of the city of Raleigh requiring, under penalty, oats to be weighed by the public weighmaster, before being offered for sale, was sustained as a valid police regulation. So, an ordinance forbidding the sale of fresh meat in the town of Durham, except at the market house (*State v. Pendergrass*, 106 N. C. 664), and an act regulating the sale of seed cotton in certain counties of the state, were held to be a proper exercise of the police power. So also, it may be stated, as a general principle, that all callings and professions which, by reason of their peculiar character, may directly or indirectly do harm to the public, are subject to police regulations, and a license may be required for their prosecution. "On this principle," says Tiedeman (Pol. Powers, § 101), "attorneys, physicians, druggists, engineers and other skilled workmen may be required to procure a license, which would certify to their fitness to pursue their respective callings, in which professional skill is most necessary, and in which the ignorance of the practitioner is likely to be productive of great harm to the public, and to individuals coming into business relations with them. So also, the licensing of dramshops, green groceries, hackmen and the like, is justifiable, in order that these callings may be effectually brought within the police supervision, which is nec-

essary to prevent the occupation becoming harmful to the public." It must not be understood, however, that the exercise of the police power is without limit. On the contrary, it is settled by abundant authority that, while it is for the legislature to determine what regulations are needed to protect the public health, and secure public comfort and safety, and its measures calculated and intended to accomplish these ends are generally within its discretion, and not the subject of judicial review, it is nevertheless true that this extensive authority must be exercised in subordination to those great principles of fundamental law which are designed for the protection of the liberty and the property of the citizen. "Liberty, in its broad sense, as understood in this country means the right not only of freedom from servitude, imprisonment, or restraint but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or vocation." *Re Jacobs*, *supra*; *People v. Gillson*, 109 N. Y. 889. In *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, Mr. Justice Field said "that among the inalienable rights as proclaimed in the declaration of independence is the right of men to pursue . . . any lawful business or vocation in any manner not inconsistent with the equal rights of others. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright." In the same case, Mr. Justice Bradley said: "I hold that the liberty of pursuit, the right to follow any of the ordinary callings of life, is one of the privileges of a citizen, of which he cannot be deprived, without invading his right to liberty, within the meaning of the constitution." In *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, Andrews, J., remarked that a man's right to liberty includes "the right to exercise his faculties, and to follow a lawful vocation for the support of life." Judge Cooley says: "The general rule, undoubtedly, is that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching on the rights of others. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them." These authorities are referred to for the purpose of showing that, under the mere guise of a police regulation, a person cannot be unduly restricted, or substantially prohibited, from pursuing a lawful occupation. In order to justify such legislation, the business must itself be of such a nature that its prosecution will do damage to the public, whatever may be the character and qualification of those who engage in it. Mr. Tiedeman, in his very reliable work (Pol. Powers, p. 290), remarks: "In order to prohibit the prosecution of a trade altogether, the injury to the

public, which furnishes the justification for such a law, must proceed from the inherent character of the business. . . . But, if the business is not inherently harmful the prosecution of it cannot rightfully be prohibited to one who will conduct the business in a proper and circumspect manner. Such an one would be 'deprived of his liberty' without due process of law." It is on the ground of their inherently harmful and dangerous character that the keeping of gaming tables or the selling of intoxicating liquor, or other things of a demoralizing nature, may be absolutely prohibited. *Mugler v. Kansas*, 123 U. S. 628, 81 L. ed. 205; *State v. Joyner*, 81 N. C. 534. This may be, and is often, directly accomplished by legislation, which, in its terms, is expressly prohibitory, instead of the circuitous method of imposing a burden in the nature of a license as a police regulation, which is difficult or impossible to be borne, and which, in the end, may make the occupation unprofitable. *Cooley, Taxn.* 404.

It must be apparent from an examination of the statute in question that the occupation of an "emigrant agent," as defined therein, does not belong to that class which is so inherently harmful or dangerous to the public that it may either directly or indirectly, be restricted or prohibited. The statute defines the said occupation "to mean any person engaged in hiring laborers in this state to be employed beyond the limits of the same." It cannot be seriously contended that a laborer, under our system of government, as indicated by the unquestionable authorities to which we have referred, does not possess the right of hiring his services to any one, either within or without the state; and, if he may do this, we are unable to see, as we have just remarked, how an agent or other person engaged in hiring him to be employed without the state can be considered as following an occupation which, in itself, is inherently dangerous or harmful, in the sense above mentioned. Indeed, this position is fully conceded by the attorney-general, and we will now consider whether the license imposed by the act is restrictive or prohibitory in its character.

While the probable harm and inconvenience of immigration, to the public, may not be averted by such legislation, it is of the greatest importance to all of the citizens of the state that the inexperienced and artless laborer may not be imposed upon by the false representations and other fraudulent practices of an emigrant agent; and it is one of the highest duties imposed upon the lawmakers to prevent such abuses by prescribing rigid and appropriate regulations, under which the said occupation can alone be followed. Regulations of this nature may be made in a variety of ways, but that which is most commonly adopted is the requirement of a license fee, which is exacted for the purpose of defraying the probable expenses of ascertaining the moral and other qualifications of the proposed licensee, and the proper inspection or other necessary police supervision under which the particular business is to be conducted. While the means adopted must have

a relation to the accomplishment of these ends, it is not absolutely necessary, in all cases, that the law or ordinance imposing the license should prescribe any specific regulation, and it is sufficient if the court can see that the fee exacted is a reasonable proportion of the necessary expenses incident to the general police supervision. The entire absence, however, of any regulation or of any police supervision whatever is a powerful aid (and especially where the amount exacted is very large) in determining whether the license is not really a disguised species of taxation, or an indirect method of unduly restricting or prohibiting the business altogether. In this case, however, we have no hesitation in reaching the conclusion that the act in question is not, and was not intended as, a mere regulation, but its object was either to tax or to restrict or prohibit the particular occupation mentioned therein. This is evident from the fact that it does not contain any of the features of a police regulation, nor is it connected, in any way with any police supervision. No provision whatever is made for the ascertainment of the moral character or other qualities of the applicant. The statute provides that "any person shall be entitled to a license" upon the payment of the prescribed fee, and therefore the vilest impostor may demand a license, and the treasurer has no discretion to withhold it. Neither are there any regulations as to the manner in which the business is to be carried on, and the licensee is left entirely unrestrained, except so far as he may be amenable to the general law. Even if there were such regulations, there is an utter absence of any provision for an inspector, or other officer whose duty it is to enforce them. The general scope and tendency of the act, in connection with the exaction of the very large license fee, induce us to believe that, viewed as a police regulation, it is so far restrictive and prohibitory as to contravene those fundamental principles we have enunciated, and which are intended to protect the citizen in the pursuit of an occupation not inherently dangerous or harmful to the public. It may be regulated, but it cannot be indirectly prohibited, by an exercise of the police power. Whatever doubt, however, that may possibly remain as to the validity of the act as a police regulation may be dissipated when we consider the reasonableness of the amount required for the license. We have already adverted to this principle, and will refer to some of the many authorities upon the subject. In *Cooley on Taxation* (page 408), it is said: "Where the grant is not made for revenue, but for regulation, a much narrower construction is to be applied. A fee for the license may be exacted, but it must be such a fee, only, as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license, and of inspecting and regulating the business which it covers." In *Tiedeman, Pol. Powers*, § 274, it is said that, "in the regulation of occupations, it is constitutional to require those who apply for a license to pay a reasonable sum to defray the expenses of issuing the license, and main-

taining the police supervision." The principle has been emphatically recognized by this court in *State v. Bean*, 91 N. C. 554. In that case it appeared that the town of Salisbury, had under its charter, the authority to regulate the manner in which provisions might be sold in its "streets and markets," and to enforce such regulations by appropriate penalties, etc. The ordinance provided that "no butcher or other person shall cut up and expose to sale any fresh meats within the limits of Salisbury without first obtaining a license from the commissioners of the town, which license shall authorize the person or persons to sell meat at a certain stand, shop, or stall specified in said license, to be used as a market, and for which license said person shall pay the sum of \$3.00 per month payable in advance." The court held that as the subjects of taxation were enumerated in the charter, and as the occupation of selling meat by butchers was not included therein, the town had no right to impose a tax upon that particular occupation; and, when it was urged that the license fee could be sustained as a regulation under the police power, it was held that it was not a police regulation, but a tax. The opinion was based upon the unreasonableness of the amount required for the license. The court (Ashe, J.) said: "There are authorities to be found to the effect that, under the police power, license may be granted for the exercise of particular avocations and employments, but in all such cases it is held that the fee or price exacted for the privilege must not be with a view to revenue; and in such cases it is competent and proper for the courts, where the effect and purpose of an ordinance are brought to be reviewed by them, to see that the fee or price paid for the privilege of exercising the franchise is reasonable, and not for the purpose of raising revenue. *Desty*, Taxn. 306. And to the like effect is *State v. Hoboken*, 38 N. J. L. 280." The court then proceeded to quote Dillon, *Municipal Corporations*, 857, to the effect that, in the case of a license under the police power, only "a reasonable fee for the license, and the labor attending its issue, may be charged." Several cases were cited to show that, because of the unreasonable amount exacted for a license, its imposition was considered as an exercise of the taxing, and not of the police, power. The authorities are abundant in support of the proposition, but its correctness is so fully established that it is hardly necessary to reproduce them in this opinion. We will refer, however, by way of further illustration, to the instructive case of *St. Paul v. Traeger*, 25 Minn. 248, 83 Am. Rep. 462. The city of St. Paul had, by ordinance, required a license fee of \$25 for every huckster of vegetables who plied his trade in the streets of the city. In determin-

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ing whether this was a license or a tax, the court, in the course of the discussion, said: "It cannot be claimed that it was enacted in the exercise of any police power, for sanitary purposes, or for the preservation of good order, peace, or quiet of the city, because, neither upon its face, nor upon any evidence before us, does it appear that any provision is made for inspection, etc. . . . The annual sum exacted for the license is manifestly much in excess of what is necessary or reasonable to cover expenses incident to its issue. . . . No regulations being prescribed in reference to its prosecution under the license, there could be little, if any, occasion for the exercise of any police authority in supervising the business, or enforcing the ordinance, and no cause for any considerable expense on that account." The court held that the ordinance was not a police regulation. Inasmuch as a license fee must be prescribed in advance, and in many instances it cannot be determined with accuracy what the expenses incident to the regulation may be, the courts are not inclined to be too exact in placing an estimate upon them, so long as the sum demanded is not altogether unreasonable. But we have no difficulty in holding, in the present case, that the amount of \$1,000, to be paid in each county in which the occupation is pursued, is enormously in excess of the probable expenses incident to the regulation. We have seen that in fact there is no regulation at all, and therefore no expense, except the insignificant amount necessary to defray the cost of simply issuing a license. If a license fee of \$3 per month was held excessive in *State v. Bean*, *supra*, where very many of the elements of a police regulation were present, what shall we say of the license fee of \$1,000 in this case, in which there is virtually no expense, and where there is not a single feature which indicates any police regulation whatever?

As the questions discussed are of much importance, and especially because they involve the constitutionality of an act of the legislature, we have been somewhat elaborate in the expression of our views. Entirely mindful of that most salutary principle that no court should declare an act of the legislature unconstitutional unless it is plainly so, and deeply conscious, as we are, of the profound responsibility imposed upon those whose province it is to exercise so delicate a duty, we cannot hesitate in deciding that the act under examination is incapable of being sustained, in any point of view. Considered as a tax (and this, we think, is its true character), it is void for want of uniformity; and, considered as an exercise of the police power, it is likewise void, because of its restrictive or prohibitory character, as well as the unreasonable amount exacted as a license fee.

Affirmed.

MARYLAND COURT OF APPEALS.

Lewis N. HOPKINS, Collector of Taxes,
Appt.
v.

BAKER BROS. & CO.

(.....Md.....)

1. **Stock in trade of a partnership** doing business in a city, which remains there until it is sold in course of business is "permanently located" there for purposes of taxation, without regard to the residence of members of the firm, within the meaning of the exception in Md. Const., art. 3, § 51, making goods taxable at the residence of the owner, except when "permanently located" elsewhere.

2. **A stock in trade of a trading partnership is properly assessed to the firm**

*NOTE.—Tax on partnership property.
As regards place of taxation.*

Personal property of a partnership which is in the same state as its principal place of business is regarded as belonging at such place, for the purposes of taxation, under statutes taxing partnerships at their place of business, and is not taxable elsewhere in the state. *Monroe v. Greenhoe*, 54 Mich. 9; *Osterhout v. Jones*, Id. 223; *Williams v. Saginaw*, 51 Mich. 130; *Putnam v. Fife Lake Twp.* 45 Mich. 123; *Torrent v. Yager*, 52 Mich. 303; *Hoadley v. Middlesex County Comrs.* 105 Mass. 619; *McCoy v. Anderson*, 47 Mich. 502; *Stockwell v. Brewer*, 59 Me. 290; *Fairbanks v. Kittredge*, 24 Vt. 9; *St. Johnsbury School District No. 1 v. Kittredge*, 27 Vt. 650.

So a firm of cattle dealers having a place of business, is not taxable at another place where it has the use of the stock yards office in common with other dealers. *Farwell v. Hathaway*, 151 Mass. 242.

So a firm having stores at two places and sending bales to a mill at another place to be made over, which mill is owned and run by other parties, is not taxable at such place although the firm is allowed to sort and ship its goods from such mill. *Lee v. Templeton*, 6 Gray, 579.

So a bookselling and publishing firm having a place of business, is not taxable in another city where it keeps some of its plates stored, even though it has some printing and binding done in such place under contract. *Little v. Cambridge*, 9 Cush. 293.

But a firm having a factory at another place where starch is made, stored, and kept till sold has a "place of business" there although the sales were made at its regular place of business at another city in the same state. *Barker v. Watertown*, 137 Mass. 227.

An inhabitant is taxable in the state wherein he resides for his interest in a firm established and doing business in another state. *Bemis v. Boston*, 14 Allen. 363.

Under Kan. Gen. Stat., p. 1023, providing that personal property shall be listed in the township or city in which the person charged with the tax resided, a firm residing in one county and having personal property in another is liable only for tax in the former. *Griffith v. Carter*, 8 Kan. 565.

But Kansas Act 1874, § 7, requiring property of a firm to be listed by the principal accounting officer or by an agent or partner thereof, implies that it is to be listed as a whole at the place where one of the firm resided and carried on the business and not that each should list his part separately. *Swallow v. Thomas*, 15 Kan. 56.

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instead of to the individual members, where the law provides for the assessment of goods at a place where they are permanently located, without regard to the residence of the owners.

(January 12, 1894.)

APPEAL by plaintiff from a judgment of the Baltimore City Court in favor of defendants in an action brought to compel the payment of a tax assessed against property constituting a stock of goods in defendant's possession for purposes of trade. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Thomas G. Hayes, for appellant:

The legal title to the stock in question is in the firm and not in the individual members of the firm, and is hence taxable to the firm and

The locality of the capital of a house purchasing cotton on commission is the same as the domicile of the members of the firm where they reside in the same city in which their business is located and is not regarded as distributed through the state where sent to purchase cotton. *St. John v. Mobile*, 21 Ala. 234.

Under Indiana Act Dec. 18, 1872, requiring boats to be listed where enrolled, registered, or licensed, they cannot be taxed where a firm of owners reside if they are not kept in that town. *Eversole v. Cook*, 92 Ind. 223.

But under Ind. Rev. Stat. 1881, § 6293, providing that boats shall be listed where the owners or one of them resides, if a boat owned by a firm is listed where two of the firm reside it is not also subject to taxation in another place in the same county where another member resides. *Cook v. Port Fulton*, 106 Ind. 170.

And under Mass. Rev. Stat., chap. 7, § 13, and Stat. 1890, chap. 120, § 2, ships are to be taxed to the partners jointly where their business is carried on. *Peabody v. Essex County Comrs.* 10 Gray, 97.

A tax on a nonresident member of a firm may be levied in the state where such firm is doing business on his interest in the partnership to be collected from the property of the firm to which he belongs. *Duer v. Small*, 17 How. Pr. 201.

And a foreign firm having a resident partner and branch business in New York is liable to taxation in that place although the business there is tributary to the business abroad. *Re McMahon*, 66 How. Pr. 190.

But a resident partner in England, of a firm doing business in New York, is not liable for income tax of the firm in respect to profits made by buying and exporting goods from England. The profits which return to the resident partner in England as his share are taxable there. *Sulley v. Atty-Gen.* 5 Hurlst. & N. 711, 6 Jur. N. S. 1013, 8 Week. Rep. 472, reversing 4 Hurlst. & N. 769.

In *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254, it was held that a firm has the characteristics of legal identity for the purpose of taxation, but this was not involved in the case. See also subheads—"Set-off for debts;" "Joint-stock association."

Set-off for debts.

In an assessment against the individual member of a firm for his interest in the property of the firm, he is not entitled to deduct the firm debts due in the state, but may have his proportionate share deducted if he makes a proper showing. *State v. Parker*, 34 N. J. L. 71.

It seems, in the absence of statute, that in East Jersey each member of the firm is assessed for his

not to the individual members of the firm at their respective places of residence.

Latrobe v. Baltimore, 19 Md. 18; *Fourth Nat. Bank of N. Y. v. New Orleans & C. R. Co.* 78 U. S. 11 Wall. 628, 20 L. ed. 88; *Cass v. Beauregard*, 99 U. S. 124, 25 L. ed. 871; *State v. Parker*, 84 N. J. L. 78; *Fairbanks v. Kittredge*, 24 Vt. 14.

Goods and chattels are permanently located in Baltimore city when actually situated within its corporate limits, with no location elsewhere and not there temporarily, *in transitu* or on storage or deposit for temporary purposes.

The legislature had the power to say that the assessable value of the glass found in possession of appellees on the day of the assessment should be ascertained by the ascertain-

ment of the average value of that glass as stock in trade for the year the taxes were levied.

State v. Sterling, 20 Md. 502.

The words "permanently located" as used in article 8, section 51, of Constitution, cannot be held to mean a location lasting forever. No such meaning is ever given to these words. The definition of "permanent" by the weight of judicial decisions does not embrace the idea of absolute perpetuity, but rather when used in connection with location, of indefinite duration.

Texas & P. R. Co. v. Marshall, 186 U. S. 398, 34 L. ed. 385; *Mead v. Ballard*, 74 U. S. 7 Wall. 290, 19 L. ed. 190; *Brasett v. Johnson*, 2 N. J. Eq. 155; *Lord v. Goldberg*, 81 Cal. 596; *Perry v. Wheeler*, 12 Bush, 541; *Elderton v.*

interest in the firm, while in West Jersey the firm is assessed as a whole.

And where three of the firm were nonresidents, the property of the firm was properly assessed where situated although the resident member lived in another city, but no deduction will be made for debts if the interest of the resident partner is not disclosed. *Taylor v. Love*, 48 N. J. L. 142.

And where one member of a firm resides in the state and the other members are nonresidents the firm is not entitled to deduction for debts. *State v. McCheaney*, 86 N. J. L. 548.

Joint-stock association.

The property of a joint-stock association that is a partnership is taxable at its place of business without regard to residence of its shareholders. *Hoadley v. Middlesex County Comrs.* 105 Mass. 519; *Ricker v. American Loan & T. Co.* 140 Mass. 846.

A joint-stock company is not exonerated from a tax imposed on insurance companies, "incorporated or associated under the laws of another government," even if the company is a partnership." *Oliver v. Liverpool & L. L. & F. Ins. Co.* 100 Mass. 581.

And a joint-stock company that was a partnership was taxable as a corporation under N. Y. Laws 1881, chap. 861, providing that every association organized under any law in this state shall be liable to pay tax on its corporate franchises or business. *People v. Wemple*, 6 L. R. A. 308, 117 N. Y. 138.

But a joint-stock company that is a partnership is not taxable under 1 N. Y. Rev. Stat., pt. 1, chap. 12, title 4, § 1, providing that all moneyed or stock corporations shall be taxed on their capital in a certain manner. *People v. Coleman*, 16 L. R. A. 183, 138 N. Y. 279, affirming 87 N. Y. S. R. 120; *Hoey v. Coleman*, 46 Fed. Rep. 221; *Byers v. Coleman*, Id. 224.

And a statute imposing a tax on the shares of stock companies is invalid as applied to a partnership, under a constitutional provision that a tax must be imposed on some produce or goods, and a share is not a commodity. *Gleason v. McKay*, 184 Mass. 419; *Ricker v. American Loan & T. Co. supra*.

Name in which the assessment is made.

Firm property should be assessed against the firm in the partnership name, but slight discrepancy will not invalidate where no one has been misled. *Van Dyke v. Carleton*, 61 N. H. 574; *Hill v. Graham*, 73 Mich. 659; *Lyle v. Jacques*, 101 Ill. 644.

But in *Thibodaux v. Keller*, 20 La. Ann. 508, it was held that a purchaser of property sold for taxes belonging to Keller & Co. as the property of J. N. Keller for taxes of J. N. Keller, obtains no title. It seems that there an assessment is on a footing with a judgment. In *Van Dyke v. Carleton, supra*, the name of the firm was reversed. In *Hill v. Graham*, 22 L. R. A.

supra, a statute provided that an assessment in the wrong name would not invalidate. And in *Lyle v. Jacques, supra*, the name was one used by that firm doing business under several names but still the same firm.

Real estate handed in with other property belonging to the firm is properly assessed in the name of the firm. *Hubbard v. Winsor*, 15 Mich. 148.

Where timber land of a member of a nonresident firm is listed to such firm by its agent in the name of the firm, a levy against logs belonging to the firm for such tax was sustained. *Sage v. Burlingame*, 74 Mich. 120.

Dissolution.

If firm property is taxable, the subsequent dissolution of the firm will not affect the right to enforce the tax. *Blodgett v. Muskegon*, 60 Mich. 580; *Robinson v. Ward*, 18 Ohio St. 238.

And a tax assessed after dissolution and paid under protest, cannot be recovered back from the town if the affairs of the firm had not been wound up or there was firm property on hand. *Oliver v. Lynn*, 180 Mass. 148.

But in *Von Phul v. New Orleans*, 24 La. Ann. 261, it was held that a firm was improperly assessed after notice of dissolution had been duly published.

And a partner who paid taxes for the firm to prevent seizure after the firm had dissolved for taxes which were then due, may set off the same against his copartner when sued by him on a note given before seizure for such partner's interest. *Evans v. Bradford*, 35 Ind. 537.

But a partner renting his copartner's interest at dissolution cannot defeat the claim for rent by suffering a sale of an undivided one half for taxes due prior to the dissolution, as it was his duty to pay the whole notwithstanding the retiring partner said he would not allow such taxes if paid. *Chapin v. Streeter*, 124 U. S. 360, 31 L. ed. 475.

A purchaser of a partnership interest assuming the liabilities of the firm is bound to pay the taxes outstanding against the share of the retiring member. *Wheat v. Hamilton*, 53 Ind. 256.

But a partner is not liable for the firm tax after he had disposed of his interest in the firm, before the time for assessing. *Washburn v. Walworth*, 138 Mass. 499.

And in the absence of agreement one partner is not liable to the others for taxes paid by the firm on capital borrowed of such first-named member. *Conn v. Conn*, 23 Or. 452.

The interest in a firm in California, of a member residing in New York, is not such a debt at his death as to be assessable against his executors in New York as the surviving partners owe no debt to them until after liquidating the firm debts. *People v. Coleman*, 44 Hun, 20. L. T.

Emmens, 4 C. B. 479; *Newton v. Mahoning County Comrs.* 100 U. S. 562, 25 L. ed. 712; *Harris v. Shaw*, 18 Ill. 465.

"Permanently located" is opposed to a temporary location or *in transitu*; when applied to goods and chattels they must have no actual location elsewhere.

Davis v. Montgomery Furnace & Chemical Co. (Ala.) Dec. 10, 1890.

Goods and chattels, horses and cattle, and other movable property of a tangible or visible character, are liable to taxation in the jurisdiction of the state where the same are and are ordinarily kept, irrespective of the residence or domicile of the owner.

Com. v. American Dredging Co. 1 L. R. A. 287, 122 Pa. 386.

Property of a partnership is with propriety taxed where the business is carried on.

Cooley, Taxn. 374; *Mobile v. Baldwin*, 57 Ala. 68; *Iroin v. New Orleans, St. L. & O. R. Co.* 94 Ill. 111; *St. Louis v. Wiggins Ferry Co.* 78 U. S. 11 Wall. 423, 20 L. ed. 192.

The court of appeals of Maryland has given a meaning and interpretation to the Act of 1865, chapter 119, and has emphatically said that "actually situated" is equivalent to "permanently located."

Firemen's Ins. Co. v. Baltimore, 28 Md. 311.

Legal protection and taxation being reciprocal, it is but just and fair that the stock in question, which receives its sole protection from Baltimore city, should pay to that city its just proportion of taxes for this protection.

Com. v. American Dredging Co. and Mobile v. Baldwin, *supra*; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613.

Messrs. James P. Gorter and William S. Bryan, Jr., also for appellants.

Messrs. D. G. McIntosh and David Stewart, for appellees:

The case is not affected by the fact that the property is partnership property.

Lindley, Partn. 2d Am. ed. pp. 110, 111; *Rates*, Partn. § 175; *Cooley*, Taxn. 1st ed. p. 271.

The interest of each partner in the partnership is his personal property.

Bemis v. Boston, 14 Allen, 386; *Fairbanks v. Kittredge*, 24 Vt. 10.

Where the partners live in different taxing districts, the place of business does not fix the place of taxation for all the personality of the firm wherever situate.

Taylor v. Love, 48 N. J. L. 142; *State v. Parker*, 34 N. J. L. 71; *Lanier v. Macon*, 59 Ga. 187.

In Kansas, "corporations, companies, and firms" are by statute taxed as distinct persons. *Swallow v. Thomas*, 15 Kan. 66.

The power of the legislature which in most states can separate for the purposes of taxation the *status* of the personal property from the domicile of its owner (*Tappan v. Merchants Nat. Bank of Chicago*, 86 U. S. 19 Wall. 490, 22 L. ed. 189) is limited in Maryland by the constitution; and under this limitation even special statutes for the taxation of partnerships as individuals, such as exist in other states, would be invalid.

The stock in trade of a merchant is not "goods and chattels permanently located."

The statute does not speak of such personal
23 L. R. A.

property as may be permanently located, but singles out "goods and chattels" by which is meant visible, tangible, movable things.

Kirkland v. Brune, 31 Gratt. 181.

And in this case the visible, tangible, movable pieces of glass have no permanent location whatever.

If a ship kept by a merchant at his dock sails away to return again, it has in a sense a permanent home there. There is far more permanency of location in this than in a box of glass which is intended to be sold and sent away never to return. And yet a ship is not "goods and chattels permanently located."

Hooper v. Baltimore, 12 Md. 464.

So with cars and engines passing through union depot.

Philadelphia, W. & B. R. Co. v. Appeal Tax Court of Baltimore, 50 Md. 897.

A similar decision was rendered about Pullman cars.

Appeal Tax Court of Baltimore v. Pullman Palace Car Co. 50 Md. 452.

It is no argument to urge the equity of business men paying their taxes in their place of business.

Hooper v. Baltimore, *supra*.

Boyd, J., delivered the opinion of the court:

This case was tried in the Baltimore city court on an agreed statement of facts. The agreement shows that Charles J. Baker, Wm. Baker, Jr., and Charles E. Baker compose the firm of Baker Bros. & Co.; that Charles E. Baker is a resident of Baltimore city and the other two members of the firm are residents of Baltimore county; that Charles J. Baker has a four-tenths interest and the other two have each a three-tenths interest in the firm. It is admitted that the place of business of the firm is on Charles street in Baltimore city, at which place is kept the stocks of the partnership of an average value of \$80,000; that the firm, has been assessed by the appeal tax court of Baltimore city for \$80,000 on their stock and \$750 on their horses used in their business and taxes \$1,393.95 for state and city taxes for 1892.

The appellees declined to pay those taxes but were willing to pay on the horses, which they keep permanently in the city, and on the three-tenths interest of Charles E. Baker. The question raised by the agreed statement of facts and the prayers were whether taxes could be levied and collected from the whole stock of the firm or whether only the three-tenths interest of Charles E. Baker therein was liable.

The court below decided that the plaintiff was only entitled to recover the amount of taxes due for the horses, and for the interest of Charles E. Baker in the whole stock of the partnership. A judgment was entered accordingly for \$432.38, with interest and costs, and the plaintiff appealed to this court.

The appellees rely upon section 51 of article 3 of the Constitution of Maryland, which provides that "the personal property of residents of this state shall be subject to taxation in the county or city, where the resident bona fide resides for the greater part of the year for which the tax may or shall be

levied, and not elsewhere, except goods and chattels permanently located which shall be taxed in the city or county where they are so located." The principal question to be determined is the meaning of the term "permanently located" as used in section of the constitution it being contended by the appellees that the goods and chattels composing their stock in trade are not "permanently located" in the city of Baltimore. Article 16 of the Declaration of Rights asserts that "every person in the state or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property."

Taking this in connection with the provision of the constitution above quoted, it is clear that it was contemplated by the framers of the constitution that personal property such as that referred to in this case should be taxed somewhere. If a resident of Baltimore county has personal property (carriage and horses for example) which go in and out of the city without having any permanent abiding place in the city, he should pay taxes on the same in Baltimore county. The object of the constitutional provision was to insure as far as possible taxation once, and to prevent it more than once on the same property. As the *situs* of personal property is ordinarily the place of residence of the owner, the constitution provides that personal property should be taxed where the owner bona fide resides for the greater part of the year, but as that provision alone might work great hardships on the county or city where goods and chattels of the owner are permanently located, the exception was made. Goods and chattels permanently located at the residence of the owner are to be taxed there, so what might be called his "floating goods and chattels" are taxed at the place of his residence, because they have no actual *situs* of their own, and hence that of their owner is adopted, but such goods and chattels as compose the stock in trade of the appellees are not carried backwards and forwards between Baltimore county or some other county and the city of Baltimore. As long as they are the property of the appellees they are located in Baltimore city, and they are as "permanently located," there as such goods and chattels can be anywhere. They are not manufactured or purchased to be kept as long as they remain in existence.

The separate articles constituting the stock may continue the property of the appellees for a day, a week, a month, a year, or longer, but until they are sold they remain permanently in Baltimore, and are not moved from place to place. That is clearly what is meant by "permanently located"—not that the goods and chattels must remain until they are worn out or indefinitely. The agreed statement of facts shows that the average value of the stock carried by the appellees is \$80,000 and that they were assessed for that amount. In other words, the appellees keep constantly on hand at their place of business in Baltimore city \$80,000 worth of goods and chattels in the shape of glass, etc. It may be true that \$5,000 worth of glass may be sold and shipped away

to-day, and another lot of glass worth \$5,000 may be substituted for it to-day or to-morrow, but the stock of goods and chattels of the value of \$80,000 is kept on hand—is permanently located at their place of business. It is not necessary to itemize the stock in trade when it is assessed. The assessors examine the stock—the goods and chattels—and fix their value for taxation, just as they do the furniture or other tangible personal property at the respective residences of the appellees. If the contention of the appellees is to prevail, their merchandise cannot be taxed anywhere. No merchant expects to keep his stock permanently on hand in the sense that term is used by the learned counsel for the appellees. He expects to sell as soon as he can receive his price, and as he sells he replenishes his stock. The articles are changing from day to day, but the stock which represents the aggregate of the goods and chattels remains about the same. Yet, can it be claimed that a merchant who resides and carries on his business in Baltimore is not to be taxed for his stock in trade. A reasonable construction must be given the constitutional provision, and we must bear in mind the object in taxing goods and chattels permanently located in the city or county where they are so located.

If the position of the appellees is correct it is possible to have hundreds of thousands of dollars, probably millions, of tangible personal property, goods, and chattels, within the city of Baltimore, having the benefit of its police and fire protection from year to year and yet not contribute one dollar to the support of the police and fire departments. Merchants transacting business in Cumberland, Hagerstown, Frederick, Annapolis and other incorporated cities and towns in the counties could escape all municipal taxes on their stock in trade by living beyond the corporate limits of those cities and towns, whilst those living within such cities and towns must pay the municipal as well as the state and county taxes on their stock in trade. Such a construction of the law would encourage fraud. A resident of a remote county might carry a large stock in trade in Baltimore city or on the eastern shore without the knowledge of the authorities of the county where he resided.

We recognize fully the force of the argument of counsel for the appellees that property cannot be taxed simply because it may seem inequitable to permit it to escape taxation. But when we are called upon to construe statutes or the constitution on this subject it is our duty in seeking the true interpretation of language used to place a reasonable construction upon it, and to bear in mind the fact that our constitution aimed to require all persons to bear their just share of the burden of taxation.

This case differs wholly from those of *Hooper v. Baltimore*, 13 Md. 464, and *Philadelphia, W. & B. R. Co. v. Appeal Tax Court of Baltimore*, 50 Md. 397, cited by the appellees. Harper was a resident of Baltimore county and this court decided that his ship was not permanently located "within the state," and hence it could not be taxed by

Baltimore city. The statute then in force required property owned by residents of this state, and not permanently located elsewhere within the state, to be assessed to the owner in the county or city where he resided. The ship was registered in the custom house at Baltimore, but under the law of congress existing at that time, she could not be registered elsewhere whilst the owner resided in Baltimore county, as Baltimore city was the port of entry of the district which embraced Baltimore county, and hence the fact that she sailed from the port of Baltimore city to foreign ports did not permanently locate her there if, in the language of the court in that case, "a vessel built for and actually employed in the foreign trade can be said to be permanently located anywhere." The case in 50 Md. 397, *supra*, determined that the rolling stock of the company could not be assessed in Baltimore city, as it was not permanently located there within the meaning of the General Assessment Act of 1876, which had a provision very similar to that in the constitution. The court decided that Baltimore city was not the home office of the corporation. It said on page 416: "The engines and cars of the appellant have no abiding place or permanent location in this state, so as to become incorporated with the other permanent property of the state, and are only brought here transiently when employed in the operation of the road." The court uses as equivalent terms "abiding place and permanent location." In this case the goods and chattels have an "abiding place"

in Baltimore city; and are "incorporated with the other permanent property" of the city. They are not simply *in transitu* or temporarily located, and it is not a strained construction of the language of the constitution to determine, as we do, that the stock in trade of the appellees is "permanently located" in the city of Baltimore, and hence liable to taxation there.

We do not deem it necessary to determine whether this stock could be taxed in Baltimore city by reason of the fact that it is owned by a firm transacting business there. We are of the opinion, however, that it is perfectly proper to assess the property to the firm instead of to the individual members thereof according to their respective interests.

There are many reasons why this should be so. The interest of the partners may vary from time to time, and should it be necessary at any time to sell the property for taxes it might be very inconvenient and cause serious delay in the collection of taxes if the interests of partners must be determined as they would likely have to be before any one would purchase.

As partnership assets are liable for partnership debts before they are for the debts of the individual members of the firm it would be proper to levy the taxes against the firm. Assessing the firm instead of the individual members, will save much inconvenience to the authorities and do no injustice to any one. It follows from what we have said that the judgment below must be reversed.

Judgment reversed and new trial awarded.

MINNESOTA SUPREME COURT.

Re WILL OF Julia C. HOLT, Deceased.

Georgiana NEEDHAM *et al.*, *Respts.*,

v.

Lydia M. BORDEN *et al.*, *Appts.*

(.....Minn.....)

- *1. **Attesting witnesses to a will** must be such as are competent at the date of attestation, and, if then competent, their subsequent incompetency, from whatever cause, will not prevent the probate of the will.
2. **The rule of competency** in such cases, in this state, is that defined by the statute. Gen. Stat. 1878, chap. 73, §§ 6, 7.
3. **A married person is not to be deemed an incompetent attesting witness** at the time of the execution of a will, simply because the husband or wife of such person is a beneficiary under the will.
4. **And the question of incompetency in such case can only arise subsequently** on the probate of the will, upon his or her examination as a witness, and then only in the single contingency that such beneficiary becomes a con-

testant, and does not then consent to the examination of the witness.

5. **The statute makes void a legacy to an attesting witness.** But this provision does not, under the laws of this state, apply to the husband or wife of such witness. Neither has any present direct or certain interest in a legacy to the other.

(December 29, 1893.)

APPEAL by contestants from an order of the District Court for Dakota County, affirming an order of the Probate Court, which admitted to probate an alleged will of Julia C. Holt, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. Jay W. Crane, for appellants:

By the common law the husband of a legatee could not be a competent witness to a will.

Giddings v. Turgeon, 58 Vt. 106; *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356; *Holdfast v. Dowling*, 2 Strange, 1253; *Hatfield v. Thorp*, 5 Barn. & Ald. 589; 1 Jarman, Wills, pp. 71-73; 2 Redf. Wills, p. 4, note 3; 4 Kent, Com. p. 508; 1 Woerner, Administration, 75; *Fortune v. Buck*, 23 Conn. 1.

*Headnotes by VANDERBURGH, J.

NOTE.—The above case is interesting as expressing a decision that the competency of a person to attest a will is to be determined by his competency at that

time to testify under the general statutory provisions as to witnesses where the statute makes no other provision as to witnesses to wills.

Our probate code provides that a will shall be "attested and subscribed in his (testator's) presence by two or more competent witnesses."

Gen. Laws 1889, § 19, p. 98. The word "witness" is defined:—"A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination, or by deposition or affidavit."

Minn. Stat. 1878, chap. 73, title 1, § 6.

Therefore before a person is and can be a witness as provided by section 6, chapter 73, he must be sworn and his declaration under oath received for some purpose.

The person who attaches his name to a will, attesting the signature of the person executing the same, is certainly not a witness within the meaning of section 6 of title 1 of chapter 73.

As it is not used in the statutory sense of section 6, the word "witnesses" as found in section 21 of the Probate Code must mean witnesses at common law.

Therefore the word "witnesses," in section 21, must be construed in accordance with the rules at common law.

The witnesses must be competent at the time of the attestation.

Hawes v. Humphrey, 9 Pick. 350, 20 Am. Dec. 481; *Stewart v. Harriman*, 56 N. H. 25, 23 Am. Rep. 408; 4 Kent, Com. 510; 1 Redf. Wills, 253, and note 1; 1 Jarman, Wills, p. 70; *Hatfield v. Thorp and Holdfast v. Doucing*, *supra*.

The attesting witnesses are regarded in law as persons placed around the testator, in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity. They must therefore be competent witnesses at the time of the attestation; otherwise the will is not well executed.

2 Greenl. Ev. § 691, note 3.

It is contrary to the spirit of the law to place round the testator such an interested person as the husband of the legatee or devisee, to guard against fraud and judge of his capacity.

1 Woerner, Administration, 75; *Giddings v. Turgeon*, and *Sullivan v. Sullivan*, *supra*.

If this court should find that under the laws of Minnesota, E. Z. Needham is a competent witness to the will, it must modify the judgment of the district court and declare the will void as to Georgiana Needham.

Laws 1889, § 21, p. 98, Probate Code; *Winslow v. Kimball*, 25 Me. 498; *Jackson v. Woods*, 1 Johns. Cas. 168; *Jackson v. Durland*, 2 Johns. Cas. 314.

Messrs. Stringer & Seymour, for respondents:

All persons, except as hereinafter provided, having the power and faculty to perceive, and of making known their perceptions to others, may be witnesses.

Gen. Stat. 1878, chap. 73, § 7.

Husband and wife are now made witnesses for and against each other.

Wilson v. Wilson, 43 Minn. 398.

No question is raised here by contestants but that E. Z. Needham testified with the permission of his wife. Mrs. Needham was in court and failed to object to Mr. Needham's

so testifying, but her consent was given when she, through her attorney, called on him as a witness.

Wolford v. Farnham, 44 Minn. 159.

The mere fact that a husband is a legatee in a will does not disqualify the wife from being a competent witness to its execution.

Hawkins v. Hawkins, 54 Iowa, 443; *Butes v. Officer*, 70 Iowa, 343.

Maxwell v. Hill, 89 Tenn. 584, holds that a witness to a will, who becomes heir to the devisee upon the latter's death, intestate, after the death of the testatrix, is not "interested in the devise" within the meaning of the Code of Tennessee, section 3003, which provided that wills shall be subscribed by at least two witnesses, "neither of whom is interested in the devise."

Vanderburgh, J., delivered the opinion of the court:

The will in question here contains a legacy to Georgiana Needham, estimated by the testator at about \$400, and it was attested by two witnesses, one of which was E. Z. Needham, who is and was at the time of such attestation the husband of Georgiana. Mrs. Needham is the proponent of the will, and in the probate court objection was made by the contestants, appellants here, to the allowance and probate of the will on the ground that the husband of the proponent E. Z. Needham was not a competent witness to the will. The action of the probate court, allowing the will, having been affirmed by the district court, the case is brought here on appeal from the judgment of the last-named court.

1. The first question presented involves the competency of the attesting witness E. Z. Needham. Undoubtedly he must have been a competent witness at the time of the execution of the will. This is the established doctrine of the common-law authorities, from the case of *Holdfast v. Doucing*, 2 Strange, 1253, down to the present time (1 Redf. Wills, 253; 2 Greenl. Ev. par. 691; *Morrill v. Morrill*, 53 Vt. 78, 38 Am. Rep. 659); and it is clearly recognized in our statute (Probate Code, chap. 2, § 19), which requires that a will shall be attested and subscribed in the testator's presence by two or more competent witnesses. But, if competent at the time of the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proven. The appellants, however, contend that the attesting witnesses must be such as would be competent under the common-law rule, and that they are impliedly not included in the definition of "witness" (Gen. Stat. chap. 73, § 6), because their competency is to be determined as of the time of the attestation, and not as of the time when they may be called to testify on the probate of the will. But this construction cannot be upheld. The cases from Massachusetts are not in point, because there the statutes removing the objection to the competency of witnesses on the ground of interest and of the relation of husband and wife are expressly declared not to apply to

attesting witnesses to a will. *Sullivan v. Sullivan*, 106 Mass. 478, 8 Am. Rep. 356. The question of the competency of such witnesses in this state is determined by the statute. Gen. Stat. chap. 78, §§ 6, 7, 9, 10. An attesting witness is competent, if he be one who would at the same time be competent to testify in court to the facts which he attests; and so the courts hold. Thus in *Jenkins v. Daves*, 115 Mass. 601, an attesting witness is declared to be one who at the time of the attestation would be competent to testify; and in *Morrill v. Morrill*, 53 Vt. 78, 88 Am. Rep. 659, "competency to testify must exist at the time of the attestation. The attestation contemplated the subsequent testimony to the facts attested when the will should be proved. The incompetency of the husband or wife to testify where either was an interested party at the common law arose out of the unity of interest and of personal relations. This unity of interest may be removed, and yet, owing to the unity and confidential nature of their personal relations, the common-law rule in respect to competency remains, on grounds of public policy. *Lucas v. Brooks*, 85 U. S. 18 Wall. 453, 21 L. ed. 783; *Giddings v. Turgeon*, 58 Vt. 110. It is conceded that the unity of interest, so far as relates to property, has been done away with by statute (*Wilson v. Wilson*, 43 Minn. 400), and the general disqualification to testify on the ground of interest is removed by Gen. Stat., chap. 78, § 7; but it is denied that the statute has removed the general incompetency growing out of the marriage relation. But the only limitation upon the competency of either is found in section 10, which provides that neither party shall be examined without the consent of the other. They are not thereby made incompetent witnesses, nor are they to be classed as such, though their right to be examined is contingent upon the consent of that one for or against whom the witness may be offered. It does not follow that a married person is incompetent to attest a will because the husband or wife of such person is a beneficiary under the will. He can only become incompetent in a single contingency, and that is, in case such interested party shall become a contestant on the subsequent probate of the will. If the latter be not a contesting party, he is in no position to raise the objection, and he may not choose to do it if he is; and if he be one of the proponents, he thereby consents to the testimony of the attesting witnesses. The contingency which would make him incompetent may never arise, and

if it does, it must be deemed to arise subsequent to the act of attestation. In the case at bar, then, what evidence is there that the witness is incompetent? The wife is proponent, and offers to examine her husband as a witness. No question, therefore, in respect to his competency is raised. Incompetency in a witness is not presumed, and the question is to be determined when the offer to examine the witness is made, and then the facts are to be ascertained by the court. The witness is not shown to be incompetent in this case, and his evidence on the probate of the will was properly received. In *Tillotson v. Prichard*, 60 Vt. 107, it is held that the wife of the grantor in a Minnesota deed was a competent attesting witness thereto, under the provisions of the statute we have been considering, and the court says "that she was a competent witness, and might be examined with the consent of her husband," and also held, as we do, that the plaintiff, by offering the deed in evidence, consented to her being a witness.

2. The appellant also contends that if the husband be a competent witness, then the legacy to his wife should be held void under the statute which annuls beneficial devisees, etc., to a subscribing witness on account of the marital relation. But there is nothing in this point. The husband has no direct or certain interest in the legacy to his wife. It is absolutely hers in her own right, and free from his control. Gen. Stat. chap. 69; *Wilson v. Wilson*, *supra*. The only devisees or legacies which the statute annuls are those made to subscribing witnesses, which clearly does not apply to the husband or wife of the legatee. In England, where husband and wife are competent witnesses (Taylor, Ev. pp. 1145, 1147), the statute has gone further (1 Vict. chap. 26, § 15), and also avoids gifts, legacies, and devises to the husband or wife of an attesting witness. It could not be done without the statute. This legislation assumes both the competency of the witnesses and that they had no interest in the legacies which would have made the same void without the aid of legislation to that effect. The construction we have adopted is in conformity with the spirit of modern legislation on the general subject of the rights of husband and wife, and the practical results will no doubt be no more serious than in the case of parents or children, who may unquestionably attest deeds and wills for each other. 1 Alb. L. J. 246. It is a matter largely for the judgment of the legislature.

Judgment affirmed.

TEXAS SUPREME COURT.

QUEEN INSURANCE CO. *et al.*, *Plffs.* in
Err.,
v.

STATE OF Texas.

(.....Tex.....)

1. A combination of insurance compa-

NOTE.—In connection with the elaborate review of the anti-trust legislation in the above case, see *State v. Phipps* (Kan.) 18 L. R. A. 657, which held 22 L. R. A.

nies to establish uniform rates of insurance and of agents' commissions is not illegal under the Texas Anti-trust Law of March 30, 1899, prohibiting trusts for restrictions in trade or the production, price, or rates of transportation for commodities or articles of commerce, since a contract of insurance is not "trade" nor is it an "article of commerce" or a "commodity."

that a combination of insurance companies was within the prohibition of the statute.

- 2. The words "restrictions in trade" in an anti-trust law making such restrictions a felony** punishable by heavy penalties, by fine or imprisonment, cannot be construed to include all contracts which in any sense restrict trade, but are limited to combinations such as those between producers or dealers to limit production or supply of an article and thus acquire a monopoly of it and then unreasonably enhance prices, or those quasi public corporations which might be disabled by the combination from performing duty to the public.
- 3. It is not illegal at common law for insurance companies to make a combination to establish uniform rates of insurance and of commissions to agents.**

(December 14, 1902.)

ERROR to the Court of Civil Appeals for the Third Supreme Judicial District to review a judgment affirming a judgment of the District Court for Travis County in favor of the state in a proceeding to enjoin an alleged illegal combination between defendants to fix rates and agents' fees, and to prohibit defendants from doing any additional business in the state. *Reversed.*

The facts are stated in the opinion.

Meers, Leake, Henry, Miller & Reeves, for plaintiffs in error:

There is nothing in the statute that tends in the slightest degree to indicate that any strained or unnatural meaning is intended to be given to the words used.

The arrangement and collocation of the words plainly show that they are to be understood in their ordinary sense and signification. The only two words used in the statute, which it would appear from the allegations of the petition are relied upon to cover, or apply to, the business of fire insurance, are, "commerce" and "commodities." The business carried on by fire insurance companies is neither one nor the other.

Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *State v. Henke*, 19 Mo. 225; *Barnett v. Powell*, Litt. Sel. Cas. 409; *Fleckner v. Bank of United States*, 21 U. S. 8 Wheat. 388, 5 L. ed. 631. See Black, Law Dict. *Commodity*; *Engelking v. Von Wamel*, 26 Tex. 469.

The first clause of the act prohibiting combinations for the restriction of trade is wholly inoperative, because it does not specify what acts or conduct shall constitute "restrictions in trade."

Wolff v. State, 6 Tex. App. 195; *Johnson v. State*, 4 Tex. App. 63; *Rogers v. State*, 8 Tex. App. 400; *Alexander v. State*, 29 Tex. 495; *Wilson*, Criminal Forms, pp. 226, 227.

The words, "restraint of trade," are universally limited to such restrictions as harmfully affect the public interest.

Oregon Steam Nav. Co. v. Winsor, 87 U. S. 20 Wall. 68, 22 L. ed. 318. See Bishop, Cont. §§ 514, 516, 518, 523; *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741, and note; *Craft v. McCounoughy*, 79 Ill. 346, 22 Am. Rep. 171. See also *Palmer v. Stebbins*, 8 Pick. 188, 15 Am. Dec. 204; *Greenhood*, Pub. Pol. 648, 666, 667; *Ladd v. Southern Cotton Press & Mfg. Co.* 53 Tex. 172; *Cooley*, Torts, p. 278; *Tiedeman*, Pol. 22 L. R. A.

Powers, p. 226; *Koehler v. Feuerbacher*, 2 Mo App. 11.

The word "trade," as used in the first clause, as well as when considered in respect to the subsequent clauses, must be given its ordinary meaning.

The obvious and most usual sense in which the word "trade" is employed is to express traffic, exchange, and dealing.

Higginson v. Pomeroy, 11 Mass. 112; *May v. Rice*, 101 U. S. 237, 25 L. ed. 799.

The act is void under section 56, article 3, of the State Constitution, which provides that "the legislature shall not, except as otherwise provided in this constitution, pass any local or special law regulating labor, trade, mining or manufacturing."

Ex parte Westerfield, 55 Cal. 550.

The 18th section of the Act, which excepts from its provisions, "agricultural products or livestock while in the hands of the producer or raiser" renders it obnoxious not only to the express denunciation of our Bill of Rights and the 14th Amendment of the Constitution of the United States, but also to the fundamental principles—the very genius of free institutions—in which our whole system of government inheres.

Absolute equality of right in the same things is the only due course of law of the land.

See *James v. Reynolds*, 2 Tex. 251; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517, and note; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Hewitt v. State*, 25 Tex. 722; *Dillingham v. Putnam* (Tex.) June 24, 1890.

Many of the cases, both state and federal, base their doctrine, with unanswerable force, not upon express limitations found in the written constitution of the state, but upon the great, inherited rights of the American people upon which their written constitutions are founded, and which, alone, give assurance of the permanency of their freedom.

Citizens Sav. & Loan Assn. v. Topeka, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Levia v. Webb*, 8 Me. 320; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Simonds v. Simonds*, 103 Mass. 572, 4 Am. Rep. 576; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Bagge's App.* 43 Pa. 512, 32 Am. Dec. 589; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *State v. Goodwill*, 6 L. R. A. 621, 33 W. Va. 179; *State v. Fire Creek Coal & C. Co.* 6 L. R. A. 359, 33 W. Va. 188; *Godcharles v. Wigeman*, 113 Pa. 431; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *People v. Detroit* (Mich.) June 8, 1888; *Lassen County v. Cone*, 73 Cal. 387; *Grand Rapids Chair Co. v. Runnels*, 77 Mich. 104; *Janesville v. Carpenter*, 3 L. R. A. 808, 77 Wis. 298; *Gordon v. Winchester Bldg. Assn.* 12 Bush, 110, 23 Am. Rep. 713; *Raggio v. State*, 86 Tenn. 272; *Shreesport v. Leary*, 26 La. Ann. 671, 21 Am. Rep. 553.

The powers sought to be exercised by the state in the statute under consideration are clearly within the prohibition of the 14th Amendment.

Strauder v. West Virginia, 100 U. S. 803, 25 L. ed. 664; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623; *Virginia v. Rives*, 100 U. S. 313, 318, 25 L. ed. 669; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Barbier v. Connolly*,

118 U. S. 27, 28 L. ed. 923; *Yick Wo v. Hopkins*, 118 U. S. 356, 80 L. ed. 220. See also U. S. Const. 14th Amend.; *Dillingham v. Putnam*, *James v. Reynolds*, *Hewitt v. State*, *Bank of the State v. Cooper*, *Wally v. Kennedy*, *Citizens Sav. & Loan Assn. v. Topeka*, *Holden v. James*, *Lewis v. Webb*, *Simonds v. Simonds*, *Millett v. People*, *Baggs's App.* *Durkes v. Janesville*, *People v. Huribut*, *State v. Goodwill*, *State v. Fire Creek Coal & C. Co.*, *Godcharles v. Wigeman*, *Wilder v. Chicago & W. M. R. Co.*, *People v. Detroit*, *Grand Rapids Chair Co. v. Runnels*, *Janesville v. Carpenter*, *Gordon v. Winchester Bldg. Assn.*, *Raggio v. State*, *Shreeport v. Levy*, and *Ex parte Westerfield*, *supra*; *Park v. Detroit Free Press Co.* 1 L. R. A. 599, 72 Mich. 560; *Pearson v. Portland*, 69 Me. 278, 81 Am. Rep. 276; *South & North Ala. R. Co. v. Morris*, 65 Ala. 183; *Chicago, St. L. & N. O. R. Co. v. Moss*, 80 Miss. 641.

The court erred in holding that the petition set out a good cause of action at common law, and that the state, by its attorney-general, had the right to prosecute the same.

State v. Farmers Loan & T. Co. 81 Tex. 580; *United States v. San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 244, 6 Am. Rep. 237; *Georgetown v. Alexandria Canal Co.* 87 U. S. 12 Pet. 91, 9 L. ed. 1012; *Atty-Gen. v. Salem*, 103 Mass. 138; *State v. Schweickardt (Mo.)* 37 Am. & Eng. Corp. Cas. 550; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 412; *People v. Albany & S. R. Co.* 57 N. Y. 161.

The court erred in rendering judgment against the defendants, enjoining them from carrying out their agreement, not to pay the local agents more than 15 per cent commissions, and not to place their business in the hands of any agent who should demand and receive more than said amount of commission from any other company, because said agreement is not against the public interest, but, on the contrary, is in accord therewith, as its tendency would necessarily be towards the reduction of rates of insurance charged the public, through the lessening of the expenses of the business.

Dela v. Winfree, 80 Tex. 400; *Ladd v. Southern Cotton Press & Mfg. Co.* 53 Tex. 172; *Tiedeman*, Pol. Powers, p. 226; *Cooley*, Torts, p. 278; *Greenhood*, Pub. Pol. 648; *Koehler v. Feuerbacher*, 2 Mo. App. 11; *Mogul S. S. Co. v. McGregor* [1892] A. C. 26, affirmed in 84 Cent. L. J. 169.

The combination charged against defendants, and the acts alleged to have been committed in pursuance thereof, namely, the attempt to fix a uniform rate of commission to be paid to soliciting agents, do not create or tend to create, or carry out, restrictions in trade; because, instead of working a public injury—as all contracts respecting trade must do, in order to be an illegal restriction thereof—the necessary tendency and result of this reduction of expenses with respect to agents must be to promote the public interest by cheapening the cost of indemnity against loss by fire to the great body of the people of the state.

Ladd v. Southern Cotton Press & Mfg. Co. and *Dela v. Winfree*, *supra*; *Tiedeman*, Pol. Powers, 226; *Greenhood*, Pub. Pol. 648; *Koehler v. Feuerbacher*, *supra*; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 68, 22 L. ed. 22 L. R. A.

818; *Bishop*, Cont. §§ 514, 516, 518, 523; *Cooley*, Torts, p. 278; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119; *Pike v. Thomas*, 4 Bibb, 486, 7 Am. Dec. 741, and *note*.

Messrs. Charles A. Culberson, Atty-Gen., and Frank Andrews, Asst. Atty-Gen., for the State:

The petition set forth a good cause of action against the defendants and the attorney-general had the authority and it was his duty under the constitution and laws of this state to institute and maintain the action in behalf of the state and the court did not err in so holding.

Const. 1876, art. 4, § 22; Rev. Stat. art. 2806; *State v. Farmers Loan & T. Co.* 81 Tex. 580; *Gulf, C. & S. F. R. Co. v. State*, 1 L. R. A. 849, 2 Inters. Com. Rep. 835, 73 Tex. 404; *United States v. San Jacinto Tin Co.* 125 U. S. 273-279, 31 L. ed. 747, 748; *United States v. Union Pac. R. Co.* 98 U. S. 569, 25 L. ed. 143; *United States v. Throckmorton*, 98 U. S. 71, 25 L. ed. 97; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *People v. Stanford*, 2 L. R. A. 92, 77 Cal. 360; *People v. Miner*, 2 Lans. 398; *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Atty-Gen. v. Tudor Ice Co.* 104 Mass. 237, 6 Am. Rep. 227; *Atty-Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 412; *People v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Cook, Stock & Stockholders*, § 37; *Green's Brice*, *Ultra Vires*, 3d ed. pp. 708, 709.

The court did not err in rendering judgment against defendants enjoining them from carrying out their agreement to fix, regulate, and control the rates of commission to be paid to fire insurance agents for their labor in this state, and the evidence conclusively sustains the finding of the court that such combinations existed, and that the same created a monopoly and prevented free and unrestricted competition in the labor, occupation, and profession of fire insurance agents in the insurance business in the state of Texas.

Const. art. 1, §§ 3, 17, 26; *More v. Bennett*, 15 L. R. A. 361, 140 Ill. 69; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501; *Re v. Maubey*, 6 T. R. 619; *Hilton v. Eckerley*, 6 El. & Bl. 47.

Private corporations created by the legislature or under its authority may lose their franchises by misuser or non-user of them, and the same may be resumed by the government under a judicial judgment upon a quo warranto to ascertain and enforce a forfeiture. This is the common law of the land and is a tacit condition annexed to the creation of every such corporation; and the combination and monopoly alleged and proved in this case is such a misuser as would warrant the state in restraining the combination and resuming the franchises, such combination and monopoly being against the public policy of this state.

Const. art. 1, §§ 3, 17, 26; Act, March 30, 1889; *Gulf, C. & S. F. R. Co. v. State*, *supra*; *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, 83 Tex. 650; *Brenham v. Brenham Water Co.* 67 Tex. 542; 1 Bl. Com. p. 153; *Scranton Electric Light & H. Co.'s App.* 1 L. R. A. 285, 122 Pa. 154; *People v. Bristol & R. Turnp. Road*, 23 Wend. 236; *Slee v. Bloom*, 5 Johns. Ch. 366, 1 L. ed. 1111; *Ward v. Far-*

well, 97 Ill. 598; *People v. Dispensary & Hospital Soc. of Women's Inst. of New York*, 7 Lans. 806; *New York v. Twenty third Street R. Co.* 113 N. Y. 819; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 52, 3 L. ed. 653; 8 Kent, Com. p. 812; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084; *Com. v. Farmers & M. Bank*, 21 Pick. 542, 32 Am. Dec. 290; *Ang. & A. Priv. Corp.* § 774; *Waterman, Corp.* §§ 427, 1024; *Taylor, Priv. Corp.* §§ 287, 457, 459; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.* 131 U. S. 384, 28 L. ed. 161; *State v. Milwaukee, L. S. & W. R. Co.* 45 Wis. 590; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.* 4 Gill & J. 121; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 666, 24 L. ed. 1038; *Christ Church v. Philadelphia County*, 65 U. S. 24 How. 301, 16 L. ed. 604; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 527, 22 L. ed. 806; *West Wisconsin R. Co. v. Trempealeau County Suprs.* 93 U. S. 595, 23 L. ed. 814; *National Bank of Genesee v. Whitney*, 103 U. S. 102, 26 L. ed. 444; *People v. Palmer*, 109 N. Y. 110; *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 761, 28 L. ed. 588; *Aller v. Thacher*, 19 Pick. 51, 31 Am. Dec. 121; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 375; *State v. Goodwill*, 6 L. R. A. 621, 88 W. Va. 179; *Charles River Bridge Proprs. v. Warren Bridge Proprs.* 36 U. S. 11 Pet. 507, 9 L. ed. 808; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 395; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Colles v. Troy City Directory Co.* 11 Hun. 397; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 535, 18 Am. Rep. 754; *Central R. Co. v. Collins*, 40 Ga. 582; *Croft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 872; *People v. Kane*, 4 Denio, 532; *Stanton v. Allen*, 5 Denio, 434, 99 Am. Dec. 282; *Saratoga County Bank v. King*, 44 N. Y. 87; *Fisher v. Bush*, 35 Hun. 641; *People v. North River Sugar Ref. Co.* 2 L. R. A. 83, 22 Abb. N. C. 164; *King v. Journeymen Tailors of Cambridge*, 8 Mod. 11; *Am. Law Review for August, 1888, Trusts*, by D. M. Mickey, Esq.

The Act of March 30, 1889, to define trusts and provide for punishments and penalties of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas, includes within its terms and intendment every trust, combination and illegal conspiracy or other agreement in restraint of trade, and was intended to apply, and does apply, to every nature of trust, in whatsoever business, occupation, or profession the same may be formed.

Act of March 30, 1889, Gen. Laws, 21st Leg. p. 141; *Tex. Const.* art. 1, § 26; *Sutherland, Stat. Constr.* §§ 284, 240 *et seq.* 1 Kent, Com. 461; *Anderson, Law Dict.* title, *Commerce*; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 349; *Webber v. Virginia*, 103 U. S. 350, 26 L. ed. 567; *Walling v. Michigan*, 116 U. S. 454, 29 L. ed. 693; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 497, 30 L. ed. 697, 1 Inters. Com. Rep. 45; *Anderson, Law Dict.* title, *Commodity*; *Webster's International Dict.* ed. 1890; *Com. v. Lancaster Sav. Bank*, 123 Mass. 495; *Connecticut Mut. L. Ins. Co.* 22 L. R. A.

v. Com. 133 Mass. 163; *Gleason v. McKay*, 134 Mass. 424; *Portland Bank v. Apthorp*, 12 Mass. 252; *Provident Inst. for Savings v. Massachusetts*, 73 U. S. 6 Wall. 624, 18 L. ed. 911; *Western U. Tele. Co. v. Seny*, 132 U. S. 473, 33 L. ed. 409, and cases cited; *Anderson's Law Dict.* title, *Trade*; *The Nymph*, 1 Sumn. 516; *Paul v. Virginia*, 75 U. S. 8 Wall. 183, 19 L. ed. 361.

The Act of March 30, 1889, defining and prohibiting trusts is not rendered unconstitutional because of the exception in the thirteenth section thereof, because the said Act applies equally to all persons and classes of persons in the same conditions and circumstances; and that court should never declare unconstitutional and void any statute which has received sanction of the co-ordinate legislative and executive departments of the government, unless there is an irreconcilable conflict between such statute and the organic law of the state.

Const. 1876, art. 8, § 1, art. 7, § 7; *Const.* 1845, art. 8, § 27; *Const.* 1869, art. 12, § 19; *Gen. Laws 1887*, p. 132; *Gen. Laws 1881*, p. 113; *Penal Code*, art. 186; *Penal Code*, arts. 318, 319; *Bell v. State*, 28 Tex. App. 96; *Ex parte Bell*, 24 Tex. App. 428; *Goldsticker v. Ford*, 62 Tex. 385; *Ex parte Sundstrom*, 25 Tex. App. 133, and cases cited; *Dillingham v. Putnam (Tex.)* June 24, 1890; *Gulf, C. & S. F. R. Co. v. Ellis (Tex.)* 17 L. R. A. 286, 49 Am. & Eng. R. Cas. 509; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1036; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1052; *Wheeler v. Philadelphia*, 77 Pa. 338; *Thomason v. Ashworth*, 73 Cal. 486; *Knickerbocker v. People*, 102 Ill. 218; *Kilgore v. Magee*, 85 Pa. 401; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *McAulich v. Mississippi & M. R. Co.* 20 Iowa, 843; *People v. Judge of the Twelfth District*, 17 Cal. 548; *Roberts v. Boston*, 5 Cush. 198; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Granger Cases ("Munn v. Illinois")*, 94 U. S. 113, 24 L. ed. 77; *Phillips v. Missouri Pac. R. Co.* 96 Mo. 540; *Humes v. Missouri Pac. R. Co.* 82 Mo. 221, 59 Am. Rep. 389; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 468; *Missouri Pac. R. Co. v. Terry*, 115 U. S. 523, 29 L. ed. 467; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923; *Soon Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Sutherland, Stat. Constr.* § 120 *et seq.*, 127; *Groesch v. State*, 42 Ind. 547; *Heanley v. State*, 74 Ind. 99; *Elder v. State*, 96 Ind. 162; *Perry v. Keene*, 56 N. H. 530; *Davis v. State*, 3 Lea, 376; *License Tax Cases*, 72 U. S. 5 Wall. 469, 18 L. ed. 600; *People v. New York Cent. R. Co.* 34 Barb. 158; *Cooley, Const. Lim.* 6th ed. pp. 192, 198, 197, 201, 210, 213, and cases cited and reviewed; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *Kentucky Cent. R. Co. v. Com.* 18 Ky. L. Rep. 792; *Van Riper v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210.

On Petition for Rehearing.

The Act of March 30, 1889, applies to the combination charged in the petition and the construction of the court limiting the application of the Act was error.

What law could the legislature pass not obnoxious to the constitution that would include

this combination? It used in the act under discussion every comprehensive term applicable to trusts known to our language; and it is also noticeable that all the terms were used in the disjunctive, showing conclusively that the legislature intended that each term should be separately considered.

That only such as were injurious were intended to be affected is evidenced by the very terms used. It is well understood that a "trust" is a combination for private gain, and to the public injury.

United States v. Trans-Missouri Freight Assn., 58 Fed. Rep. 58; Kan. Laws 1889, chap. 257; Me. Laws 1889, chap. 266; Mo. Gen. Laws 1889, p. 96; Tenn. Laws 1889, chap. 250; N. C. Laws 1889, chap. 374.

In view of the public history which led to the various acts of legislation upon the subject of trusts, state and national, it seems to us that it does not admit of doubt that the legislature intended this act to apply to every trust which injured the public; and more especially is this true when applied to any business licensed by the state and affected with a public use. The business of insurance is charged with the public use in this state. The legislature had the power to charge it with a public use.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247.

The manifest purpose of the law being to prevent all combinations in restraint of trade to the public injury, and the language used for that purpose being sufficient to include this combination, the duty of the court is to effectuate the legislative intention.

1 Kent, Com. 461; Sutherland, Stat. Constr. § 240.

Upon examination of the question sent out and required to be answered by the great commercial agencies of Bradstreet's and Dun's it will be found that the questions of insurance are twice propounded. It will be noted that the question is not, Do you carry insurance? but, How much are you insured for? They assume that all mercantile concerns and interests are insured, and this assumption is based upon the intimate experience of the agencies with mercantile pursuits. It shows how intimately is this business connected with the trade of the world.

The Nymph, 1 Sumn. 516; *Connecticut Mut. L. Ins. Co. v. Com.*, 138 Mass. 163; *Welton v. Missouri*, 91 U. S. 280, 23 L. ed. 349; *Western U. Teleg. Co. v. Texas*, 105 U. S. 480, 26 L. ed. 1067; Anderson, Law Dict. title, *Commerce*; *Walling v. Michigan*, 116 U. S. 454, 29 L. ed. 694; Anderson, Law Dict. title, *Trade*.

There are two important reasons why *Paul v. Virginia*, 75 U. S. 8 Wall. 163, 19 L. ed. 357, should not be authority in this case. In the first place the decision was rested upon the broader ground of a local contract, and the utterances as to insurance not being commerce are dicta. On the other hand the case was decided in 1868, more than a quarter of a century ago, when insurance had a very limited use, and such uses as it now has were not only unknown but at that time unthought of.

That the law-maker is incapable of the subtle distinctions and nice shadings of a learned judge, ought not to defeat the purpose of the 22 L. R. A.

law, nor render ineffective the legislative intention.

Perry v. Keene, 56 N. H. 580; *License Tax Cases*, 72 U. S. 5 Wall. 469, 18 L. ed. 500; Cooley, Const. Lim. 6th ed. pp. 197, 200, 201.

That the words "restrictions in trade" if given their ordinary and technical meaning, would make punishable all contracts in restraint of trade, however reasonable they may be, does not justify the restricted meaning given the words by the court; for if the legislature passes such an act, as it has the unquestioned authority to do, the only duty of the court is to enforce the law as it finds it, giving the words used their "ordinary meaning" or "signification."

Cooley, Const. Lim. 6th ed. chap. 7, sub. 4, p. 197; *Western U. Teleg. Co. v. State*, 55 Tex. 314, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311; *Western U. Teleg. Co. v. Seay*, 132 U. S. 472, 33 L. ed. 409; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

The uncontroverted evidence in the case shows that the combination controlled more than 80 per cent of all the fire insurance business in Texas.

This combination controls, and compels through fear of entire loss of business, a vast army of men to labor for it at greatly reduced compensation. The business is commerce itself; the labor of the agents is commerce itself; and the business of insurance as applied to both is trade itself, and the restrictions of the court upon the meaning of these terms will but prove a license to still greater evils and the exacting of still greater tribute.

United States v. Trans-Missouri Freight Assn., 58 Fed. Rep. 58, is authority for the conclusion that only such restraints in trade as are unreasonable and to the public injury are within the meaning of an act of congress.

If it be correct, the necessity for restricting the meaning of the words to avoid the evils pointed out by the court that might possibly arise has been dissipated and the proper construction of the act would be as here contended for; that is, the combination charged is within the statute if the restraint is unreasonable.

The business of insurance in this state being charged with a public use, the state, through its attorney-general, independent of statute, may restrain those engaged in the business from carrying out a combination to the injury of the public, and prevent them from acquiring a virtual monopoly of the business.

Gulf, C. & S. F. R. Co. v. State, 1 L. R. A. 894, 2 Inters. Com. Rep. 385, 72 Tex. 404.

To transact insurance business a public franchise is required, and the consent of the state, through its proper officers, must first be obtained before the business can be pursued. These are just, reasonable, and constitutional regulations.

State v. Stone (Mo.) Dec. 4, 1893; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

The court is of opinion that the combination is not illegal, for the reason that insurance is not a "prime necessity."

In *Richardson v. Buhl*, 6 L. R. A. 457, 77 Mich. 632, friction matches were held to be prime necessities because of their daily use.

In *India Bagging Assn. v. Kock*, 14 La. Ann. 164, it was held that India bagging was an article of "prime necessity" to cotton planters.

In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159, coal is held to be a "necessity."

In *People v. North River Sugar Ref. Co.*, 5 L. R. A. 886, 54 Hun. 854, sugar was held to be a necessity.

In *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 887, lumber is considered to be a necessity.

Any article of general use and benefit to the public, which affords to the public convenience, comfort, enjoyment, and profit, ought to be considered "a prime necessity." Insurance affords all these in this latter day of business progress, and has become an important factor in every business of the country and in the use and enjoyment of property and possessions and belongings.

The combination being hurtful to the public, and the business being charged with a public use and being free from unlicensed competition, and the injury being one which individuals cannot redress for manifest reasons, it becomes the duty of the attorney-general to take such action in the name of the state as will prevent and restrain the injury to the public.

Const. art. 4, § 22; *State v. Farmers Loan & T. Co.* 81 Tex. 530; *Gulf, C. & S. F. R. Co. v. State*, 1 L. R. A. 849, 2 Inters. Com. Rep. 335, 72 Tex. 404; *United States v. San Jacinto Tin Co.* 125 U. S. 274, 81 L. ed. 748; *People v. Utica Ins. Co.* 15 Johns. 353, 8 Am. Dec. 243.

The legislature has never attempted to say what rates insurance companies may collect as a tax from the public. We conclude, therefore, that the law only "allows" them to collect a reasonable tax or rate of insurance.

State v. Farmers Loan & T. Co. supra.

Section 4 of the Act requires the attorney-general to enjoin combinations and trusts in the name of the state. It is a declaration of public policy and must be so regarded. Being a valid law, its command to the attorney-general should not be disregarded; and being a declaration of public policy, must have weight with the court in connection with the authorities, if they need any further support, in holding that the injunction will be granted as prayed for.

Green's Brice, Ultra Vires, §§ 706, 712; *Beach, Railways*, § 534; *Atty-Gen. v. Cambridge*, 16 Gray, 247; *Atty-Gen. v. Boston Wharf Co.* 12 Gray, 557; *Greenhood*, Pub. Pol. pp. 634, 635.

Gaines, J., delivered the opinion of the court:

This action was brought in the name of the state of Texas, by its attorney-general, against the Texas Insurance Club, an association of insurance agents, and against fifty-seven foreign insurance corporations doing business in this state under permits granted in pursuance of the statutes of the state. It is alleged in the petition that the Texas Insurance Club was created with the consent

and by the procurement of the other defendants, with the object of organizing a combination for the purpose of fixing a uniform rate of insurance throughout the state upon a graduated scale, and of thereby preventing competition among each other, and at the same time of establishing a fixed rate of commission to be paid to the agents of such companies. It is claimed in the petition that the acts charged against the defendants show an illegal combination, as defined and denounced in the Act of March 30, 1889, entitled "An Act to Define Trusts and to Provide for Penalties and Punishment of Corporations, Persons, Firms and Associations of Persons Connected with Them, and to Promote Free Competition in the State of Texas." Laws 1889, p. 141. It is also claimed in the petition that the combination, purposes, and acts of the defendants are in restraint of trade and contrary to public policy, and therefore illegal at common law. The prayer was that the Texas Insurance Club be dissolved, and that the permits of the other defendants be canceled, or that the defendants be enjoined from carrying out the objects of the combination as alleged in the petition. The trial court held that the Act of March 30, 1889, did not apply to a combination to fix rates of insurance or the commissions of the agents of insurance companies, and also that the act was unconstitutional and void, by reason of the 13th section, which excepted from its operation "agricultural products and livestock while in the hands of the producer or raiser;" and sustained a demurrer to so much of the petition as charged a violation of that statute. However, the demurrer to that part of the petition which charged a combination alleged to be illegal at common law was overruled; and after hearing the evidence the court held that the effective allegations of the bill were sustained by the proof, and entered a decree enjoining the defendants from making or carrying out any agreements between them establishing fixed rates of insurance, or fixing the percentage of commissions to be paid to their agents. The defendants appealed, and the attorney-general filed cross-assignments of error. The court of civil appeals affirmed the judgment of the district court in every particular, but held that the Statute of March 21, 1889, was invalid, because it nowhere in terms declared that "trusts" such as are defined in the first section are illegal. Assuming that the whole case is before us upon the pleadings and facts as determined by the court of civil appeals, we will proceed to dispose of the questions involved in it, so far as may be necessary for its disposition.

The Act of March 30, 1889, reads as follows: "Act to Define Trusts and to Provide for Punishments and Penalties of Corporations, Persons, Firms and Associations of Persons Connected with Them, and to Promote Free Competition in the State of Texas. Section 1. Be it enacted by the legislature of the state of Texas: That a trust is a combination of capital, skill or acts by two or more persons, firms, corporations, or associations of persons, or of either two or more of them for either, any, or all of the following

purposes: First—To create or carry out restrictions in trade. Second—To limit or reduce the production or increase or reduce the price of merchandise or commodities. Third—To prevent competition in manufacture, making, transportation, sale, or purchase of merchandise, produce, or commodities. Fourth—to fix at any standard or figure, whereby its price to the public shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, use, or consumption in this state. Fifth—To make or enter into, or execute or carry out any contract, obligation, or agreement of any kind or description by which they shall bind or have bound themselves not to sell, dispose of, or transport any article or commodity or article of trade, use, merchandise, commerce, or consumption below a common standard, or by which they shall agree in any manner to keep the price of such articles, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of any article or commodity or transportation between them or themselves and others to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or by which they shall agree to pool, combine, or unite any interest they may have in connection with the sale or transportation of any such article or commodity, that its price might in any manner be affected. . . . Sec. 4. Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business in this state, and it shall be the duty of the attorney-general to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the state of Texas. . . . Sec. 6. Any violation of either or all the provisions of this act shall be and is hereby declared a conspiracy against trade, and any person who may be and may become engaged in any such conspiracy, or take part therein, or aid or advise in its commission, or who shall as principal, manager, director, agent, servant, or employé, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates or orders thereunder, or in pursuance thereof, shall be punished by fine not less than fifty nor more than five thousand dollars and by imprisonment in the penitentiary, not less than one nor more than ten years, or by either such fine or imprisonment. Every day during a violation of this provision shall constitute a separate offense. Sec. 7. In any indictment for an offense named in this act it is sufficient to state the purposes or effects of the trust or combination, and that the accused was a member of, acted with, or in pursuance of it, without giving the name or description, or how, when or where it was created. Sec. 8. In prosecutions under this act it shall be sufficient to prove, that a trust or combination as defined herein exists, and that the defendant belonged to it, or acted for or in connection with it, without proving all belonging to it or proving or producing any article of agree-

ment or written instrument on which it may have been based, or that it was evidenced by any written instrument at all. The character of the trust alleged may be proved by its general reputation. . . . Sec. 10. Each and every person, firm, corporation, or association of persons who shall in any manner violate any of the provisions of this act, shall for each and every day that such violation shall be committed or continued, forfeit and pay the sum of fifty dollars, which may be recovered in the name of the state of Texas, in any county where the offense is committed, or where either of the offenders reside, or in Travis county, and it shall be the duty of the attorney-general, or the district or county attorney to prosecute for and recover the same. Sec. 11. That any contract or agreement in violation of the provisions of this act shall be absolutely void and not enforceable either in law or equity. Sec. 12. That the provisions hereof shall be held cumulative of each other and of all other laws in any way affecting them now in force in this state. Sec. 13. The provisions of this act shall not apply to agricultural products or livestock, while in the hands of the producer or raiser. . . . The omitted sections throw no light upon the questions under consideration.

Admitting, for the present, that the language of the statute sufficiently manifests the intention of the legislature to make such combinations as are defined therein unlawful, and to make punishable acts committed in violation of its provisions, and that it is not in conflict with the constitution by reason of the fact that it exempts "agricultural products and livestock while in the hands of the producer or raiser" from its operation, we still have the question whether the combination charged in the petition is embraced within the provisions of the law. We are of opinion that that question must be answered in the negative. To determine that it is so embraced, we must hold either that it is a restriction in trade, within the meaning of the first subdivision of section 1, and that these words sufficiently define an offense so as to make it punishable under our laws, or that the contract of insurance is a commodity such as is named in the other subdivisions. A combination between two or more insurance companies to increase their rates or to diminish the rates to be paid to their agents is, in a general sense, a combination in restraint of trade. But we think that the words "restrictions in trade" were not intended to receive that construction in the statute under consideration. If so intended, it may be gravely doubted whether, under our laws, they sufficiently designate an offense so as to make it punishable. Our Penal Code contains the following general provisions: "Art. 3. In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws written or unwritten may be appealed to, it is declared that no person shall be punished for any act or omission unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this state." "Art. 6. Whenever it appears that a provision of the penal law is

so indefinitely framed, or of such doubtful construction that it cannot be understood, either from the language in which it is expressed or from some other written law of the state, such penal law shall be regarded as wholly inoperative." "Art. 9. This code and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects; and no person shall be punished for an offense not made penal by the plain import of the words of the law." It must be conceded that except as to laws which result in a contract, or which create a vested right, it is not in the power of one legislature to control the action of another. Any statute laying down a canon of construction may, as a general rule, be repealed, either expressly or impliedly, by a subsequent statute; and where, under a rule of construction declared in a former law, a statute cannot take effect, which would be operative but for the former act, the argument is certainly cogent that it was the intention of the legislature in the last enactment to repeal the rule of construction laid down in the former. But it may be argued with equal force that a provision of the Penal Code affixing a punishment to an act named or otherwise designated, but not accurately and expressly defined, should be enforced, notwithstanding the rules of construction laid down in its general provisions. It may be plausibly maintained that the intention was that all the provisions should stand together, and that the special provision should be deemed an exception, and that the general rule should yield to it. Yet, under article 3 of the Penal Code as it existed before the Revised Statutes took effect, which "declared that no person should be punished for any act or omission as a penal offense, unless the same is expressly defined," it was held that a special provision of that Code, which sought to make punishable an act without defining it, was inoperative. *Johnson v. State*, 4 Tex. App. 63; *Wolff v. State*, 6 Tex. App. 195; *Rogers v. State*, 8 Tex. App. 401. See also *State v. Foster*, 31 Tex. 578. That provision was repealed by the Revised Statutes, which adopted in its stead the amended article 3, hereinbefore quoted. But in *French v. State*, 14 Tex. App. 76, article 398, as amended by the Act of March 27, 1879 (Laws 1879, p. 67), was held inoperative by reason of the rule of construction laid down in article 3, *supra*. In like manner, in *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516, the rule of construction announced in article 9 was recognized as applicable to a municipal ordinance. That article was primarily intended to abrogate the rule of the common law that penal statutes should be construed strictly; but it expressly declares another rule, which is in accord with the common law, and which is founded upon the soundest reason. There is a maxim that ignorance of the law excuses no one, which is not true as applied to every case, for a man is not guilty of theft who honestly takes property under an honest claim

of right, though he be mistaken as to the law. But it is true in the sense that no one can allege his ignorance of the law which makes a certain act penal, in justification of his commission of that act. If he be held bound to know the law, he should have the means of knowing it, and hence he should not be punishable for the infringement of a statute unless it designate with a fair degree of clearness and precision the act or omission which is forbidden by it. The offense need not be "defined," in the logical legal sense of that word, for general terms may be used, which in themselves require to be defined; but the terms employed should be sufficiently definite in their meaning as plainly to designate the very act which is sought to be made punishable by law.

Applying these rules of construction, we are of opinion that the acts charged against the defendants do not subject them to the forfeitures and penalties therein provided for, under that part of the statute which seeks to make unlawful combinations "to create or carry out restrictions in trade." These words are very comprehensive in any aspect, and, if their meaning is limited, it becomes difficult to define the sense in which they were employed by the legislature. In ordinary language, the word "trade" is employed in three different senses: First, in that of the business of buying and selling; second, in that of an occupation, generally; and, third, in that of a mechanical employment, in contradistinction to agriculture and the liberal arts. Ordinarily, when we speak of "trade," we mean commerce, or something of that nature; when we speak of "a trade," we mean an occupation, in the more general or the limited sense. In law, the words "restraint of trade" are fairly well defined; and the question presents itself whether, in the use of the words "restrictions in trade," the legislature meant to use the word "trade" in the last sense, or as the mere equivalent of "commerce" or "traffic." Some contracts in restraint of trade are held to be contrary to public policy, and unlawful in the sense that they will not be enforced by the courts. Others are lawful and enforceable. To be unlawful, they must be unreasonable. As to restraints which are reasonable, the authorities are not in accord, though the evident tendency of modern decisions is to uphold such contracts in doubtful cases. The rule as to contracts in unreasonable restraint of trade has been applied without question to very varied employments,—to professional men, such as attorneys at law and physicians, as well as to merchants, shopkeepers, carriers, and those engaged in mechanical pursuits of every character. The rule is founded both upon the ground that the public has an interest in the employment, and upon the further ground that it is contrary to public policy; that any person should wholly deprive himself of his right to pursue an occupation in which he is presumably skilled. See *Mitchell v. Reynolds*, 1 Smith, Lead. Cas. 8th Am. ed. *417, and English and American notes. But while a party may bind himself for an adequate consideration not to pursue his avocation within the limits of a prescribed local-

ity, provided the limits be reasonable, he cannot bind himself not to follow his trade in any place whatever. Now, an agreement between two or more persons, by which one of them undertakes to bind himself not to follow his trade or practice his profession in a territory of prescribed limits, is "a combination," within the meaning of the statute under consideration. A contract between two or more to do a thing is a "combination of . . . acts" of such persons to bring about the performance of the contract. It is upon this theory, in part, that the charge made in the petition is based. Now, the clause of the act which we are endeavoring to construe makes no distinction between such restraints of trade as are reasonable and such as are unreasonable. Hence, if we should give to the words, "restrictions in trade" their ordinary technical meaning it would follow that the act made punishable all contracts in restraint of trade, however reasonable they may be. It would follow that if one merchant engaged in the hardware business should buy out another, such other agreeing not to pursue the same business on the same block or street, or in the same town, for a limited time, both would be subject to the penalties affixed by the act. It is probable that the legislature has the power to make such a law; but it is unreasonable to presume that they intended to make it, and no construction ought to be given to an act which would lead to such results, unless its language is so clear and unambiguous as to admit of no other conclusion. It is true that article 9 of the Penal Code, already quoted, requires us to construe the act "according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects;" but when the words employed have different meanings, one being more limited than another, it does not require that we should construe them in the more comprehensive sense. The principle is inherent in the construction of all laws of doubtful import, that the intention of the legislature must be sought for, and, when discovered, must govern. In discovering that intention it is proper to look to the consequences of any particular interpretation, and, if they be found unreasonable or oppressive, such interpretation ought to be rejected. The penalty affixed by the act in question for a violation of its provisions is a fine of not less than \$50, nor more than \$5,000, and imprisonment in the penitentiary not less than one, nor more than ten years, or by either such fine or imprisonment. Each day of the continuance of the combination is made a separate offense. The offense may be punished by confinement in the penitentiary, and is therefore a felony. We do not think that it was the purpose of the legislature to give to the word "trade" so comprehensive a meaning as would subject all parties to "contracts in restraint of trade" (as these terms are understood at common law) to such heavy penalties; and conclude that the word must be construed in a more restricted sense, and as synonymous with "traffic." In this sense it embraces the buying and selling of

any article of commerce, the barter of such articles, and their transportation by common carriers; but it does not embrace the business of insurance, which is trade only in the sense that it is an occupation or employment.

If, therefore, the acts charged in the petition are punishable under the statute, they must be denounced by some other provision. Is the contract of insurance an "article of commerce" or a "commodity," within the meaning of those terms as used in the remaining four subdivisions of the statute? In *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357, the Supreme Court of the United States held that the business of insurance, as carried on in one state by a company chartered by another, was not commerce between the states; and the same doctrine is affirmed by the supreme court of Kansas. *State v. Phipps*, 50 Kan. 609, 18 L. R. A. 657. We have no reason to doubt the correctness of the conclusion. It is only by a strained construction that the word "commerce" can be made to embrace the business of insurance, and to say that insurance is an article of commerce is a construction still more strained. It is an aid to commerce, but not commerce itself; nor is it an article of commerce. In *Nathan v. Louisiana*, 49 U. S. 8 How. 78, 12 L. ed. 993, the court says that a dealer in foreign exchange "is not engaged in commerce, but in supplying an instrument of commerce. He is less engaged in it than the ship builder, without whose labor foreign commerce could not go on." The word "commodity" has two significations. In its most comprehensive sense it means "convenience, accommodation, profit, benefit, advantage, interest, commodiousness;" but, according to Webster's International Dictionary, the use of the word in this sense is obsolete. Page 286. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale; and we think that this was the meaning intended to be given to it by the legislature in the statute in question. This clearly appears by the context. The language descriptive of the second category of offenses—"to limit or reduce the production or increase or reduce the price of merchandise or commodities"—implies that a commodity is something that may be produced; so, by that description, of the third class, a commodity is something that may be manufactured, made, transported, and sold; in the fourth, it implies something that may be sold, used, or consumed; and so, also, the fifth and last class, it relates to a commodity that is the subject of sale and transportation. Insurance is neither "produced," "consumed," "manufactured," "transported," nor "sold," in the ordinary signification of any of these words, and therefore it is not within "the plain import" of the language employed in the act.

But there is another point of view from which the statute in question should be considered. Its title is, "An Act to Define Trusts, and to Provide for Penalties and Punishment of Corporations, Persons, Firms, and Associations of Persons Connected with Them, and to Promote Free Competition in

the State of Texas." The term "trusts" is not here employed in a technical legal sense. By very recent commercial usage, the meaning of the word has been extended so as to comprehend combinations of corporations or capitalists for the purpose of controlling the price of articles of prime necessity, or the charges of transportation for the public. The formation of gigantic combinations for these purposes in late years has created alarm and excited the liveliest interest in the public mind. The amount of discussion which it has invoked, considering the time during which it has progressed, is probably without parallel. See 2 Beach, Priv. Corp. 856, and notes. In the year 1888 the discussion seems to have become general, and in 1889 many legislatures, including our own, made laws for the purpose of punishing and repressing such conspiracies. *Id.* 1851, note 2. Notable instances of these combinations were those of the manufacturing corporations engaged in refining sugar, which were declared illegal by the court of appeals of New York in the cases of *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 39; "*The Cotton-Seed Oil Trust*" (*State v. American Cotton Oil Trust*, 40 La. Ann. 8); "*The Diamond Match Trust*" (*Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457); "*The Chicago Gas Trust*" (*People v. Chicago Gas Trust Co.* 180 Ill. 268, 8 L. R. A. 497); "*The Standard Oil Trust*" (*Rice v. Rockefeller*, 56 Hun. 516); "*The Cattle Trust*" (*Gould v. Head*, 83 Fed. Rep. 886); and "*The Alcohol Trust*" (*State v. Nebraska Distilling Co.* 29 Neb. 700). For other cases of like character, see *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178, 8 Am. Rep. 159; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 887; *Clancey v. Onondaga Fine Salt Mfg. Co.* 62 Barb. 395; *Craft v. McConoughy*, 79 Ill. 348, 23 Am. Rep. 171; *India Bagging Assn. v. Kock*, 14 La. Ann. 164; *Gibbs v. Consolidated Gas Co.* 180 U. S. 396, 32 L. ed. 979; *Texas Standard Cotton Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598; and *Anderson v. Jett*, 89 Ky. 875, 6 L. R. A. 390.

The instances of combinations shown by the cases cited serve to illustrate the causes of popular discontent, and the evils which the legislatures of several states sought to remedy by direct statutory enactments upon the subject. They were combinations organized for the purpose of affecting the prices of articles of prime importance in commerce, or the rates of transportation and intercommunication. The evils resulting from these practices were doubtless paramount in the minds of our legislators when they passed the statute under consideration, and it was to repress these practices that the law was enacted. By "the plain import of its language" it makes unlawful all combinations to raise or depress the price of all articles of commerce whatever, or to increase or diminish the rates of transportation of such articles. It seems to us, therefore, that the words in the first subdivision of section 1 of the Act—"to create or carry out restrictions in trade"—were intended only as a general expression of the purpose of the law, and that the acts

defined in the subsequent members of the section were intended as a specific definition of what was meant in the first. *National Benefit Co. v. Union Hospital Co.*, 45 Minn. 272, 11 L. R. A. 437, was a case involving the question of a partial restraint of trade, and in their opinion the court says: "There are two classes of cases, some of which appellants have cited, which are often confounded with, but are clearly distinguishable from, cases like the present, and stand upon an entirely different footing. The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it, and then unreasonably enhance prices. The other is where a corporation of a quasi public character, charged with a public duty, as a railway company, gas company, or the like, enters into a contract restrictive of its business, which would disable it from performing its duty to the public." We think it was to combinations of the character described in these remarks that our statute was intended to apply, and not to combinations of persons engaged in any employment which may be restrictive of that business. But it is a rule of construction that each word and sentence should be presumed to be intended for a purpose, and that each should be given effect; and it may be argued that our construction destroys the effect of the words in the first clause, and that under such construction they might have been omitted without changing the meaning of the section. But the argument defeats itself. If the words "restrictions in trade" are not to be limited in their meaning, then all the subsequent parts of the section were unnecessary, and might have been omitted without altering the sense. Every act therein defined is clearly a "restriction in trade," in the most comprehensive meaning of those terms. The same argument may be made in reference to the words "article" and "commodity," and it may be said they should be construed to have a different meaning. But, if the word "commodity" was employed in its broadest meaning, it embraced "article," and the latter might have been omitted. The fact is, the section of the act under consideration abounds in tautology; and its general structure is such that rules based upon grammatical niceties should not prevail over broader and more liberal rules of construction. Our conclusion is that the case stated in the petition does not come within the provisions of the statute; but we are not prepared to concur with the court of civil appeals in holding that the whole act is inoperative. It is true that, while trusts are defined in the first section, nowhere, either in that or any other section, are they expressly declared unlawful. The following sections provide forfeitures for corporations and punishment for persons who "violate any of the provisions of the act," but they do not designate what shall constitute a violation of its provisions in any direct terms. Confining ourselves to the letter of the law, there is a clear hiatus,—a lack of connection in its provisions. But the legislature evidently intended to affix a punishment to some acts, and it is reasonable to presume that the

acts they have defined were those intended to be forbidden. This intention is made more evident by the sixth section, which declares that a violation of the provisions of the act is "a conspiracy against trade," etc.; also by the seventh, which provides that it shall be sufficient, in an indictment under the act, "to state the purposes and effect of the trust or combination and that the accused was a member of and acted with or in pursuance of it, without giving its name or description, or how, when, or where it was created." The eighth section also provides that it shall be sufficient to prove upon the trial that "the trust or combination as defined herein exists and that the defendant belonged to it or acted for or in connection with it, without proving all the members belonging to it," etc. There is no express declaration that trusts are unlawful,—the acts which are declared to constitute a trust are not expressly made punishable, nor is any act expressly declared to be a violation of the provisions of the statute; yet the language is sufficient, we think, to manifest unmistakably the intention of the legislature to punish as offenses some of the acts defined in the first section, and it is but reasonable to conclude that the purpose was to subject them all to a like punishment. The intention of the legislature is the aim of statutory construction, and where, though not expressed, it is clearly manifested by implication from the language used, we cannot say that it should not have effect. That which is not expressed in words may be "plainly imported" by implication. We have deemed it proper to say this much upon this question, although its determination, in our opinion, is not necessary to a decision of this case. The other question, as to the validity of the statute, involves a construction of the constitution, and we do not feel called upon to determine it. The decision of a grave constitutional question, although involved in a case, is properly pretermitted until a controversy arises in which such decision becomes necessary to its disposition.

Having determined that the acts charged against the defendants are not embraced within the provisions of the statute, it becomes necessary to decide whether or not they are unlawful at common law. We have found no direct decision in any court of last resort upon the point. The decisions upon cases involving similar questions are not altogether harmonious. We have seen that contracts in unreasonable "restraint of trade" are illegal in the sense that they are not enforceable. Of these, there is a well-defined class,—those in which the parties seek to bind themselves by an agreement that one of them shall cease to pursue his vocation. The terms are usually employed by the courts in this sense. It is clear that the combination in question is not of this class. But, employing the terms in a looser sense, it is frequently said that agreements to raise or depress prices between persons engaged in the same business is a combination in restraint of trade. That such contracts, as applied to certain kinds of business, are unlawful, in the sense that they are not valid, there is no doubt; but whether the rule extends to every class of business is

a different question. It extends to a business in which the public have a right, as distinguished from a business which may be merely beneficial to the public. Such is the carrying trade, and especially the business of transportation by railroad and communication by telegraph. Railroad and telegraph companies derive their right to condemn property from the fact that their business is established for a public use. So, the business of gas companies, who have acquired a right to lay their pipes in the public streets, in analogy to that of railroad companies, is treated as public. *People v. Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497. Thus far we may clearly see our way; but when we come to a business not public in its character, in the sense previously indicated, difficulties arise. We take it as being well settled that all the combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy, and contracts to effect or carry out such combinations are held void. *India Bagging Assn. v. Kock*, 8 La. Ann. 164; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 178, 8 Am. Rep. 159. Combinations of this character are commonly called "monopolies," but they are not the technical monopolies known to the common law. 4 Bl. Com. chap. 12, § 9. The doctrine that they are illegal probably had its origin in the laws against forestalling, regrating, and engrossing,—offenses which, at a very early day in England, were made punishable by statutes which have since been repealed. They were probably offenses at common law, though their precise nature, as defined in that system, seems to be obscure. 1 Bishop, Crim. L. 8th ed. § 525. According to Blackstone, "forestalling" was defined by the statute "to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; or of any practices to make the market dearer to the fair trader;" and "regrating" "to be the buying of corn or other dead victual in any market and selling it again in the same market or within four miles of the place." "Engrossing" is "the buying up large quantities of corn or other dead victual with intent to sell them again." As we have said, these statutes have been repealed in England. They were applicable to a condition of society which no longer exists. But it is to be presumed that the common-law principle which underlies them is the origin of the modern doctrine on the subject. We find that most of the cases in which agreements among manufacturers and dealers to increase the price of their wares and commodities related to some merchantable article of necessity or of great utility. In the case of *India Bagging Assn. v. Kock*, *supra*, it is said in the opinion that bagging is an article "of prime necessity" to cotton planters. In the elaborate opinion delivered in the trial court in the *Sugar Refining Case*, Judge Barrett lays stress upon the fact that sugar is "a necessary article of commerce." *People v.*

North River Sugar Ref. Co., 22 Abb. N. C. 164, 2 L. R. A. 33. So, also, in the opinion in the same case in the supreme court. 54 Hun, 354, 5 L. R. A. 386. In the opinion in the same case in the court of appeals the question was not discussed, it not being deemed necessary to a decision of the case. 121 N. Y. 582, 9 L. R. A. 33. In *Richardson v. Buhl*, 77 Mich. 682, 6 L. R. A. 457, the court also says: "The article" in controversy "has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country." Similar expressions may be found in other cases. On the other hand, in *Central Shade Roller Co. v. Cushman*, 143 Mass. 353, an agreement between three manufacturers of shade rollers to control the manufacture and sale of their products was held not unlawful, distinctly upon the ground that their wares were not articles of "prime necessity." The doctrine was adhered to and reaffirmed by the same court in the subsequent case of *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 12 L. R. A. 563. In the latter case the court says: "Their contract had no relation to an article of prime necessity, or to staple commodities ordinarily bought and sold in market." In most of the cases in which agreements between persons doing a business not of a public character have been held contrary to public policy and void, the contracts related not only to articles of commerce, but to staple commodities.

Insurance is a mere contract of indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restriction will be found in any charter. Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground. Combinations among workmen to increase or maintain their wages by unlawful means are unlawful. But are such

combinations unlawful when the only means resorted to to accomplish their objects is a refusal on part of the parties to the agreement to accept employment at a lower rate of wages than that designated in the contract? This is the next question for determination, and it is not without difficulty. In treating of criminal conspiracies, Mr. Bishop says: "Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or specifically to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work, mutual inquiring and imparting information as to the wages paid in other localities, or anything else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhibition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law,—the result of which is that a conspiracy to enhance or reduce wages is not indictable *per se*, while yet it may be so by reason of proposed unlawful means." 2 Bishop, Crim. L. § 283, subd. 2. The author then proceeds to consider certain means which have been determined to be unlawful, in which a mere agreement by men not already under contract not to work unless for a certain rate of wages does not seem to be included. But the matter seems to be involved in some obscurity. In a previous section the author cites the remarks of distinguished English judges, including Lord Mansfield, to the effect that such agreements are unlawful in themselves, but adds: "In a later case, *Earle, J.*, perhaps with a view to conforming to the Statute of 6 Geo. IV., chap. 129, § 4, yet distinctly qualifying the words of Lord Mansfield, stated it as settled that workmen are at liberty, while they are perfectly free from engagements, and have the option of entering into employment or not, to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'" Mr. Freeman, in his note to the case of *People v. Fisher*, says: "Recent decisions in England, and the spirit now prevailing there and in this country, of giving encouragement to workmen in their endeavors to associate themselves into organizations for their mutual benefit, have settled beyond question that unemployed workmen may unite, and agree not to work unless for a certain price. This is a plain right, upon which no doubt ought ever to have existed." 28 Am. Dec. 508. The learned annotator then quotes: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they may choose to agree to demand;" citing *Reg. v. Rowlands*, 5 Cox, C. C. 436, 460. In *Com. v. Hunt*, 4 Met. 111. 33 Am. Dec. 246, it was held by the supreme court of Massachusetts that an association among journeymen bootmakers, in which they bound themselves

not to work for any person who employed one not a member of the association, was not indictable at common law. Following that decision, that court also held, in *Bowen v. Matheson*, 14 Allen, 499, that an agreement among certain defendants by which they sought to compel the plaintiff, a shipping master, among other things, to ship men from them at an established rate of wages, was not illegal, and did not give a ground of action, although the plaintiff's business had been damaged by the conspiracy. So, also, in *Carew v. Rutherford*, 106 Mass. 10, 8 Am. Rep. 237, they say that "it is no crime for any number of workmen to associate themselves, and agree not to work for or deal with certain men or certain classes of men, or work under certain wages or without certain conditions." We take it, therefore, that the weight of authority is against the proposition that such a combination among workmen was indictable at common law. It does not follow, however, that any agreement of that character is not against public policy, and therefore void; but it is proper to show that it was not an indictable offense at common law, for, if so, any contract in pursuance of such an agreement would have been illegal, in the sense that it would not be enforceable in the courts.

Upon the question whether an agreement among workmen to raise their wages is contrary to public policy, as being in restraint of trade, there is some conflict in the authorities. In *Collins v. Locke*, 4 App. Cas. 674, the judicial committee of the privy council held that a contract between stevedores in a certain port, by which they agreed to parcel out the stevedoring business, was not void, as a contract in restraint of trade, at common law. The court says: "The objects which this agreement has in view are to parcel out the stevedoring business of the port among the parties to it, and to prevent competition at least among themselves, and also, it may be, to keep up the price to be paid for the work. Their lordships are not prepared to say that an agreement having these objects is invalid if carried into effect by proper means,—that is, by provisions reasonably necessary for the purpose,—though the effect of them might be to create a partial restraint upon the power of the parties to exercise their trade." In *Master Stevedores' Assn. v. Walsh* 2 Daly, 1, which was a civil action, it was held that it was not unlawful for workmen to agree that they would not work below certain rates, and that a by-law of an association which provided a pecuniary penalty for the violation by way of a fine could be recovered. The decision was not by a court of last resort, but the opinion is able, learned, and exhaustive, and, as it seems to us, convincing. See also *Sayre v. Louisville Union Benev. Assn.* 1 Duv. 143, 85 Am. Dec. 618. In *Ladd v. Southern Cotton Press & Mfg. Co.*, 58 Tex. 172, it was also decided, in effect, that a combination among the compressing companies in the city of Galveston, by which they increased the prices for compressing cotton, was not unlawful. This proposition is based distinctly upon the ground that compressing cotton is not a public business. On 22 L. R. A.

the other hand, it is held by the supreme court of Illinois, in *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, that an association of stenographers, one of the objects of which was to control prices to be charged for work by its members, is an illegal combination, and that its rules would not be enforced so as to sustain an action of one member against another. The cases cited all relate to combinations between carriers or dealers in, or producers of, staple articles of commerce, as the opinion itself shows. The court also quotes from Tiedeman on Commercial Paper (section 190), as follows: "All combinations of capitalists or of workmen for the purpose of influencing trade in their especial favor by raising or reducing prices are so far illegal that agreements to combine cannot be enforced." The cases cited by this author do not sustain the proposition. *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159, was a combination to affect the price of coal. *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, was an association composed of the proprietors of canal boats to regulate the rate of transportation. In the other cases cited—*Brisbane v. Adams*, 3 N. Y. 129; *Noyes v. Day*, 14 Vt. 384; *Doolin v. Ward*, 6 Johns. 194; and *Thompson v. Davies*, 13 Johns. 112—it is simply held that agreements to prevent competition in bidding at auction sales are contrary to public policy, and therefore void. Combinations of that character tend to affect the price of the thing to be sold, and directly to defraud the owner. In his work on Sales, the same author lays down the same proposition, and attempts to sustain it by the same authorities. Tiedeman, Sales, § 303. Notwithstanding our great respect for the court which made the decision, we cannot concur in the doctrine announced in the case of *More v. Bennett*. It is opposed to the well-considered cases on the same point which we have previously cited, and which as we think, lay down the correct rule. Now, the business of stevedores is essential to maritime commerce, and that of compressing cotton is an important aid to traffic in that staple. In that particular, neither are secondary to the business of insurance. The public has an interest in the one, just as it has in the others: and, if it be law that those engaged in lading ships and in compressing cotton may combine to regulate their charges, we see no good reason why insurance companies may not combine for a similar purpose. The same may be said of lawyers, physicians, dentists, and others pursuing like occupations, in which many persons may have an interest in the services to be performed. But there is a stronger reason for holding illegal combinations to enhance prices among those engaged in occupations which are licensed, and are protected from unlicensed competition, than among those of whom no such license is required. In *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159, Judge Agnew, who delivered the opinion, puts the case very strongly against a combination among coal companies to control the market, and yet says: "To fix a standard of prices among men in the same employment, as a fee bill, is not in itself criminal, but may become so when the

parties resort to coercive restraint or penalties upon the employe or employers, or, what is worse, to force of arms." For these reasons, we conclude that the combination in this case is not illegal at common law.

But, if it should be determined that the combination charged in the petition is so far illegal as to make any contract growing out of it void at common law, we are not prepared to say that it would either subject the corporations engaged in it to a forfeiture of their franchises, or to be enjoined at the suit of the state. The application of either rule would result in grave consequences. A corporation which exceeds its powers in an important particular commits a breach of an implied condition of its contract, and may be properly held subject to the penalty of a forfeiture. But the sanction of a rule of law which holds a contract not made punishable merely void as against public policy is ordinarily simply to refuse the parties any remedy for its enforcement, and it may be doubted whether the courts would interfere to enjoin their performance. The courts may command parties to a legal contract in restraint of trade to refrain from violating its provisions, but can they enjoin a party to a contract merely void to refrain from its performance? The rule is to leave the parties as they have left themselves. If the contract be executory, a court will not enforce it in favor of one claiming under it; if executed, it will not rescind it at the suit of a party claiming against it. The public policy which creates the rule in these cases, it seems to us, has gone no further in providing a sanction for its enforcement than to refuse a remedy in the courts to either party to the agreement. The *North River Sugar Refining Case* was tried, and appealed to the supreme court *in banc*, and thence an appeal was again taken to the court of appeals. It was stubbornly contested and argued with distinguished ability on both sides at every stage of its progress. In the opinion of the trial judge, stress is laid upon the fact that the tendency of the combination was to create a monopoly in restraint of trade. 22 Abb. N. C. 164, 2 L. R. A. 33. In the supreme court this is made a principal ground upon which the opinion of the court is based. The opinion recognizes that it was a con-

spiracy in restraint of trade under the statute of New York, and an indictable offense. 54 Hun, 354, 5 L. R. A. 386. But it is notable that the court of appeals expressly waives any consideration of that question, and holds that the defendant corporation had subjected its charter to forfeiture, by reason of its having exceeded its powers in forming with other corporations a trust in the nature of a partnership. It may be that to restrain a party from performing a contract merely void at common law, as being contrary to public policy, would be to violate the rule which leaves all the parties to suffer the consequence of their improvident engagements of such a character, and gives relief to none; but this would not apply if the interest of a third person was to be affected. The question is not without difficulty, and, since its determination is not necessary to this case, we do not decide it. It may be that a thorough examination of the authorities would show that it is settled.

We would not be understood as holding that the combination declared in this case is not detrimental to the public, and that sound policy does not demand the suppression of that and all like organizations of a similar magnitude. There are certain contracts, and perhaps combinations, which the law regards as being against public policy. The courts cannot extend the rule merely by reason of their opinion as to what the law ought to be. What other combinations or contracts should be held illegal on the ground of public policy is a political question,—that is to say, one which it is the province of the legislative department of the government to determine. The legislature has power to weigh the public interest even "in golden scales," and, if such combinations be found detrimental, they can denounce the evil, and provide the remedy.

It follows that we are of opinion that this action cannot be maintained, and therefore *the judgments both of the Court of Civil Appeals and of the District Court are reversed*, and judgment is here rendered for the defendants in the latter court, the plaintiffs in error in this court.

Rehearing denied.

NEBRASKA SUPREME COURT.

Albert WELTON

v.

Thomas J. DICKSON *et al.*, County Commissioners, and Aaron C. LODER *et al.*, *App'ts.*

(.....Neb.....)

*1. The constitutional provision, "The property of no person shall be taken

*Headnotes by RAGAN, C.

or damaged for public use without just compensation," prohibits, by implication, the taking of private property for any private use whatever, without the consent of the owner.

2. Such constitutional provision forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury.

NOTE.—The above case does not deny that a so-called private road may be condemned at the expense of the petitioner if it is in fact to be open for the public use and therefore does not weaken the conclusion expressed in the note to *Latah County* 22 L. R. A.

v. Peterson (Idaho) 16 L. R. A. 31, but it will be seen that in the present case the private road constituted a mere easement which was essentially private.

- 3. The want of power in a legislature to transfer to one man the property of another** without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature.
- 4. When the public exigencies demand the exercise of the power of taking private property** for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment.
- 5. But what is such a public use as will justify the exercise of the power of eminent domain** is a question for the courts to decide. But if the public use be declared by the legislature the courts will hold the use public, unless it manifestly appears from the provisions of the act that they can have no tendency to advance and promote such public use.
- 6. Sections 47-52, chap. 78, Comp. Stat. 1893, authorize the taking of private property** for private use,—the roads therein mentioned being essentially private, and beyond the public control,—and said sections are therefore unconstitutional and void.
- 7. The absence of a plain and adequate remedy at law** affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.

(January 4, 1894.)

A PPEAL by defendants Loder and Marshall from a decree of the District Court for Lancaster County in favor of complainants in a proceeding brought to restrain the attempted establishment of a private road over complainant's land. *Affirmed.*

The facts sufficiently appear in the commissioner's opinion.

Messrs. N. Z. Snell and Beeson & Root, for appellants:

The county commissioners had exclusive jurisdiction to hear and determine the questions as to the opening of this road, and the plaintiff had the right to appear before them and object to the establishment of the road and to a full hearing as to the necessity or right to have the road laid out and established, and it will be presumed that they would decide it correctly, but if Mr. Welton was dissatisfied with their decision he could take the case to the district court by appeal or on error; and the district court had no power or authority to take the whole matter out of the hands of the commissioners in this summary manner and assume jurisdiction to try and determine the whole case.

State v. Clary, 25 Neb. 403; *State v. Palmer*, 18 Neb. 644.

There being an adequate remedy at law chancery will not interfere.

Maxwell, Pl. & Pr. 543, 718; *Brown v. Otoe County Comrs.* 6 Neb. 111; *Clark v. Dayton*, Id. 198; *Ellis v. Karl*, 7 Neb. 381; *Poyer v.* 22 L. R. A.

Des Plaines, 123 Ill. 111; *Wallack v. Society for Reformation of Juvenile Delinquents*, 67 N. Y. 23; 1 High, Inj. 2d ed. §§ 29, 88 *et seq.*; 2 High, Inj. 2d ed. §§ 1242-1244, 1257, 1258; *West v. New York*, 10 Paige, 539, 4 L. ed. 1081. The better reasoning holds private road laws valid.

Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; *Perrine v. Farr*, 22 N. J. L. 856; *Allen v. Stevens*, 29 N. J. L. 509; *Hickman's Case*, 4 Harr. (Del.) 580; *Harvey v. Thomas*, 10 Watts, 65, 86 Am. Dec. 141; *Pocopson Road*, 16 Pa. 15; *Kilbuck Private Road*, 77 Pa. 39; *Waddell's App.* 84 Pa. 90; *Metcalf v. Bingham*, 8 N. H. 461; *Proctor v. Andover*, 42 N. H. 851; *Clark v. Boston, C. & M. Railroad*, 24 N. H. 118; *Breuer v. Bowman*, 9 Ga. 37; *Robinson v. Swope*, 12 Bush, 21; *McCauley v. Dunlap*, 4 B. Mon. 57; *Denham v. Bristol County Comrs.* 103 Mass. 202; *Jones v. Andover*, 6 Pick. 59; *Com. v. Hubbard*, 24 Pick. 98; *Ferris v. Bramble*, 5 Ohio St. 109; *Shaver v. Starrett*, 4 Ohio St. 494.

The correct conclusion was reached by Judge Beck in *Bankhead v. Brown*, 25 Iowa, 540. See also *Turner v. Althaus*, 6 Neb. 54; *State v. Lancaster County Comrs.* Id. 485; *Pleuler v. State*, 11 Neb. 547; *Re Creighton*, 13 Neb. 282; *McClay v. Lincoln*, 32 Neb. 412.

Messrs. Pound & Burr, for appellee:

No remedy is adequate that does not stop the threatened danger and prevent the unlawful and lawless invasion and appropriation of plaintiff's homestead.

Commissioners acting under color of law and proceeding without any legal authority to permanently appropriate the land of a private citizen may be enjoined from proceeding with such appropriation.

2 High, Inj. §§ 1308, 1809, 1818; *Beatty v. Beebe*, 28 Neb. 210; *Follmer v. Nuckolls County Comrs.* 6 Neb. 204; *McArthur v. Kelly*, 5 Ohio, 189; *Anderson v. Hamilton County Comrs.* 12 Ohio St. 635; *Mohawk & H. R. Co. v. Archer*, 6 Paige, 88, 3 L. ed. 907; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Witham v. Osborn*, 4 Or. 818, 18 Am. Rep. 287; *Green v. Green*, 84 Ill. 820; *Green v. Oakes*, 17 Ill. 249; *Lumden v. Milwaukee*, 8 Wis. 485; *Waddell's App.* 84 Pa. 90; *Coster v. Tide Water Co.* 18 N. J. Eq. 55.

When county commissioners or other public officers are proceeding in excess of their powers, or in the absence of power or jurisdiction, and their acts are likely to result in irreparable injury to property owners, an injunction is the appropriate relief.

Armstrong v. St. Louis, 8 Mo. App. 151; *Covington v. Nelson*, 35 Ind. 532; *Conrad v. Smith*, 32 Mich. 429; *Carter v. Chicago*, 57 Ill. 283; *Dinwiddie v. Rushville*, 87 Ind. 66; *Baltimore v. Gill*, 81 Md. 375; *Lumden v. Milwaukee*, and *Follmer v. Nuckolls County Comrs. supra*; *Vanderlip v. Grand Rapids*, 3 L. R. A. 247, 73 Mich. 522; *Benton County Comrs. v. Templeton*, 51 Ind. 266.

When there is some legal remedy, but it is clearly inadequate to give the relief to which the plaintiff is entitled, he may have an injunction.

Watson v. Sutherland, 72 U. S. 5 Wall. 74, 18 L. ed. 580; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 781; *Keene v. Bristol*, 26 Pa. 46.

The tendency of modern thought is to extend the remedy by injunction.

8 Pom. Eq. § 1899; *Bishop v. Moorman, supra*; *Omaha & N. W. R. Co. v. Menk*, 4 Neb. 21; *Roy v. Atchison & N. R. Co.* Id. 439; *Bankhead v. Brown*, 25 Iowa, 540.

Such statutes have uniformly been held unconstitutional in states having a constitutional provision like the one in our constitution or one of similar import.

Sedgw. Stat. & Const. Law, 2d ed. 447-450; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Bloodgood v. Mohawk & H. R. R. Co.* 18 Wend. 9, 31 Am. Dec. 313; *Reeves v. Wood County Treasurer*, 8 Ohio St. 346; *McQuillen v. Hutton*, 42 Ohio St. 204; *Jenal v. Green Island Draining Co.* 12 Neb. 166; *Forney v. Fremont, E. & M. V. R. Co.* 23 Neb. 468; *Osborn v. Hart*, 24 Wis. 90, 1 Am. Rep. 161; *Cooley*, Const. Lim. 2d ed. 580; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 49; *Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Coster v. Tide Water Co.* 18 N. J. Eq. 55; *Consolidated Channel Co. v. Central Pac. R. Co.* 51 Cal. 269; *Cooley*, Const. Lim. 2d ed. 582; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 73, 8 L. ed. 63, 22 Am. Dec. 679.

Statutes authorizing private roads or right of way to be laid out across the lands of unwilling parties by the exercise of the right of eminent domain are held, in states having a constitutional provision like the one in our constitution, unconstitutional and void.

Bankhead v. Brown, 25 Iowa, 540; *Nesbitt v. Trumbo*, 39 Ill. 110, 39 Am. Dec. 290; *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 39; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Dickey v. Tenneson*, 27 Mo. 373; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Clack v. White*, 2 Swan, 540; *Varner v. Martin*, 21 W. Va. 534; *Roberts v. Williams*, 15 Ark. 43; *Witham v. Osborn*, 4 Or. 318, 18 Am. Rep. 287; *Sadler v. Langham*, 84 Ala. 311; *Orear v. Crossly*, 40 Ill. 175; *Stewart v. Hartman*, 46 Ind. 381; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379; *Ross v. Davis*, 97 Ind. 79; *Elliott, Roads & Streets*, 146; *Cooley*, Const. Lim. 580; *Lewis*, Em. Dom. § 167.

As to what is a public use is a question of law to be decided by the courts.

McQuillen v. Hutton, *Tyler v. Beacher*, and *Re Eureka Basin Warehouse & Mfg. Co. supra*; *Savannah v. Hancock*, 91 Mo. 54; *Coster v. Tide Water Co. supra*.

A private road cannot be laid out in part along or over a public road.

Boyer's Road, 37 Pa. 257.

When an easement has once been acquired mere non-user will not defeat the right to it.

Curran v. Louisville, 38 Ky. 632.

Ragan, O., filed the following opinion: Chapter 78, Comp. Stat. 1893, provides: "Sec. 47. When the lands of any person shall be surrounded or enclosed, or be shut out and cut off from a public highway by the lands of another person or persons, who refuse to allow such person a private road to pass to or from his or her said land, it shall be the duty of the county board on petition of any

person whose land is so surrounded or shut out, to appoint three disinterested freeholders of the precinct or township, in counties under township organization, in which the land lies, as commissioners to view and mark out a road from the land of the petitioner to the nearest public highway, and assess the damages the person will sustain through whose land the road will pass. Sec. 48. The person desiring to secure the right of way shall give the person or persons through whose lands the road will run, at least two days' notice of such intended application, by leaving or causing to be left a written notice at his usual place of abode; and satisfactory evidence that such notice has been given shall be presented to the board before commissioners shall be appointed. Sec. 49. The commissioners shall, before entering upon the discharge of their duties, take and subscribe an oath before some judge or justice of the peace, that they are not interested nor of kin to either of the parties interested in the proposed road, and that they will faithfully and impartially view and mark out said road to the greatest ease and convenience of the parties, and as little as may be to the injury of either, and assess the damages which will be sustained by the party through whose land it will run. Sec. 50. Said commissioners shall make out a report of their proceedings, stating particularly the course and distance of said road, and the amount of damages assessed, which report, together with a certificate of the oath, shall be returned to the county commissioners and filed by the county clerk. Sec. 51. If the report be approved by the county board, and the petitioner shall produce satisfactory evidence that he has paid the damages assessed (or tendered payment, if the party refuse to receive it), and all costs attending the proceedings, the county board shall grant an order to said petitioner to open a road not exceeding fifteen feet in width; and if any person or persons obstruct said road, such person or persons shall be liable to all the penalties for obstructing a public road; provided, however, if such road shall pass through any enclosure, and it shall be required by the owner thereof, the person applying for such road shall put up and keep at each entrance into such enclosure a good and substantial swinging gate; provided further, that either party may appeal from the decision of the county board in like manner as prescribed in case of public roads. Sec. 52. Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever." The board of county commissioners of Lancaster county, on the petition of Owen Marshall and Aaron C. Loder, appointed three commissioners, who viewed and marked out a private road through the land of one Albert Welton, and made report of their proceedings to said board of county commissioners. Thereupon, Welton brought this suit to the district court of Lancaster county to enjoin Marshall and Loder and the board of county commissioners from laying out and establishing on his

land the private road petitioned for. The suit is based on the grounds that the statute quoted above is unconstitutional, and that the threatened action of the defendants, if permitted, will work an irreparable injury to Welton, for which he has no adequate remedy at law. The appellants demurred to the petition on the ground that it did not state a cause of action. The court overruled the demurrer, and entered a decree perpetually enjoining the board of county commissioners from establishing such private road on the lands of Welton. The case comes here on appeal. The principal question in the case is the constitutionality of the sections of the statute recited above.

If B's land shall be shut off from public highways by the land of A., and he shall refuse to allow B. a private road across his (A's) land, then this statute against A's consent, takes a part of his land, and transfers it to B., to be used as a private road by him, his heirs and assigns, forever.

Section 21, article 1, of the Constitution of the state, provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." The uniform holding of the courts is that such a constitutional provision as this is an implied prohibition on the power of the legislature to take the private property of A. without his consent, even when compensation is made, and transfer it to B., for his private use. The supreme court of the state of New Jersey, in *Coster v. Tide Water Co.*, 18 N. J. Eq. 54, declares: "This want of power in the legislature does not depend upon any constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature. To justify the taking of the citizen's property by the legislature, the use for which it is appropriated must be a public use." Speaking on this subject, the eminent jurist, Cooley, says: "The right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power, in any case, to take the property of one individual, and pass it over to another, without reference to some use to which it is to be applied for the public benefit. The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen, and transfer it to another, even for a full compensation, when the public interest will be in no way promoted by the transfer." Cooley, *Const. Lim.* 2d ed. 580.

Now, is the use for which this statute authorizes the taking of appellee's land a public or private one? Is the purpose of this law to take A's property, and transfer it to B., for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public, the law is good. If, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void. And, whether one or the other, is a question of law. To make the use public, it need not

be for the benefit of the whole public or state or any large portion of it. It may be for the inhabitants of a small or restricted locality. But the use and benefit must be in common, not to a particular individual or estate. *Coster v. Tide Water Co.* 18 N. J. Eq. 54.

A statute of Ohio provided: "The trustees of any township may, whenever in their opinion the same will be conducive to the public health, convenience, or welfare, cause to be established, located, and constructed as hereinafter provided, any ditch within such township." Certain parties petitioned for the construction of a ditch across the lands of others, under said statute. On the trial the court was requested to charge the jury as follows: "If you find that the petitioners . . . are the only persons in any way interested in the location of the ditch, and that it would not be conducive to the public health, convenience, or welfare to locate the ditch in question, then and in that case you should return your verdict against the proposed ditch." The court refused to give this instruction, and the case was taken to the supreme court for review, and that tribunal says: "The facts being ascertained, the question of whether or not the ditch will conduce to the public health, convenience, or welfare, within the meaning [of this statute], so that it will be of public use, is a question of law." In *Jenal v. Green Island Draining Co.*, 12 Neb. 168, was considered a statute of this state authorizing the construction of levees, dykes, and drains, and the reclamation of wet and overflowed lands, by incorporated companies. The act provided, among other things that the company might appropriate any land, stone, timber, gravel or other materials necessary for the right of way or construction, maintenance, or improvement of the proposed work, by first paying into the county treasury of the county where the land is situate, for the use of the owner of the land, the amount of damage assessed by the appraisers who were appointed therefor. Chief Justice Maxwell, speaking for this court, said: "The statute in question authorizes the entry upon lands, and construction of drains, whenever the private interest of the corporation requires it, and without reference to the public welfare. Any number of persons, not less than three, being the owners of wet and overflowed lands, whenever it is for their interest, may locate a ditch across the lands of others. . . . This is an infringement of the right of private property, and is unauthorized and void." The general road law of this state (Comp. Stat. 1893, chap. 78), confers on county boards of the several counties of the state general supervision over the public roads of the state, with power to maintain them; requires a petition for a public road to be signed by ten freeholders; fixes their width at 66 feet; makes the cost of their construction and maintenance a public charge; provides that, when persons traveling with carriages shall meet on such roads, each shall turn to the right of the center thereof; prohibits all persons addicted to the excessive use of intoxicating liquors from being em-

played as drivers on said roads; prohibits the running of horses on such roads; the leaving in such roads, unhitched or unguarded, any horses or teams; and that the overseer of each road district shall annually cause furrows to be plowed on either side of all such roads, as fire guards. None of these provisions are found in this act in reference to private roads, and none of these provisions apply to private roads. Had the legislature intended that these private roads should be for the public use, then, indeed, the entire private road act would be superfluous, but the law we have under consideration expressly provides: "Upon the establishment of the right of way, as in this chapter provided, the same shall vest and descend as an easement in the party and his or her heirs or assigns forever." The fact that the legal title is not taken, but an easement created, does not render this law less objectionable, for of what value is one's legal title, if another have the possession and use forever? Marshall and Loder would acquire no greater estate to the land in question if Welton gave them an absolute warranty deed. The public have an easement in all public roads, while the legal title remains in the adjoining owner, but by this law no right in or to the private road is conferred on the public. This law is, and was intended to be, an act for the transfer of A's property, against his consent,—compensation being made to him,—to B., his heirs and assigns, for their private use and convenience, and is therefore in conflict with the implied prohibitions of the constitution, and void.

In *Bankhead v. Brown*, 25 Iowa, 540, the question of the constitutionality of a private road law was decided. By the statute considered in that case, it was provided: "Section 1. Private roads may be laid out in the same manner as county roads, and the general road laws of the state, as to the establishment of county roads, are applicable, except that it is not necessary that any person but the applicant shall sign the petition." Section 2 provides that the board of supervisors may appoint a commissioner to report upon the application, and requires a bond from the applicant to pay all costs and damages. Section 3 provides that no such road shall be ordered to be opened until the costs and damages have been paid, and the conditions on which it is established shall have been complied with by the applicant. Section 4 provides that on the final hearing the board may receive petitions for and against the proposed road, hear testimony, and establish the road, upon the payment of costs and damages, and upon such condition, as to fences, as to the board may seem just to all parties concerned. Laws 1866, chap. 127. It will be observed that the Iowa law is substantially the same as the one under consideration here, with the exceptions that the Nebraska statute contains no provisions allowing the board of county commissioners to receive petitions for and against the proposed road; and the Iowa statute has no provisions vesting the perpetual easement in the private road established in the party petitioning therefor. *Bankhead v. Brown*, *supra*, arose out of an effort of Bank-

head to have established a private road, under the provisions of the Iowa law just quoted, across the land of Brown, in order to reach Bankhead's coal mine. The establishment of the private road was restricted by Brown on the ground that the law authorizing it was unconstitutional, in that it proposed the taking of private property for private uses. Dillon, *Ch. J.*, delivering the opinion of the court, said: "With respect to the act, . . . we are of opinion that roads thereunder established are essentially private,—that is, are the private property of the applicant therefor,—because: (1) The statute denominates them 'private roads.' . . . If the roads established thereunder were not intended to be private, and different from ordinary and public roads, there was no necessity for the act. (2) Such roads may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions, as to fences, etc., as the board may prescribe. (3) The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private. (4) We see no reason, when such a road is established, why the person at whose instance this was done might not lock the gates opening into it, or fence it up or otherwise debar the public of any right thereto. Could not the plaintiffs, in this case, after having procured the road in question, abandon it, at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so, does it not incontestably establish that it is essentially private? For it must be private if it is of such a nature that the plaintiffs can, at their pleasure, use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it. If the act is valid, might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway, and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These considerations mark the great difference between such a road and a public highway, and demonstrate the essentially private character of the road. In the following cases, acts substantially like the Iowa act providing for the establishment of private roads have been declared unconstitutional. *Neubitt v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Dickey v. Tenison*, 27 Mo. 373; *Clack v. White*, 2 Swan, 540; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Sadler v. Langham*, 34 Ala. 311; *Newell v. Smith*, 15 Wis. 102." The language quoted above from the learned judge in reference to the Iowa law is applicable to the statute under investigation. The eminent jurist, commenting on the constitutional provision of the state of Iowa "that private property shall not be taken for public use without just compensation," continues: "The limitation . . . upon the right of eminent domain, or the power of the legislature to take private property for public use, is found in all, or nearly all, of the state constitutions. Many of the questions growing out of this limitation upon the otherwise absolute

power of the legislature to take property of one for the benefit of the many have been settled by adjudication." And he deduces from the numerous authorities cited by him in the opinion the following propositions: "(1) That the constitutional limitation above quoted prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner. (2) That it forbids private property from being compulsorily taken for any but public use, and then only upon just compensation being made, the amount of which is to be assessed by a jury. (8) When the public exigencies demand the exercise of the power of taking private property for the public use is solely a question for the legislature, upon whose determination the courts cannot sit in judgment. (4) That what is such a public use as will justify the exercise of the power of eminent domain is a question for the courts. But 'if a public use be declared by the legislature the courts will hold the use public, unless it manifestly appears by the provisions of the act that they can have no tendency to advance and promote such public use.'" We are entirely satisfied with the reasoning and conclusions of this opinion, and follow it without hesitation. Statutes similar to the Nebraska law have been held invalid in the following cases: *Stewart v. Hartman*, 46 Ind. 331; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Orear v. Crossly*, 40 Ill. 175; *Sholl v. German Coal Co.* 118 Ill. 422, 59 Am. Rep. 379.

Counsel for appellants, in their brief, cite us to many authorities to sustain the validity of the law assailed as invalid in this case. In some of the cases cited the statutes were held good on the ground that the general public had a right to use the private roads provided for by the statutes. Such was the ground of the decision in *Shaver v. Starrett*, 4 Ohio St. 495; *Denham v. Bristol County Comrs.* 108 Mass. 202. In *Sherman v. Buick*, 82 Cal. 242, 91 Am. Dec. 577, the court sustained the constitutionality of a law very similar to our own, but did so by holding that, although the statute denominated the road a "private road," it was in fact and in law a public road, under the control of the government, and open to every one who might have occasion to use it, and the court declared that "the phrase 'private road' is unknown to the common law. All roads are public." The opinion, as counsel say, is ably reasoned, but we do not think this court can say that all roads are public roads, in this state. The

legislature has said that all public roads shall be 66 feet wide, and, by the law we are considering, it is provided that private roads shall be 15 feet wide. Evidently, then, the legislature has attempted to recognize two classes of roads. If Marshall and Loder had opened the private road they sought to across Welton's farm, and had been indicted under the criminal statutes for running their horses on a public road of the state, and the proof had shown that the running of their horses was on a private road established under this private road law, can any one doubt that the jury would have been rightly instructed to acquit them?

Counsel for appellants also insist that appellee has an adequate remedy at law, by appeal from the order of the board of county commissioners, should it make an order establishing the road, and that, therefore, this case must be dismissed. The law being invalid, the case of the appellee resolves itself into an appeal on his part to a court of equity to enjoin the appellants from committing a threatened trespass. The supreme court of Illinois, in *Poyer v. Des Plaines*, 123 Ill. 111, lay down the rule in such case thus: "There are two exceptions, clearly recognized, to the rule that courts of equity will not interfere to restrain a trespass, whether committed under the forms of law or otherwise, which are (1) to prevent irreparable injury; and (2) to prevent a multiplicity of suits. Before a court of equity will interfere to prevent a trespass upon the ground of irreparable injury, such facts must be alleged from which it may be seen that irreparable mischief will be the result of the act complained of, and that the law can afford the party no adequate remedy." In *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580, the Supreme Court of the United States says: "The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case, as disclosed in the proceedings. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity." The facts averred in the appellee's petition show that the trespass threatened by the appellants, if committed, would cause appellee an injury, to the redress of which his legal remedy would be inadequate.

The decree of the District Court is affirmed. The other Commissioners concur.

OKLAHOMA SUPREME COURT.

Francis R. McKENNON, *Appt.*,

v.

Harvey C. WINN.

(1 Okla. 327.)

1. The statute of frauds is in force in the United States only where it has

NOTE.—Adoption of the common law in the United States.

It is evident that this subject, pursued into all its 22 L. R. A.

been adopted by legislative enactment, and at common law an oral contract for real estate is valid.

2. A valid oral contract for the sale of real estate, or an interest therein, can be made in the absence of statutory restrictions.

3. The common law was brought into

details, would cover nearly the whole body of American law. The purpose of this note is to examine the subject so far as to determine the rules

Oklahoma by the settlers on April 22, 1889, unless it had already been established there by the Act of Congress of March 1, 1889, establishing a district court of the United States in the Indian territory.

4. **The sale by a town site claimant of his interest in a town lot** before the title has passed from the United States is not against public policy.

(July 1, 1883.)

APPEAL by complainant from a judgment of the District Court for Oklahoma County in favor of defendant in a proceeding brought to enforce specific performance of a contract for the sale of real estate. *Reversed.*

The facts are stated in the opinion.

Mr. Fred M. Elkin, for appellant:

At the time the contract alleged in the com-

plaint was made there was no statute of frauds in force in this territory. The common law put in force in this territory by act of the legislature of the territory of Missouri, on the 19th day of January, A. D. 1816, was the common law as modified by statute to the fourth year of the reign of James I., 1607.

Mo. Stat. p. 436.

The statute of frauds is not a part of the common law but was an enactment of the parliament of England, passed during the reign of Charles II., half a century after the above date. The statute of frauds in force in most of the states of the Union is the Statute of Anne.

The common law is in force and the statutes of Missouri are not.

See *St. Louis & S. F. R. Co. v. O'Loughlin*, 4 U. S. App. 283, 49 Fed. Rep. 440.

Messrs. Sweet & Keyes for appellee.

and principles which have been established on the subject; the question in what jurisdictions the common law has been in the main adopted as the basis of jurisprudence; the question how far English statutes are to be regarded as a part of the common law; and the date at which such statutes ceased to be so regarded, or, in other words, the date at which the common law is to be regarded as fixed for the purpose of its adoption in this country.

It may be said generally that the common law has been adopted as the basis of jurisprudence in every state in the Union except Louisiana, and in that state it is adopted in criminal matters.

The English common law, so far as it was adapted to the local circumstances of this country, our ancestors on their immigration hither brought with them, and it must be regarded as law until abrogated by statute. *Card v. Gritman*, 5 Conn. 168; *Baldwin v. Walker*, 21 Conn. 181.

The common law is part of the law of Alabama so far as it is applicable to the condition and circumstances of that state. *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374.

The common law is a part of the law of Iowa, although not adopted by any statute. *State v. Two-good*, 7 Iowa, 262.

The common law is in force in Michigan, except so far as it is repugnant to or inconsistent with the constitution and statutes. *Higb's App. 2 Dougl. (Mich.) 515*; *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465.

On the question whether the common law or the civil law governs the rights of abutting owners on the street known as "The Bowery" in New York city authorities are cited to the effect that the country belonged to the crown of England even while the Dutch were in possession. *Kernochan v. New York Elev. R. Co.* 3 N. Y. Supp. 648.

The common law forms the basis of the system of jurisprudence in Mississippi, except as repealed, changed, or modified by statute. *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425.

But Colorado having been acquired by treaty and purchase long after the Revolution and from powers not having the common law, it is held there that the first foothold or existence of the common law in that state was given by legislative enactment. *Herr v. Johnson*, 11 Colo. 393.

The common law as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is enforced in Kansas in aid of a general statute. *Parsons v. Lindsay*, 3 L. R. A. 659, 41 Kan. 396.

Common-law terms are to receive the common-law meaning. *Carpenter v. State*, 4 How. (Miss.) 163, 34 Am. Dec. 116; *Buckner v. Real Estate Bank*, 5 Ark. 636, 41 Am. Dec. 105.

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The common-law rules for construction of statutes are a part of the common law adopted in Massachusetts. *Com. v. Churchill*, 2 Met. 118.

The rule that statutes are to be construed with reference to the principles of common law applies also to constitutional provisions. *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697.

The common law of one state is not necessarily common law in another, as each state adopts such portions as are suitable and desirable. *Bent v. Thompson* (N. M.) Jan. 23, 1890.

Effect of English decisions.

The construction which British statutes had received in England at the time of their adoption in this country, even to the time of the separation of this country from the British empire, may be regarded as part of the statutes, but subsequent decisions are not to be regarded as binding. *Cathcart v. Robinson*, 30 U. S. 5 Pet. 264, 8 L. ed. 120.

The English decisions rendered prior to May 14, 1776, are evidence of what the common law was which was adopted by the Georgia Act of 1784, but not as being themselves the law. To be conclusive of any question they should be clear and well settled, but the Georgia court is free to adopt a different view, if it believes the law was otherwise at that time. *Robert v. West*, 15 Ga. 122.

It is said in *Marks v. Morris*, 4 Hen. & M. 463, "it was the common law we adopted and not English decisions," and these will be looked to for information merely, and not as authority.

The court says that we should take the standard of that law, namely, "that we would live honestly, should hurt nobody, and should render to every one his due, for our judicial guide." *Marks v. Morris, supra.*

The adoption of the common law by the Washington Code 1881, § 1, does not shut the courts up to following English or other American decisions as to what the common law is. The court is to administer justice according to the promptings of reason and common sense, which are the cardinal principles of common law, and not to take the English decisions blindly, without inquiry as to their reason or application to the circumstances. *Sayward v. Carlson*, 1 Wash. 29.

English decisions made since the Revolution have no binding force, but are consulted as expositions of the rules and principles of the common law by men of experience. *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Bowie v. Duval*, 1 Gill & J. 175; *Stump v. Napier*, 2 Yerg. 45.

Usage, tradition, and works of approved authority may be relied upon as well as decisions of the courts to show what was the common law. *Com. v. Churchill*, 2 Met. 118.

Burford, J., delivered the opinion of the court:

The appellant filed his complaint in the court below to enforce the specific performance of a contract for the conveyance of real estate situated in Oklahoma City, Oklahoma county, Okla. Terr. A demurrer was filed to the complaint, alleging, as grounds: First, that the court has no jurisdiction of the person of defendant, or the subject of the action; second, that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was sustained, to which the appellant excepted, and brings the case to this court by appeal. The amended complaint, to which the demurrer was sustained, reads as follows:

"In the district court of the third judicial district of the territory of Oklahoma, in and for Oklahoma county. Francis R. McKen-

non, plaintiff, vs. Harvey R. Winn, defendant. Amended complaint. Plaintiff herein, Francis R. McKennon, complains of the defendant, Harvey R. Winn, and says that heretofore, to wit, on the 23d day of April, A. D. 1889, the said defendant entered upon and occupied, as a town-site claimant, under the public land laws of the United States, a certain tract of land in the city of Oklahoma City, in Oklahoma county, in the territory of Oklahoma, and more particularly described as follows, to wit: Lots numbers 11 and 12, in block 9, in said city, county, and territory; the same being a part of the south-east quarter of section 33, township 12 north, of range 3 west of the Indian meridian. That afterwards, to wit, on the — day of April, A. D. 1889, the said defendant, being an occupant still of said tract, as above stated, and being desirous of inclosing said

No decisions of the courts of England, under the authority of the Statute of James passed in 1533, or in analogy to it, have any force or effect in Delaware where that statute was never in force. *Hulley v. Security Trust & S. D. Co.* 5 Del. Ch. 578.

Constitutional and statutory adoption of common law.

In some states the constitution has expressly adopted the common law, as in Delaware Const. 1776, art. 20; New York, art. 1, § 17; Maryland, Declaration of Rights, art. 5; Michigan (1850) Schedule 1; Wisconsin (1848), art. 4, § 13; West Virginia, art. 8, § 21.

In Massachusetts the common law is adopted without express mention by the provision in the Constitution, chap. 6, art. 6, "that laws heretofore adopted, used, and in force in the province, colony, or state of Massachusetts Bay should continue in force."

And in Kentucky, the Constitution (1850), art. 8, § 8, continued in existence the laws which were in force June 1, 1792.

In many other states the common law has been expressly adopted by statute. Arizona Rev. Stat. 1887, § 2365; Mansfield Dig. (Ark.) 1884, § 566; California Pol. Code, § 4468; Colorado, Mill's Anno. Stat. 1891, § 4184; Florida Rev. Stat. 1892, § 56; Idaho Rev. Stat. 1887, § 18; Illinois, Starr & C. Anno. Stat. chap. 28, § 1; Indiana Rev. Stat. 1881, § 236; Kansas Gen. Stat. 1889, § 7231; Missouri Rev. Stat. 1889, § 6561; Montana Comp. Stat. 1887, 6th Div., § 201; Nebraska Comp. Stat. 1891, chap. 15, § 1; Nevada Gen. Stat. § 3021; New Mexico Comp. Laws, 1883; North Carolina Code, § 641; R. I. Pub. Stat. 1882, chap. 259, § 1; Pennsylvania Act, Jan. 28, 1777; South Carolina Gen. Stat. § 2738; Texas, Sayle's Civ. Stat. 1888, § 3128; Vermont Rev. Laws 1880, § 689; Virginia Code 1849, chap. 16, § 1, 2; Washington, Hill's Code of Procedure, § 106; Wyoming Rev. Stat. 1887, § 496.

The common law was extended to all the territory within the limits of the state of Alabama to the exclusion of Spanish and French law by the Ordinance of 1787, which was in force in the Mississippi territory, providing that the inhabitants should always be entitled to "the benefits of the writ of habeas corpus, and of the trial by jury, of judicial proceedings according to the course of common law," and by the recognition of this ordinance in the Alabama constitution. Pollard v. Hagan, 44 U. S. 3 How. 212, 11 L. ed. 565; Barlow v. Lambert, 28 Ala. 707, 65 Am. Dec. 374.

The common law became a part of the law of Iowa also by reason of the Ordinance of 1787, even if it would not have been the law independent of that ordinance. O'Ferrall v. Simplot, 4 Iowa, 381.

The New Hampshire Constitution of 1783, adopted 22 L. R. A.

ing all the laws heretofore adopted, used, and approved in the province, colony, or state of New Hampshire and usually practiced on in the courts of law, adopts the body of the common law so far as applicable to the institutions of the state. *State v. Rollins*, 8 N. H. 550.

The common law of England so far as applicable to the condition of Massachusetts, is adopted by the Constitution, part II, art. 6, declaring that "all the laws which have heretofore been adopted, used, and approved in the province, colony, or state of Massachusetts Bay and usually practiced on in the courts of law, shall still remain and be in force until altered or repealed by the legislature, such parts only excepted as are repugnant to the rights and liberties contained in this constitution. *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373.

The common law is adopted in South Carolina by General Statute, § 2734, so far as it is "not altered by this act nor inconsistent with the condition of this state and the customs and laws thereof." *Edwards v. Charlotte, C. & A. R. Co.* (S. C.) Sept. 29, 1866.

The statutes which adopt the common law usually make express exception in terms more or less similar to those above quoted of such parts of the common law as are inapplicable to the condition of things in this country or inconsistent with our constitutions and laws.

The adoption of the common law by the Territorial Act of Nevada, 1861, p. 1, being ratified by the state constitution, the common law so far as it is not repugnant to, or inconsistent with the Constitution or laws of the United States, or of the state, must be enforced. *Van Sickle v. Haines*, 7 Nev. 249.

This decision regarded the statute as including the adoption of the common law on the subject of riparian rights, but was overruled on this point in *Reno Smelt. M. & R. Works v. Stevenson*, 4 L. R. A. 60, 20 Nev. 226, in which it is held that the common law on this subject is inapplicable to the condition of Nevada.

What constitutes the common law adopted.

The rules of admiralty are not necessarily a part of the common law so as to be binding in a collision case, where the action is brought in a court of common law. *Sawyer v. Eastern Steamboat Co.* 46 Me. 400, 74 Am. Dec. 463.

The distinction between common law and admiralty in the Constitution of the United States is to be determined by the system exercised in England before the Revolution, and by the state courts before the adoption of the Constitution. *Bains v. The James & Catherine*, Baldw. 568.

That common law and admiralty jurisdiction are

tract with a substantial fence, and erecting thereon a house, and said defendant not having sufficient means (money) wherewith to inclose and otherwise improve this tract, the said defendant entered into an oral agreement with this plaintiff, whereby it was mutually agreed and understood by and between the said defendant and this plaintiff that the said plaintiff should furnish to the said defendant a sufficient sum of money wherewith to inclose said tract with a substantial fence, and that said plaintiff should furnish one half of the amount of money necessary to erect upon said tract such a house as the said plaintiff and defendant might thereafter agree upon, and, in case the said defendant could not furnish sufficient money to pay defendant's portion or share (one half) of the cost of such house, then, in the latter event, the

plaintiff was to lend to the said defendant a sum of money sufficient to pay for said defendant's share of the same. That the said defendant should continue in the occupancy of said tract, and that the said defendant should hold and occupy the said tract with a view to acquiring title thereto from the United States government, and that such title should be acquired and held for the benefit of said defendant and plaintiff, in equal portions or shares. That afterwards, to wit, on the — day of May, A. D. 1889, it was agreed by and between the said plaintiff and defendant that the said tract should be occupied and held by the said defendant,—the lot number 11 for the benefit of this plaintiff, and the lot number 12 for the benefit of said defendant. That in pursuance of the aforesaid agreement this plaintiff, hereto-

entirely distinct although administered by the same tribunal is also declared in *The Sarah*, 18 U. S. 5 Wheat. 391, 5 L. ed. 644.

Whether or not the ecclesiastical law of England is adopted as part of the common law has been somewhat in dispute. In the affirmative are *Crump v. Morgan*, 38 N. C. 91, 40 Am. Dec. 447; *LeBarron v. LeBarron*, 36 Vt. 386; and to the contrary are *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Burtis v. Burtis*, Hopk. Ch. 557, 2 L. ed. 522, 14 Am. Dec. 563; *Perry v. Perry*, 2 Paige, 501, 2 L. ed. 1003. The instances in which courts have by implication adopted some portion of the ecclesiastical law add weight to the affirmative; but, without further considering the subject here, it will be separately treated hereafter.

The common law, so far as it respected the erection of churches of the episcopal persuasion of England, the right to present, or collate to such churches, and the corporate capacity of the parsons thereof to take in succession seems to have been fully recognized and adopted in the province of New Hampshire. *Pawlet v. Clark*, 3 U. S. 9 Cranch, 333, 3 L. ed. 749.

Adoption in particular matters.

The numerous decisions mentioned below on particular subjects must be considered in the light of illustrations merely. It would be impossible in this note to follow out the law on each of these subjects and show its present exact condition. For instance the law as to *Shelley's Case*, 1 Coke, 88, or as to the various water rights below mentioned, involves many decisions which may not even mention the subject of common law. And it is not presumed that even those which consider the question of the adoption of the common law on these subjects are all presented here. But a reference to these subjects is here made by way of illustrating the rule of the courts as to the adoption or rejection of the common law.

As to the adoption of the common law in respect to the running at large of cattle, see *note to Bulpit v. Matthews* (Ill.) 22 L. R. A. 55.

The law-merchant is a part of the common law. *Cook v. Renick*, 19 Ill. 598; *Platt v. Eads*, 1 Blackf. 81. The common law as to nuisances prevails in Alabama. *Ferguson v. Selma*, 43 Ala. 400.

The common law on the subject of sureties is part of the common law of Pennsylvania. *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 805.

The common law making a champertous contract with an attorney illegal is in force in Ohio, in the absence of any legislation on the subject. *Key v. Vattier*, 1 Ohio, 132.

The common-law rule as to the legality of wagers must be followed in California, although the courts may not approve of it, and cannot be rejected 22 L. R. A.

merely because the English judges have regarded it with disfavor. *Johnson v. Fall*, 6 Cal. 359, 65 Am. Dec. 518.

The adoption by statute in North Carolina of all portions of the common law which had been in force in the province includes the common-law doctrine as to curtesy. *McCorry v. King*, 3 Humph. 267, 30 Am. Dec. 165.

In relation to real property and its tenures, the common law or the English code system has never had place in Louisiana. *Franklin's Succession*, 7 La. Ann. 386.

The common law of dower is a part of the law of Iowa. *O'Ferrall v. Simplot*, 4 Iowa, 381.

The rule in *Shelley's Case* is a part of the common law and not inapplicable to our institutions. *Powell v. Brandon*, 24 Miss. 343.

The common-law rule as to fixtures is adopted in America. *Harkness v. Sears*, 26 Ala. 493, 62 Am. Dec. 742.

The rights and liabilities of husband and wife in property must be determined by common-law principles, except so far as they are modified by statute. *Van Maren v. Johnson*, 15 Cal. 803.

The common-law rule as to tenancy by entireties is in force in Mississippi. *Hemingway v. Scales*, 43 Miss. 1, 2 Am. Rep. 598, 97 Am. Dec. 425.

The common-law rule that the exercise of a general power of appointment by will makes the property part of the assets of testator, seems to be as conformable to our institutions as to those of England. *Cutting v. Cutting*, 86 N. Y. 539.

The common law as to charitable gifts became a part of the common law of New York under the Constitution of 1777. *Williams v. Williams*, 8 N. Y. 541.

And also a part of the law of Pennsylvania. *Witman v. Lex*, 17 Serg. & R. 38, 17 Am. Dec. 644.

And of Vermont. *Burr v. Smith*, 7 Vt. 241, 20 Am. Dec. 154.

As to remedies.

The superior court in Georgia is governed by the rules and practice of the common law, so far as they are permitted to operate by the constitution and laws. *Straffin v. Newell*, T. U. P. Charit. 172, 4 Am. Dec. 705.

Without any statutory provision giving any specific remedy, where a purely statutory right or remedy is asserted, courts will adopt analogous common-law remedies to forward the ends of justice. *Hightower v. Fitzpatrick*, 42 Ala. 597.

The adoption of the common law with general British statutes in aid of it by the legislature of Missouri in 1816 included an adoption of the action of ejectment, including the fiction of lease, entry, and ouster. *Grande v. Foy*, 1 Hemp. 105.

The common-law practice to review an action of

fore, to wit, on the twenty-eighth day of April, A. D. 1889, furnished and paid unto the said defendant a sum of money, to wit, fourteen dollars and eighty-five cents, in full payment of the entire costs of a certain fence erected upon and inclosing said tract, as in the foregoing agreement provided, and the said defendant then and there accepted said amount of money in pursuance of said agreement. That in pursuance of the aforesaid agreement said parties caused to be erected upon the said tract a small frame house, at a cost of the value of thirty dollars, and that this plaintiff afterwards, to wit, on the — day of May, A. D. 1889, paid to the said defendant the sum of five dollars in part payment of this plaintiff's share of the cost of said house, and said sum was then and there accepted by said defendant as such part pay-

ment. At the time last stated this plaintiff instructed defendant to call upon one Felix L. Bone—the said Bone being then and there this plaintiff's agent—for the balance of the share of this plaintiff of the cost of said house, to wit, the sum of ten dollars, and the said defendant then and there agreed to do so. That on the day and dates last above stated the said Bone had in his possession, and subject to the order of this plaintiff, moneys of this plaintiff greatly in excess of the amount last above stated, and on the said last above named day this plaintiff instructed said Bone to pay to this defendant the sum of ten dollars. That in pursuance of, and under the terms of, the aforesaid agreement, this plaintiff, heretofore, on, to wit, the — day of —, A. D. 1889, went into and took possession of the said lot eleven

debt by a writ of error was, in 1812, held to prevail in the District of Columbia, and exclude an appeal for new trial by jury. *United States v. Wonson*, 1 Gall. 20.

The common-law rule not to consider any paper as part of the record unless made so by the pleadings, or by some opinion of the court referring to it, is common to all courts exercising admiralty jurisdiction according to the courts of common law. *Fisher v. Cookerell*, 80 U. S. 5 Pet. 253, 8 L. ed. 115.

The equitable right, founded on common-law principles, of a junior mortgagee to redeem from a prior mortgage exists in Alabama. *Wiley v. Ewing*, 47 Ala. 424.

The disqualification of jurors by relationship is, in Delaware, controlled by the common law, there being no statute on the subject. *State v. Williams*, 24 Ohio L. J. 435.

Limitation of the adoption.

The adoption of the common law by Nevada Gen. Stat., § 8021, so far as "not repugnant to, or in conflict with the constitution and laws" of the United States and of the state, adopts only so much of the common law as is applicable to the condition of that state. *Reno Smelt. M. & R. Works v. Stevenson*, 4 L. R. A. 60, 20 Nev. 202.

This is the general rule expressed more or less like the above statement in the decisions of all the states.

The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birth-right, but they brought with them and adopted only that portion which was applicable to their situation. *Van Ness v. Pacard*, 27 U. S. 2 Pet. 144, 7 L. ed. 377.

In *Morgan v. King*, 80 Barb. 9, it is said that in adopting the common law of England there is no adoption of any mere formal rules or written code, or mere verbiage in which the common law is expressed, but that the written law of England is adopted as a constantly improving science, rather than as an art; as a system of legal logic, rather than as a code of rules,—that is that the fundamental principles and modes of reasoning and the substance of the rules of the common law are adopted as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.

Only such parts of the common law and its statutory affinities as concern the conditions and circumstances of the people are in force in Delaware. *State v. Williams*, 24 Ohio L. J. 435.

To the same effect are decisions in other states. *People v. Randolph*, 2 Park. Crim. Rep. 174; *Bent v. 22 L. R. A.*

Thompson (N. M.) Jan. 23, 1890; *Browning v. Browning*, 3 N. M. 371; *Harkness v. Sears*, 26 Ala. 493, 69 Am. Dec. 745; *Pennock's Estate*, 20 Pa. 233, 59 Am. Dec. 718; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552.

Rules must be relaxed the enforcement of which would be entirely unsuited to the interests of the people they are to govern. *McClintock v. Bryden*, 5 Cal. 100, 63 Am. Dec. 87.

This was said in discussing the effect of mere possession of public lands as against miners. *Ibid.*

Allowing a tradesman's book as evidence against the original debtor on the oath of the tradesman alone was held in 1788 to be in accordance with the law prevailing in Pennsylvania and adapted to the peculiar situation of the country, although different from the rule in England. *Poultney v. Ross*, 1 U. S. 1 Dall. 238, 1 L. ed. 117.

So the rule in England that the books of a tradesman cannot be put in evidence without the oath of a clerk or proof of his handwriting if dead, is not adopted in Illinois, where a tradesman employs no clerk but keeps his own books. *Boyer v. Sweet*, 4 Ill. 120.

So the publication of a communication by a newspaper, which has no tendency to obstruct the administration of justice, and not reflecting upon the integrity of the judge or in any way impeaching his conduct, is held not to constitute a contempt, even if it might be so regarded in England. *Stuart v. People*, 4 Ill. 404.

The ancient common-law rule allowing conveyance of land by parol was not adopted in Ohio, even prior to the enactment of the statute of frauds, and was not adapted to the circumstances and state of society, but was opposed to the policy of all the laws respecting lands under which titles were recorded and the universal custom of giving and receiving deeds. *Lindsley v. Coats*, 1 Ohio, 245.

The court says the ancient common-law mode of transferring real estate by parol was adopted at a time when writing was practiced or understood by but few individuals. *Ibid.*

But in *Lavalle v. Strobel*, 89 Ill. 370, it is said that verbal partition followed by livery of seisin was good until the adoption of the statute of frauds, although in that case no verbal partition was in fact involved.

The common-law rule of shifting inheritances, being radically different from the provisions as to descent in the Ordinance of 1787, cannot be regarded as being in force in Illinois. *Bates v. Brown*, 72 U. S. 5 Wall. 710, 18 L. ed. 535.

In Indiana also the English rule of shifting inheritances is held to be inapplicable. *Cox v. Matthews*, 17 Ind. 367.

(11), and occupied same. That afterwards, to wit, on the 3d day of June, A. D. 1889, this plaintiff learned from the said Bone that the said defendant had not called upon the said Bone for the sum of ten dollars. That on the day last above stated this plaintiff offered to pay, and tendered to said defendant, the said sum of ten dollars, the balance due from plaintiff to defendant on account of the said house erected; and the said defendant then and there refused to accept or receive the same, and said defendant then and there refused, and has ever since and does now still refuse, to fill defendant's part of said agreement. That heretofore, to wit, on the — day of —, A. D. 1890, said defendant made application to board No. 2, town-site trustees, for a deed to said tract of land, to wit, lots numbers eleven and twelve (11 &

12), in block No. nine (9), and on the 15th day of January, A. D. 1891, said lots were by said board awarded to said defendant, and on the — day of —, A. D. 1891, said board issued to said defendant a deed therefor. That said board of trustees were duly appointed by the secretary of the interior, and qualified, as such trustees, in accordance with the laws of the United States. That heretofore, to wit, on the 3d day of September, 1890, said board, in pursuance of the authority vested in them, entered at the United States land office the southeast quarter section thirty-three, township twelve north, of range three west of the Indian meridian, of which last-named tract said lots number eleven and twelve, in block number nine, are a part and parcel, and patent for the same was duly issued to said board of

So in Ohio it is said to be utterly opposed to our policy. *Drake v. Rogers*, 13 Ohio St. 21, overruling *Dunn v. Evans*, 7 Ohio, pt. 1, p. 169.

This doctrine was, however, adopted in North Carolina. *Cutlar v. Cutlar*, 9 N. C. 324; *Caldwell v. Black*, 27 N. C. 463.

But was abolished by statute thereafter.

The right to hunt on unenclosed ground claimed in South Carolina, though conceded to be contrary to the law of England, is considered but not expressly decided in *Fripp v. Hasell*, 1 Strobb. L. 178, but the land was found to be in fact sufficiently enclosed.

The common law in relation to villenage does not govern in respect to slaves. *Fable v. Brown*, 2 Hill, Eq. 378.

The rule of the common law that the cutting of a standing tree is waste is wholly inapplicable to the condition of Indians, when a large proportion of the territory consisted of forest. *Dawson v. Coffman*, 28 Ind. 220.

It is said in *Hieatt v. Morris*, 10 Ohio St. 523, in respect to long-continued use of a party wall, that if the mere fact of twenty-one years' enjoyment was relied on to support it "we, as at present advised, should probably hold that such an unbending rule is not adapted to the circumstances and existing state of things in this country."

Estates in joint tenancy are held not to exist in Ohio, being not in accordance with the policy of the society and institutions of that state. *Sergeant v. Steinberger*, 2 Ohio, 806.

The common-law rule denying a reversal in part only of a judgment against an infant and another is rejected in Connecticut on the principle that common-law rules may be varied from so far as they may appear "contrary to reason or unadapted to our local circumstances, the policy of our law, or simplicity of our practice." *Wilford v. Grant*, Kirby, 117.

The doctrine of charitable uses is upheld in Indiana as not dependent upon the Statute of Elizabeth, but the doctrine of *cy pres* is rejected as unsuited to our institutions. *Grimes v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690.

In *Van Sickle v. Haines*, 7 Nev. 249, it was held that the right of a riparian owner having title to the soil under the water of a stream must be determined in Nevada by the common law.

But this was reconsidered in *Reno Smelt. M. & R. Works v. Stevenson*, 4 L. R. A. 80, 20 Nev. 269, in which it was held that the common-law doctrine of riparian rights is rejected in Nevada as unsuited to the condition of that state.

In *Edwards v. Charlotte, C. & A. R. Co.* (S. C.) Sept. 29, 1893, the adoption of the common law by statute is regarded as an adoption of the so-called 23 L. R. A.

common-law rule as to surface water, although that rule does not appear to have been ever actually adopted by any decision until long after the independence of the United States. See note to *Gray v. McWilliams* (Cal.) 21 L. R. A. 593.

The common-law rule that the owner of land through which a stream of water flows must have previously appropriated it to some use before he can be said to sustain any damage from its diversion, is held inapplicable in Vermont. *Martin v. Bigelow*, 2 Aik. (Vt.) 187, 16 Am. Dec. 694.

In *Fulmer v. Williams*, 1 L. R. A. 603, 123 Pa. 191, it is said: "On this continent the early settlers found large rivers with navigable tributaries forming vast systems of internal communication extending hundreds, and in some instances thousands, of miles above the reach of tide water. The common-law definition of a navigable river was unsuited to this state of things and seems never to have been adopted in Pennsylvania." But the decisions have not been uniform as to the adoption of common law in respect to navigable streams, and no attempt is made here to present that subject further than merely to call attention to it.

The English common law as to waters has been held inapplicable to our large lakes, such as Lake Champlain, and the fact that no such lakes exist in England is sufficient to explain the inapplicability of the English law to our lakes. *Champlain & St. L. R. Co. v. Valentine*, 19 Barb. 494. For the law of this country as to ownership of the bed of lakes and ponds, see note to *Gouverneur v. National Ice Co.* (N. Y.) 18 L. R. A. 695.

So the common law as to waters is held inapplicable to the Niagara river, which is a national boundary, there being no such river in England. *Kingman v. Sparrow*, 12 Barb. 201. For rivers and lakes as state boundaries, see note to *Buck v. Ellensolt* (Iowa) 15 L. R. A. 187.

The adoption of the common law as to easements of light and air is a matter on which the decisions are in some conflict and which is the subject of another distinct note soon to appear.

In United States courts and territories.

There is no common law of the United States as distinguished from the individual states. *People v. Folsom*, 5 Cal. 374; *Wheaton v. Peters*, 33 U. S. 8 Pet. 658, 8 L. ed. 1079; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L. R. A. 508, 128 Pa. 217.

The common-law rule of decision in a federal court is that of the state in which the court is sitting. *Lorman v. Clarke*, 2 McLean, 568.

The common law is the rule of decision in the federal courts, even when sitting in a territory in the absence of statutes repealing or modifying it. *Pyeatt v. Powell*, 10 U. S. App. 200, 51 Fed. Rep. 551.

trustees. That on the 80th day of April, A. D. 1891, this plaintiff demanded of defendant that said defendant should convey to plaintiff, by deed, all his (the said defendant's) title to lot 11, in block 9, aforesaid, and then and there plaintiff tendered to said defendant the sum of ten dollars, in good and lawful money of the United States, in payment of the sum due from plaintiff to defendant as aforesaid; and the said defendant then and there refused to execute such conveyance, and refused to accept or receive the sum so tendered. The plaintiff at all times has been ready and willing to pay said sum of ten dollars, and now brings and pays into the court the said sum of ten dollars, in fulfillment of plaintiff's agreement, and for the use and benefit of the said defendant. That plaintiff has complied in every particular

with, and fulfilled, all the provisions of the aforesaid agreement, where not prevented by said defendant as hereinbefore stated. That said defendant has wholly failed and refused, and now fails and refuses, to comply with and fulfill the provisions of the aforesaid agreement, to the great damage of this plaintiff. Wherefore, plaintiff prays that it be adjudged that the said defendant hold said lot number eleven, in block nine, in trust for the use and benefit of this plaintiff, and that the said defendant be decreed to convey said lot to this plaintiff, and that in the event said defendant refuses to convey said lot a commissioner be appointed by the court to execute such conveyance, and that plaintiff recover costs of this suit. Fred M. Elkin, Attorney for F. R. McKennon.

"County of Oklahoma, territory of Okla-

Thus the common law will be applied to cases arising in the Indian territory, in the absence of any proof of the laws, rules, or customs obtaining in that territory, in the exercise of the jurisdiction given to the United States court created for that territory with the assent of the Indians although there can be no presumption of its adoption based on the character of the settlers. *Ibid*.

As federal courts have no common-law jurisdiction, in an equity suit brought in the original jurisdiction of the United States Supreme Court, respecting a bridge over a navigable river, the same rules of action must govern as if the suit had been commenced in the lower federal court having jurisdiction over the place. *Pennsylvania v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518, 14 L. ed. 249.

The acquisition of California by the United States did not extend over it the common law which recognizes and sustains the doctrine of escheats. *People v. Folsom, supra*.

So it is held in *Herr v. Johnson*, 11 Colo. 306, that there was no common law there until adopted by the legislature.

See also *infra* as to criminal matters.

In criminal matters.

There are no common-law offenses against the United States. *United States v. Hudson*, 11 U. S. 7 Cranch, 32, 3 L. ed. 259; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 608; *Re Greene*, 53 Fed. Rep. 104; *United States v. Eaton*, 144 U. S. 877, 36 L. ed. 591; *United States v. Lewis*, 36 Fed. Rep. 449.

There was much uncertainty on this point in the early decisions. In *United States v. Worrall*, 2 U. S. 2 Dall. 384, 1 L. ed. 426, the circuit court, although divided in opinion upon this point, passed sentence against the prisoner. In *United States v. Coolidge*, 1 Gall. 488, the judges were divided in opinion and certified the case to the supreme court where in 14 U. S. 1 Wheat. 415, 4 L. ed. 124, the court doubted the authority of *United States v. Hudson, supra*, but followed it for the reason that no counsel appeared for the defendant and the attorney-general declined to argue the point.

But the common law may be looked to for the interpretation of terms in acts of congress adopting or creating common-law offenses if they are not clearly defined in the act. *Re Greene, supra*; *United States v. Armstrong*, 2 Curt. C. O. 448; *United States v. Coppersmith*, 4 Fed. Rep. 198.

That the common law prevails in the District of Columbia is held in respect to theft in a Connecticut case. *State v. Cummings*, 33 Conn. 250, 39 Am. Dec. 208.

In *Key v. Vattier*, 1 Ohio, 132, it is said that it had been decided that the common law, although in 22 L. R. A.

force in that state in all civil cases, cannot be resorted to for the punishment of crimes.

So it is said in *Re Lamphere*, 61 Mich. 105, that there is no crime whatever punishable by the laws of Michigan except by virtue of a statutory provision, although there is a general statute resorting to the common law for all nonenumerated crimes, but that the punishment of all indefinite offenses is fixed within named limits and beyond the unregulated discretion of the courts.

The definition of murder and manslaughter not being given by statute in Massachusetts is to be sought in the common law, which was adopted by the first settlers by universal consent and afterwards formally confirmed by the Constitution. *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711.

The common-law rule as to the sufficiency of a blow as provocation which will reduce homicide to manslaughter is modified by the institution of slavery, so that such blow by master to slave will not mitigate the killing of the master by the slave. *Jacob v. State*, 3 Humph. 498.

The common-law rule that the killing of a human being by a slave with malice aforethought is murder is in force in Alabama. *Burt v. State*, 39 Ala. 837.

The common law of England as to crime is in force in Alabama, except as changed by statute, so far as it is consistent with the constitution. *State v. Cawood*, 2 Stew. (Ala.) 362.

The common law of conspiracy became a part of the law of Maryland. *State v. Buchanan*, 5 Harr. & J. 358, 9 Am. Dec. 584.

The common law as to the crime of kidnapping is in force in New Hampshire. *State v. Rollins*, 8 N. H. 550.

The common-law rule as to homicide without intent to kill is in force in Maine. *State v. Smith*, 22 Me. 399, 54 Am. Dec. 578.

The common-law rule as to the capacity to commit rape before the age of fourteen is not conclusive in this country. *People v. Randolph*, 2 Park. Crim. Rep. 174.

The common law as to the presumed incapacity of an infant under fourteen years of age to commit rape is not in force in Ohio. The difference in climate, and the fact that the population in this country includes people of different races, prevents the common-law rule from being universally correct in this country. *Williams v. State*, 14 Ohio, 222, 45 Am. Dec. 538.

The common law in matters of practice as well as principle governs in criminal cases in Texas, in the absence of statutes to the contrary. *Hyde v. State*, 16 Tex. 445, 67 Am. Dec. 630.

The common-law practice denying any new trial in a capital felony does not govern in Delaware.

homa. Fred M. Elkin, being duly sworn, upon his oath says that he is attorney for the plaintiff in the above-entitled cause; that he has read the foregoing complaint, knows the contents thereof, and that the facts therein set forth are true, as he verily believes. [Signed] Fred M. Elkin.

"Subscribed and sworn to before me this 21st day of January, 1892. [Signed] Will H. Clark, Clerk. By E. W. Sweeney, Deputy."

The first ground of demurrer is not well taken. The land was situated in Oklahoma county, and the defendant, so far as we know from the record, was a resident of said county. The town site had been entered by trustees under the law of the United States applicable thereto, and the lots in question

by them conveyed to the appellee. The United States had no further interest in the land, and the interior department no further control as to its disposition.

The second ground for demurrer presents two questions: First, Can a parol contract for the conveyance of real estate, or an interest therein, made after the settlement of this country, and prior to the adoption of our organic act, be enforced? Second, Is a contract for the conveyance of real estate, entered into before title is acquired from the United States, and to be executed after title is acquired, void, as against public policy?

The first proposition seems to be settled by the adjudicated cases and text-writers in favor of the appellant. "Every contract, on whatever subject, may be in oral words, which will have the same effect as if written,

where the common-law practice of respite pending appeal to the sovereign does not exist. *State v. Williams*, 24 Ohio L. J. 435.

In criminal matters the common law has been expressly adopted in the absence of statutory provisions on any particular question by *Arkansas Mansf. Dig.* § 508; *Dakota Code Cr. Pr.* § 610; *Florida Rev. Stat.* 1892, § 2309; *Illinois Rev. Stat. Starr & C.* § 349; *Louisiana, Vorhees' Rev. Stat.* 1876, § 976; *Mississippi Gen. Stat.* 1892, § 1452; *New Jersey Rev.* § 192.

Common-law crimes are recognized as existing in *Connecticut Gen. Stat.* 1888, § 1642; *Idaho Rev. Stat.* 1887, § 7232.

In *Colorado Mills' Anno. Stat.*, § 1467, the common-law course of trial is adopted in criminal cases.

In *Texas the Penal Code*, § 4, declares that the principles of common law shall be the rule of construction when not in conflict with statutory provisions, and the *Code of Criminal Procedure*, §§ 27 and 725, made the rules of the common law as to procedure and evidence applicable.

Tennessee Milliken & Vertrees' Code, § 5648, provides that an indictment for a common-law offense may describe it according to the common law.

The *Louisiana Act of 1805* adopting the common law in criminal cases, adopted it as it existed at that date, modified, explained, and perfected by statutory enactment so far as they are not found to be inconsistent with the peculiar character and genius of the government and institutions of that state. *State v. McCoy*, 8 Rob. (La.) 545, 41 Am. Dec. 301.

Adoption of British statutes.

In adopting the common law, the date at which it is to be deemed complete so as to be unaffected by subsequent English statutes is not uniformly established. In many states there is no express provision as to the adoption of any English statutes, but the general doctrine, even in those states, is that English statutes or acts of parliament in aid of, or to supply the defects of the common law prior to the time of its adoption in this country are to be taken as part of the common law thus adopted. In several states English statutes down to a period named are expressly adopted so far as they are general and not local to the kingdom of England, and are applicable to American institutions and conditions. In adopting these statutes this limitation is, with some variation of language, expressly named in nearly every instance.

The 4th of July, 1776, is fixed in several states as the date after which the enactment of British statutes should not affect the common law. *Florida Rev. Stat.* 1892, § 59; *Maryland Const.* 1867, Declaration of Rights, § 5; *Rhode Island Pub. Stat.* 1882, chap. 259, § 1. So in *Kentucky Rev. Stat.* chap. 67, 22 L. R. A.

§ 1, that is the date fixed from which English decisions should not be binding.

In *Pennsylvania the Act of January 28, 1777*, adopts such statute laws of England as were theretofore in force in the province with certain specified exceptions.

But in a large number of states the 4th year of James I. is taken as the period at which English statutes cease to affect the common law. *Arkansas Mansf. Dig.* 1884, § 506; *Colorado Mills' Anno. Stat.*, 1891, *Illinois Starr & C. Anno. Stat.* chap. 23, § 1; *Indiana Rev. Stat.* 1881, § 236; *Missouri Rev. Stat.* 1892, § 6561; *Virginia Code* 1849, chap. 16, § 2 (Statute of 1776); *Wyoming Rev. Stat.* 1887, § 498.

But in *Colorado, Illinois, Indiana, and Wyoming* by the statutes above referred to express exception is made of the Statutes, 43 Eliz. chap. 6, § 2; 18 Eliz. chap. 8, and 37 Hen. VIII., chap. 9.

This statutory adoption is recited as to *Illinois* in *McCool v. Smith*, 66 U. S. 1 Black, 459, 17 L. ed. 218. And, as to *Indiana*, in *Dawson v. Coffman*, 23 Ind. 230.

And, as to *Virginia*, in *Scott v. Lunt*, 32 U. S. 7 Pet. 598, 8 L. ed. 797.

And, as to *Missouri*, in *Baker v. Crandall*, 78 Mo. 597, 47 Am. Rep. 123.

And, as to *Colorado*, in *Herr v. Johnson*, 11 Colo. 393.

In *Matthews v. Ansley*, 81 Ala. 20, it seems to be held that English statutes are not in force unless passed before the settlement of this country.

The law of England, both common and statute, as it was at the organization of the provincial government, is the law of New Hampshire, so far as it consists with the institutions of that state, unless it be repugnant to the constitution, or altered or repealed by some statutory or legislative enactment. *State v. Moore*, 26 N. H. 448, 59 Am. Dec. 354.

Delaware Constitution 1776, art. 25, provides that the "common law of England as well as so much of the statute laws as has been heretofore adopted in practice in this state shall remain in force, unless they shall be altered by future law of the legislature, such parts only excepted as are repugnant to the rights and privileges contained in this constitution and the declaration of rights agreed to by this convention." *Del. Laws, Appendix*, p. 89; *Clawson v. Primrose*, 4 Del. Ch. 643.

The *Statute of 32 Hen. VIII.* chap. 34, § 1, giving the assignee of a reversion the legal title to the rent, being one of the English statutes adopted by the *Illinois* statute, the construction given to that Act by the *British* courts was also intended to be adopted. *Fisher v. Deering*, 60 Ill. 114.

By the adoption of the common law "as recognized in the United States" as a basis of jurisprudence by the *New Mexico Act of 1876*, no statutes

except when some positive rule of the common or statutory law has provided otherwise." Bishop, Cont. § 158; *Mallory v. Gillett*, 21 N. Y. 412; *Wyman v. Goodrich*, 26 Wis. 21; *Green v. Brookins*, 28 Mich. 48, 9 Am. Rep. 74; *White v. Maynard*, 111 Mass. 250, 15 Am. Rep. 28. By the common law prior to the enactment of the statute of frauds (29 Car. II. chap. 8, A. D. 1676), contracts for the sale of real estate, or an interest therein, were not required to be in writing. Bishop, Cont. § 1281; 4 Kent, Com. p. 450. The English-speaking people brought the common law to America with them, in the first settlement of the colonies; and it has prevailed in all the states and territories, modified by legislative acts, local conditions, and such of the English statutes adopted prior to the settlement of our colonies as

were of general application, and suited to our conditions, except in some portions where the French or civil law prevailed. At the time of the settlement and discovery of America the statute of frauds had not been adopted, and has only become the law of the United States, or of our several states and territories, by legislative enactment. This leads us to the inquiry, Did the common law prevail in the territory in April, 1889? It is contended that prior to the settlement of Oklahoma, and until the same was superseded by statutory laws, the Code Napoleon, or civil law, prevailed. Whatever may have been the laws of the country now known as Oklahoma, they ceased to operate in the region originally comprising the Indian territory when the territory ceased to be a part of the territory of Louisiana, and the laws

were repealed but only such portions of the common law adopted as did not conflict with the existing laws. *Bent v. Thompson* (N. M.) Jan. 23, 1890.

The common law as it stood in 1775 was adopted in Tennessee. *Porter v. State*, Mart. & Y. (Tenn.) 226.

The common law brought to this country by our ancestors was the law as then modified by statutes. *Sackett v. Sackett*, 8 Pick. 309.

The common law adopted by the Ordinance of 1787 was the law as then understood and expounded by the courts in America. *Penny v. Little*, 4 Ill. 301.

In adopting the common law of England, it is adopted as amended or altered by the English statutes in force at the time of the migration of our colonial ancestors. *Hamilton v. Kneeland*, 1 Nev. 44.

The English statutes passed before the American Revolution are part of the common law in this country, so far as applicable to our condition and not abrogated. *Coburn v. Harvey*, 18 Wis. 148.

The statute law of the mother country when introduced into the colony of New York because it was applicable to the colonists in their new situation and not by legislative enactment, becomes a part of the common law of the province. *Bogardus v. Trinity Church*, 4 Paige, 178, 3 L. ed. 394.

The early English statutes enacted before the settlement of New York such as the Statute of Merton, are part of the common law of New York. *Miller v. Miller*, 18 Hun, 512.

That many statutes were practiced under nearly a century in the province of Pennsylvania which were never adopted by the legislature is stated in *Republica v. Masca*, 1 U. S. 1 Dall. 75, 1 L. ed. 43.

The common law of England has always been in force in Pennsylvania, but British statutes before the settlement of Pennsylvania have no force there, unless they are convenient and adapted to the circumstances of the country, and statutes made since the settlement of Pennsylvania have no force there, unless the colonies are particularly named. *Morris v. Vanderen*, 1 U. S. 1 Dall. 67, 1 L. ed. 40.

In the Pennsylvania Act of January 28, 1777, it is provided that the common law and such of the statute laws of England as have been heretofore in force in the said province shall be in force except as therein excepted. The exception relates to the oath of allegiance to the king, the acknowledgment of authority in the heirs of William Penn, the laws as to members of assembly and elections, and as to treason, and "anything inconsistent with the then existing constitution." Report of Judges, 3 Binn. 565.

The report of the judges as to what English statutes are in force in Pennsylvania, says it has always been held that many of the English laws relating both to property and to felonies would have been improper for the state of things in an infant colony, and accordingly they were never practically extended here. It is said also that with respect to English statutes enacted since the settlement of Pennsylvania, "it has been assumed, as a principle, that they do not extend here unless they have been recognized by our acts of assembly or adopted by long-continued practice in courts of justice." *Ibid*.

Where the English statutes contravene or change the common law and are not so incorporated into it as to become part and parcel of the system, it is supposed that they have no force in Ohio independent of legislative enactment adopting them. *Crawford v. Chapman*, 17 Ohio, 452.

The right to distrain for rent, without any express provision therefor in a lease, is recognized in Illinois under the Act of February 4, 1819, adopting the common law and statutes, or acts of parliament in aid of it prior to the fourth year of James I., although the right to distrain in such a case in England did not exist until the fourth year of Geo. II. The legislation adopting the common law had reference to that law as it then existed. *Penny v. Little*, 4 Ill. 301.

Michigan having never been a common-law colony, the common law recognized in the jurisprudence of that state is the English common law unaffected by statute. *Re Lamphere*, 61 Mich. 105.

It should be noted in reference to the above statement that the English statutes have been expressly repealed in Michigan, although that fact is not expressly made the basis of the declaration. It is, however, referred to in the same connection and probably should be regarded as the ground of the declaration which otherwise would be in conflict with the doctrine of nearly all other courts. See also, in this connection, the cases concerning repeal of English statutes, *infra*.

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Particular Illustrations.

The Statute of 6 Anne, chap. 31, § 8, denying liability to others for accidental fire started on one's own premises, is a part of the common law in Wisconsin. *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69.

That statute as re-enacted by 14 Geo. III., is also a part of the common law in force in New York. *Lansing v. Stone*, 14 Abb. Pr. 202, 37 Barb. 15.

The statute of Anne as to the negotiability of paper is not in force in Indiana. As the fourth year of James I. is fixed by statute as the time when such statutes ceased to be part of the

of the territory of Indiana and the territory of Missouri, which may have once prevailed in said region, became inoperative in—ceased to have any force or effect in—the Indian territory, when that territory ceased to be a part of said territories. *St. Louis & S. F. R. Co. v. O'Loughlin*, 4 U. S. App. 283, 49 Fed. Rep. 440. There was no law in the Indian territory regulating the making of contracts at the time of the approval of the act of congress establishing a United States district court in said territory by the Act of March 1, 1889. 25 Stat. at L. 783. Congress, with the assent of the Indians, created the court for the whole of the Indian territory, which included Oklahoma, and conferred on it jurisdiction in all civil cases between citizens of the United States who are residents of the territory, or between citizens of the

United States or of any state or territory, and any citizen of, or person residing or found in, the Indian territory. It gave the court authority, and imposed upon it the duty, to apply the established rules and principles of the common law to the adjudication of those cases of which it was given jurisdiction. *Pyeatt v. Powell*, 10 U. S. App. 200, 51 Fed. Rep. 551. But if it be held that the establishment of a United States court in the Indian territory did not put the common law in force in said territory, except in so far as was necessary to execute the powers of said court, and for the adjudication of such cases as actually went into that forum, then there was no law in Oklahoma, at the date of its settlement, regulating the making of contracts. If this should be conceded, then it necessarily follows, on principle, that when

common law adopted. *Holloway v. Porter*, 46 Ind. 62.

The Statute of 4 & 5 Anne, chap. 16. § 9, dispensing with attornment to create privity and enabling an assignee to sue for rent, is not in force in Illinois for the same reason. *Fisher v. Deering*, 60 Ill. 114.

The Statute of 12 Anne in derogation of the common law against usury was adopted by the New York Constitution of 1777. *Henry v. Bank of Salina*, 5 Hill, 536.

The Act of Charles II., as to the service of process on Sunday, is not in force in Alabama because it was passed after the settlement of this country. *Matthews v. Ansley*, 31 Ala. 20.

The court here seems to adopt a rule that has not been followed elsewhere.

The English Statutes of 30 Charles II., chap. 7, and 4 and 5 William & Mary, chap. 24, concerning the liability of executors and administrators, became a part of the law of Maryland. *Sibley v. Williams*, 3 Gill & J. 62.

The Statutes of 13 Edw., chap. 11, and 1 Rich. II., chap. 12, concerning escapes, were held in 1800 to be in force in Pennsylvania. *Shewell v. Fell*, 3 Yeates, 17.

They are also in force in Illinois. *Plumleigh v. Cook*, 13 Ill. 639.

The Statute of Gloucester, 6 Edw. I., chap. 5, as to waste by tenants for life became a part of the law of Massachusetts. *Sackett v. Sackett*, 8 Pick. 309.

The 45th chapter of 13 Edw. I. giving the writ of *scire facias* is in force in Florida by virtue of the Act of November 6, 1820, adopting the common and statute laws of England which are of a general and not of a local nature, with certain exceptions and provisos. *Union Bank of Florida v. Powell*, 3 Fla. 175, 52 Am. Dec. 367.

A *scire facias* given by the Statute of Westminster in aid of the common law is in use in Illinois. *Sans v. People*, 8 Ill. 327.

The writ of *scire facias*, whether it depends on the common law or English statutes, came to Virginia upon the settlement of the colony. *Dykes v. Woodhouse*, 3 Rand. (Va.) 237.

The Statute of *Quia Emptores*, 18 Edw. I., forbidding the creation of new tenants by means of subinfeudation, became a part of the common law of New York. *Van Rensselaer v. Hays*, 19 N. Y. 73, 75 Am. Dec. 278.

The Statute of 2 and 3 Edw. VI., chap. 24, as to the locality of a homicide for the purpose of jurisdiction, where a person is injured in one county and dies in another, is a part of the common law of Massachusetts. *Com. v. Macloon*, 101 Mass. 10, 100 Am. Dec. 89.

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The Statutes of 1 Edw. III., chap. 16, and 34 Edw. III., chap. 1, respecting the jurisdiction and powers of justices of the peace, became a part of the common law of Massachusetts and were adopted by usage. *Com. v. Leach*, 1 Mass. 61; *Com. v. Knowlton*, 2 Mass. 535.

The Act of 23 Edw. III., chap. 13, under which a trial *per medietatem lingue* is allowed was in force in the province of Pennsylvania and therefore adopted by the first legislature under the commonwealth, as one of the statutes which had been in force. *Respublica v. Mesca*, 1 U. S. 1 Dall. 75, 1 L. ed. 43.

The Statute of 5 Eliz. as to apprentices and servants is not applicable to the condition of Alabama. *Clark v. Goddard*, 39 Ala. 184, 84 Am. Dec. 777.

The Statute of Elizabeth concerning charitable uses is presumed to have been in force in the colony of New York. *Yates v. Yates*, 9 Barb. 337.

In Reformed Prot. Dutch Church v. Mott, 7 Paige, 77, 4 L. ed. 77, 32 Am. Dec. 613, it was said that the Statute of Elizabeth relative to charitable uses was never acted upon in this state, but the court held that the law of charities existed before that statute.

The Statute of 43 Eliz., chap. 4, in regard to charitable uses, became a part of the law of Massachusetts. *Goling v. Emery*, 16 Pick. 107, 28 Am. Dec. 645.

The English Statute of Uses constitutes a part of the common law of Alabama. *Horton v. Sledge*, 29 Ala. 478.

In Pennsylvania, it is held that the Statute 43 Eliz. chap. 4, was not adopted there. *Witman v. Lex*, 17 Serg. & R. 88, 17 Am. Dec. 644.

But the Statute of Elizabeth as to charitable uses is held to be in force in Vermont. *Burr v. Smith*, 7 Vt. 241, 29 Am. Dec. 154.

The Statutes of Elizabeth restraining alienation of real estate by charitable corporations were a part of the common law of New York. *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 46 N. Y. 141.

In *De Ruyter v. St. Peter's Church*, 3 Barb. Ch. 124, 5 L. ed. 843, it is said that they were probably a part of the law of the colonies.

In Kentucky, it is held that none of the mortmain acts of England were ever in force on the ground that those acts were local and not applicable to the British colonies. *Lathrop v. Commercial Bank of Scioto*, 8 Dana, 114, 33 Am. Dec. 481.

The English Statute of 9 Geo. I., commonly called the "Black Act," being made to protect the forest and parks, although containing provisions also against the malicious shooting of persons, cannot be regarded as a part of the common law

people from all parts of the United States, on the 22d day of April 1889, settled the country known as Oklahoma, built cities, towns, and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma, with them, the established principles and rules of the common law, as recognized and promulgated by the American courts, and as it existed when imported into this country by our early settlers, and unmodified by American or English statutes. So that, in any event, the common law prevailed in Oklahoma at the time the contract between the appellant and appellee was entered into; and as, at common law, contracts for the sale or conveyance of real estate were not required to be in writing, the contract mentioned in the complaint

may be enforced, unless void for other reasons.

It is contended that the contract is one for the sale of an interest in public lands, made before the title had passed from the United States, and hence is void as against public policy. We are aware that some of our courts have adopted this rule, and there are many strong reasons in support of it; but the Supreme Court of the United States, in *Lamb v. Davenport*, 85 U. S. 18 Wall. 807, 21 L. ed. 759, said: "Unless forbidden by positive law, contracts made by actual settlers on lands, concerning their possessory rights, and concerning the title to be acquired in future from the United States, are valid, as between the parties to the contracts, though there be at the time no act of congress by which title

of Georgia. *State v. Campbell*, T. U. P. Charlt. 167.

The Statutes of Limitation of 32 Hen. VIII., chap. 2, and 21 James I., chap. 16, are a part of the law of the colony of New York. *Bogardus v. Trinity Church*, 4 Paige, 178, 3 L. ed. 304.

The Statute of 32 Hen. VIII., chap. 2, was held in 1767 to be in force in Pennsylvania. *Boehm v. Engle*, 1 U. S. 1 Dall. 15, 1 L. ed. 17; *Morris v. Vanden*, 1 U. S. 1 Dall. 67, 1 L. ed. 40.

But the Statute 32 Hen. VIII., chap. 2, against embezzlement, is not in force in Pennsylvania, neither is the Act of 21 Jac. I., chap. 16. *Morris v. Vanden*, *supra*.

The ground of decision in respect to these statutes is not stated.

The ancient common-law rule that an assignee of rent and reversion could only maintain an action of debt and not an action of covenant, having been changed by Statute 32 Hen. VIII., chap. 34, is not a part of the common law of Connecticut. *Baldwin v. Walker*, 21 Conn. 181.

The Statute of 32 Hen. VIII., chap. 34, which permits grantees of reversions and privies in estate to take advantage of a breach of a condition, is a part of the common law adopted in this country. *Hamilton v. Kneeland*, 1 Nev. 40. See *Fisher v. Deering*, 60 Ill. 114.

The Statute of 32 Hen. VIII., chap. 34, giving grantees of reversions the right to enforce real covenants, has not become incorporated into the law of Ohio. *Crawford v. Chapman*, 17 Ohio. 452.

The alteration of the common law by Statute 32 Hen. VIII., chap. 23, which gives a wife and her heirs a right of entry after her husband's death notwithstanding a deed of her premises by him, is a part of the common law of Massachusetts. *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 330.

The Statute of 21 Jac. I., chap. 12, as to the locality of actions against officers seems to have been in force in Massachusetts before the Revolution, but was subsequently repealed by implication. *Pearce v. Atwood*, 13 Mass. 354.

The Statute of James passed in 1623 is said never to have had any existence in Delaware, but the Act of 15 Geo. II., was the first statute of limitations known to have been in force in that colony. *Hulley v. Security Trust & S. D. Co.* 5 Del. Ch. 578.

The Statutes 8 & 9 Wm. III., chap. 11, § 7, as to abatement of suits on the death of one of the plaintiffs or defendants, seem to have been adopted in Massachusetts. *Boynton v. Rees*, 9 Pick. 532.

The Statute of William & Mary, chap. 5, as to distress and sale for rent is not in force in North Carolina, being held utterly irreconcilable to the spirit of a free republican government. *Dalglish v. Grandy*, Taylor & C. 161.

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The Statute of William & Mary, chap. 5, which gives the right to distrain for rent, being expressly recognized in Wisconsin by the Statute of 1839, must be regarded as a part of the common law which was perpetuated by the constitution. *Coburn v. Harvey*, 18 Wis. 148.

But the right of the landlord to distrain for rent in the absence of an express agreement therefor, not existing in England prior to the fourth year of James I., cannot be regarded as a part of the common law adopted in Colorado. *Herr v. Johnson*, 11 Colo. 333. See also *Penny v. Little*, 4 Ill. 301.

The English statutes as to benefit of clergy were local and not a part of the common law. *Fuller v. State*, 1 Blackf. 63.

In *Girard v. Philadelphia*, 4 Rawle, 333, 26 Am. Dec. 145, it is said that it is practically clear that the English statutes of wills were originally in force in Pennsylvania.

Repeal of English statutes.

An express repeal of English statutes was made by the Michigan Act of 1810, by the Iowa Act of 1840, and by the New York Laws of 1823, chap. 21, § 1, which declare that no English statute should be regarded as in force in New York since May 1, 1783.

In *Helfenstine v. Garrard*, 7 Ohio, 276, it is held that the English Statute of Uses, 27 Hen. VIII., chap. 10, is not in force in Ohio, and that if it ever was in force there, it became so by statute and was repealed by the Acts of 1805 and 1806.

An Ohio statute in 1873, adopted from Virginia, made the English statutes up to the fourth year of James I. in force so far as they aided the common law and were not inapplicable, but this act was repealed and re-enacted in 1805 and again repealed in 1806. Therefore British statutes contravening or changing the common law are not in force in Ohio except as they are made so by re-enactment, unless they are so incorporated into the common law as to be part and parcel of it. *Crawford v. Chapman*, 17 Ohio, 452.

An interesting question arises as to whether such repeal of English statutes is to be regarded as excluding from consideration those English statutes which had become a part of the common law of the colonies; that is to say whether the adoption of the common laws is to be regarded, notwithstanding this general repeal of English statutes, to be the adoption of the common law unaffected by any English statutes, or as modified and perfected by English legislation as well as decision down to the time of this adoption.

In *Lansing v. Stone*, 37 Barb. 15, the latter is held to be the correct rule, and that English statutes which were a part of the common law of the col-

may be acquired." This case is decisive of the question at issue, and is supported by the ruling of the same court in the case of *Hussey v. Smith*, 99 U. S. 20, 25 L. ed. 814. There was no positive law, at the time this contract was entered into, forbidding the sale of town lots by settlers, and the contract was binding in law, and may be enforced by a proper proceeding.

The complaint states a cause of action, and the demurrer thereto should have been overruled. The court below erred in sustaining the demurrer to the complaint, and for that error the judgment is reversed, at costs of appellee. The cause is remanded to the court below, with instructions to overrule the demurrer, and for further proceedings in accordance with this opinion.

any of New York continued, notwithstanding such repealing act, to be a part of the common law.

So, in *Miller v. Miller*, 18 Hun, 512, it is declared that early English statutes such as the Statute of Merton are part of the common law of New York but no mention is made of the repealing acts.

To similar effect it is held in *O'Ferrall v. Simplot*, 4 Iowa, 361, that the Statute of Merton is not abrogated in Iowa by the Act of 1840, declaring that none of the statutes of Great Britain shall be considered as laws of that territory, but the statutes intended will be held to be those of Great Britain after the Union with Scotland in 1707.

But to the contrary it was held in *Levy v. McCarter*, 81 U. S. 6 Pet. 102, 8 L. ed. 384, that the words "common law" used in the New York Constitution of 1777 and the Statute of Descents of 1786 adopting the common law, were used to mean the unwritten law as distinguished from statutes, even those antecedent to the American Revolution, and especially after the Act of 1788, declaring that none of the statutes of England or Great Britain shall be considered laws of the state, the Statutes of 11 & 12 Wm. III., chap. 6, in respect to descents, cannot be regarded as in force in New York.

In Wisconsin the Michigan Act of 1810, which became a part of the law of Wisconsin, was re-

pealed by Wis. Rev. Stat. 1849, p. 750, but by p. 757, chap. 157, § 5, all statutes abrogated by any law repealed were deemed abrogated, therefore English statutes are repealed in Wisconsin. In several cases English statutes have been held to be a part of the common law of that state, without considering the effect of such repealing act. In *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 273, it was held that the English Statute of Mortmain and the Statute of 43 Eliz. chap. 14, were not in force in that state, but here again there is no discussion of the effect of the repealing act.

The repeal by the Iowa Act of 1840 of the Statute of Michigan and Wisconsin did not repeal the Ordinance of 1787, as applied to that territory. *O'Ferrall v. Simplot*, 4 Iowa, 361.

In repealing the Statute of Elizabeth and the Statute of Mortmain, the New York legislature did not intend to ratify and reintroduce the system of pious and charitable uses which prevailed in England before the reformation. *Ayers v. Methodist Episcopal Church Trustees*, 3 Sandf. 398; *Downing v. Marshall*, 23 How. Pr. 39.

The question of the repeal or abrogation of the common law in any particular is not here entered upon, but the subject of repeal considered only in respect to British statutes. B. A. E.

WISCONSIN SUPREME COURT.

Ettie C. CAMERON, *Appt.*,

v.

E. P. MOUNT, *Respnt.*

(.....Wis.....)

Representations that a horse is safe for a lady to drive, by which she is induced to drive the horse on trial and is thrown out and injured by the plunging and kicking of the horse, which is in fact an ugly, vicious, and tricky animal, create a liability in the nature of a tort for breach of a warranty of the safety of the horse, although the person making the representations did not know that they were false.

(November 22, 1908.)

APPEAL by plaintiff from an order of the Circuit Court for Walworth County granting a new trial after verdict in her favor in a proceeding brought to recover damages for personal injuries alleged to have been inflicted upon her by the viciousness of a horse which defendant was trying to sell to her husband, and which she undertook to try, upon defendant's statement that the horse was safe for her to drive. *Reversed.*

The facts are stated in the opinion.

Messrs. Ryan & Merton, for appellant:

Plaintiff drove this horse at the special solicitation and request of the defendant, and it was so driven by the plaintiff relying upon the representation that it was kind, gentle, and fit for a lady to drive. Such representation amounted to a warranty.

Smith v. Justice, 13 Wis. 601; *Barnes v. Burns*, 81 Wis. 235.

A warranty of the fitness of an animal for family use for the trial trip, made under the circumstances of the one in this case, can be upheld.

Personal property may be sold upon trial with a warranty, and if the property is not as warranted or represented, the intended purchaser may recover his damages.

Benjamin, Sales, p. 792, note; *Northwood v. Rennie*, 3 Ont. App. Rep. 87; *Day v. Pool*, 53 N. Y. 416, 11 Am. Rep. 719; *Kimball & A. Mfg. Co. v. Vroman*, 85 Mich. 810.

Where a warranty is given, the legal effect is usually, if not universally, to make the stipulation or warranty stand as security for performance, and the injured party prosecutes his remedy upon it to enforce it.

Kimball & A. Mfg. Co. v. Vroman, *supra*.

Where there is an express warranty, we need

NOTE.—The question of liability on a warranty not made as part of a contract of sale where a person has been damaged by reliance thereon seems to be 22 L. R. A.

a novel one. While the decision is expressly based on the doctrine of warranty the case is in some respects very similar to cases of negligence.

not prove that the party who made the warranty knew it to be false.

Swayne v. Waldo, 78 Iowa, 749; *Frenzel v. Miller*, 87 Ind. 1, 10 Am. Rep. 62; *Dowling v. Lawrence*, 58 Wis. 283; *Ohweiler v. Lohmann*, 82 Wis. 204.

A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given over or undertaken by the other. Consideration may either be the doing of the act or the giving of the promise.

82 Am. & Eng. Encyclop. Law, p. 831; *Train v. Gold*, 5 Pick. 880; *Burrough v. Hill*, 14 R. I. 225; *Hewett v. Currier*, 63 Wis. 386; *Norwood v. Faulkner*, 22 S. C. 367, 53 Am. Rep. 717.

Mr. Warham Parks, for respondent:

There can be no doubt but that this action as originally brought was an action in tort, for a willful misrepresentation of the character of the horse, whereby the plaintiff was induced to use him and was injured in consequence thereof, and alleged a scienter. After a trial which resulted in a disagreement of the jury, the plaintiff amended his former complaint and since said time it has been an open question unsolved and hardly solvable whether the action was then changed by said amendment from an action *ex delicto* to an action *ex contractu*. No amendment could be allowed changing the action from one on contract to one in tort, or from one in tort to one on contract.

Lane v. Cameron, 88 Wis. 608; *Kewaunee County Suprs. v. Decker*, 34 Wis. 378; *Sweeney v. Vroman*, 60 Wis. 278; *Barndt v. Frederick*, 11 L. R. A. 199, 78 Wis. 8.

But it possibly might be in this case under the rule in *Pierce v. Carey*, 87 Wis. 282; but see also *Western Assur. Co. v. Towle*, 65 Wis. 254.

There can be no warranty that is not a contract. A warranty must be upon sale, one of the terms of the contract of sale; must be upon consideration; there can be no warranty that is not a contract; it must be entered into and accepted by both parties as an agreement between them.

Halley v. Folsom, 1 N. Dak. 325; *Hogins v. Plimpton*, 28 Mass. 97; *Spalding v. Conant*, 146 Mass. 292; *White v. Stelloh*, 74 Wis. 438.

In order to create a warranty there must be a contract and assertions or affirmations of quality, made by the owner during the negotiation for the sale, which may be supposed was intended to cause the sale and operated in causing it. If such affirmation was made in good faith it is still a warranty, and if made with a knowledge of its falsity is a warranty and also a fraud.

Hopkins v. Tanqueray, 26 Eng. L. & Eq. 254, 15 C. B. 130; *Parsons*, Cont. 7th ed. 621, 5th ed. 580.

A warranty in order to become a part of the contract and to be a warranty, must be made at the time of the sale and be one of the terms of the contract of sale.

Congar v. Chamberlain, 14 Wis. 258; *Morehouse v. Comstock*, 42 Wis. 626; *Collette v. Weed*, 68 Wis. 428; *Barker v. Cleveland*, 19 Mich. 230; *Benjamin*, Sales, 2d ed. 748.

In all cases where an action is brought for injury done to person or property by another,

by domestic animals, such as horses, oxen, etc., the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the pleadings and proven upon trial as a condition of recovery.

2 Shearm. & Redf. Neg. § 629, p. 489, and note; *Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346, and cases cited, and note; *Dickson v. McCoy*, 39 N. Y. 403; *Graham v. Payne*, 122 Ind. 403; *Murray v. Young*, 13 Bush, 337; *Moynahan v. Wheeler*, 117 N. Y. 285; *Finney v. Curtis*, 78 Cal. 498; *State v. Donohue*, 49 N. J. L. 548; *Klenberg v. Russell*, 125 Ind. 531; 1 Hilliard, Torts, 3d ed. p. 564; *Dearth v. Baker*, 22 Wis. 78; *Kertschacke v. Ludwig*, 28 Wis. 481; *Chunot v. Larson*, 43 Wis. 543, 23 Am. Rep. 567.

So far as the evidence shows, the statement of the defendant that the horse was gentle, was true, and if so, there is no ground upon which the verdict can be upheld.

Finney v. Curtis, *supra*; 2 Shearm. & Redf. Neg. § 647, and note 4, p. 513; *Kennedy v. New York*, 73 N. Y. 865, 29 Am. Rep. 169.

And even where the animal has been mischievous under special circumstances, the owner is not bound to foresee that it may be mischievous under other circumstances, not affecting its disposition.

Tupper v. Clark, 43 Vt. 200; *Cockerham v. Nixon*, 33 N. C. 269; *Windle v. Jordan*, 75 Me. 149.

It must be shown in order to hold the liveryman responsible, in the horse let out for hire to a bailee, before a recovery can be had of him for an injury sustained on account of the conduct of the horse, that such conduct was a habit of the horse known to his owner.

Hadley v. Cross, 84 Vt. 586, 80 Am. Dec. 699; *Inglis v. Bills*, 9 Met. 1, 48 Am. Dec. 346, and note.

The representation of the party that the horse was kind and gentle and fit for a lady to drive did not make him an insurer of the safety of the lady in driving him.

Inglis v. Bills, *supra*; 2 Shearm. & Redf. Neg. § 494.

The measure of damages in a breach of contract for warranty does not contemplate such damages as is prayed for here.

Case v. Stevens, 137 Mass. 551; *Allen v. Trucedell*, 135 Mass. 77.

If this was a warranty, it was a fraudulent warranty, and knowledge must be proven and alleged in a fraudulent warranty as in all actions for injuries from animals.

Pierce v. Carey, 87 Wis. 282; *Dowling v. Lawrence*, 58 Wis. 282; Hilliard, Torts, 3d ed. p. 84, and notes; *Sackett*, Instruction to Juries, p. 147; *Walker v. Hough*, 59 Ill. 375.

Orton, J., delivered the opinion of the court:

The complaint states the following case: The plaintiff's husband, Claude N. Cameron, wished to buy a kind and gentle road horse for his wife to drive. The defendant called upon the said Claude N. Cameron, and told him that he had been informed he wished to buy a horse for his wife, and that he had with him a kind, gentle, and safe horse, to

sell; whereupon the said Claude called his wife, the plaintiff, to look at the horse, and she came and looked at him, and asked the defendant if the horse was kind and gentle, and free from any bad tricks and habits. The defendant then and there represented and warranted to the plaintiff that said horse was kind and gentle, and free from any tricks and bad habits, and that he was perfectly safe and well calculated for a lady to drive, and invited her to get in his buggy and drive the horse herself. The plaintiff, relying on said representations and warranty, got into the buggy to drive the horse, to try him, and, after driving a short distance, she attempted to turn around, and the horse made a sudden plunge, reared up, and kicked and upset the buggy, and the plaintiff was thrown violently to the ground, and permanently injured in her spine, and bruised and injured in other places on her body, to her damage of \$3,000. In truth and fact the horse was an ugly, vicious, and tricky animal, and not a safe driving horse, and entirely unsuitable for a lady to drive or manage. On the trial of the action the facts stated in the complaint were substantially established by the testimony of the plaintiff and her witnesses, and the jury found a special verdict in her favor, and her damages at \$3,000. The defendant made a motion for a new trial, based on several grounds, and especially on the ground that the complaint did not state a cause of action. The court granted the motion, but without stating any grounds therefor, and without terms. The plaintiff has appealed from this order. The briefs and arguments of counsel on both sides go to the question of the sufficiency of the complaint, it not being alleged therein that the defendant knew at the time he made the said representation and warranty that they were untrue. There was no scintilla alleged in the complaint. The learned counsel seem to be of the opinion that this deficiency of the complaint was the real ground for the granting of a new trial. The jury found specially that the defendant knew that the representations and warranty were false, but it is conceded that there was no evidence to sustain such a finding. The learned counsel of the appellant contend that this was not a good ground for ordering a new trial of the action, and, on the other hand, the learned counsel of the respondent contend that this reason was not only sufficient for ordering a new trial, but that the plaintiff cannot recover without such an averment and proof of a scintilla. There seemed to be great doubt on the trial, as well as here, whether the action is in tort or on contract. We are inclined to hold that such an averment and proof are not necessary to sustain the action, and that the action is in tort. The representations and warranty set out in the complaint are not strictly and technically a "warranty," as in sales of personal property. If they were, no one would contend that it would be necessary to prove that the defendant knew that the facts or conditions embraced therein did not exist or were not true, and the action would be on contract. On such a warranty the law is well settled; but, nevertheless, they do con-

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stitute a warranty of the facts and conditions embraced therein as effectually, and are an assurance and engagement just as positive and absolute, as a technical warranty. To sustain an action on such a warranty there is no more necessity of proof that the defendant knew that his statement was false than in the other case of a warranty. The action on a warranty in the sale of personal property is on contract. The action on a warranty relating to other matters or transactions is in tort, and the warranty is a constructive fraud, like a false representation. The learned counsel of the respondent contends that no warranty, as such, can exist except in relation to sales. To show that a warranty may exist in its strictness so far as to dispense with proof that the defendant knew its falsity with respect to other matters than sales, and to illustrate the principle, the case of *Kuehn v. Wilson*, 13 Wis. 105, may be referred to. The defendant, as a farrier, treated the plaintiff's colt, and "warranted the colt would get well and do well," and it died within a short time thereafter without any fault of the plaintiff. *Mr. Justice Cole* said in the opinion: "An express warranty that the colt would get well would be an absolute engagement to make good the loss if the colt died. The warrantor would take the chances and hazards," etc. Here there is a warranty that the horse was perfectly safe and well calculated for a lady to drive, and that he was kind and gentle, and had no tricks or bad habits, and the same "absolute engagement to make good the loss" or damage if the horse was not perfectly safe and well calculated for a lady to drive, and "the warrantor took the chances and hazards" of the experiment. Such warranties constitute a class of frauds, exceptional to the common cases of mere false representations, where an intent to defraud and a knowledge that they were false must be proved. It is an absolute and unconditional engagement to make good the loss.

The following is a terse and yet comprehensive statement of the law governing this kind of warranty, taken from *Gregory v. Schoenell*, 55 Ind. 101, found in a note to 8 Am. & Eng. Encyclop. Law, 793: "The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. In such a case the law holds a party bound to know the truth of his representations." "Whoever pretends to positive knowledge of a particular fact, when he does not know it, and represent such fact to be true, in order that another may rely upon it and act upon it, and does rely and act upon it, and damages flow from the false representation, the person making it is guilty of willful deception and fraud." "If he affirms that to be true within his own knowledge which he does not know to be true, this falls within the notion of legal fraud." "If a man having no knowledge whatever on the subject takes upon him-

self to represent a certain state of facts to exist, he does so at his peril; and if it is done to procure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he asserts." "A reckless statement, made without caring whether it is true or false, is actionable." "In such cases it is not necessary to prove that the defendant knew that the representation was not true." These extracts are taken from the following cases, in which it is held that it is immaterial whether the defendant knew the falsity of the express and positive statement which he has made, and upon which another has relied and acted to his injury. *Taylor v. Ashton*, 11 Mees. & W. 415; *Smout v. Ilbery*, 10 Mees. & W. 10; *Parson v. Watson*, Cowp. 788; *Pulsford v. Richards*, 17 Beav. 94; *Haycraft v. Creasy*, 2 East. 108; *Evans v. Edmonds*, 18 C. B. 786; *Burrowes v. Lock*, 10 Ves. Jr. 470; *Pasley v. Freeman*, 8 T. R. 51; *Milne v. Marwood*, 15 C. B. 778; *Addison, Torts*, 738, 739.

It has been the doctrine of the English courts a long time that when the representation is so positive and absolute as to have the force of an express warranty it is immaterial whether the defendant knew it to be false or not. The representations and warranty in this case have all the accompanying ingredients to make it an actionable fraud. The defendant invited and induced the plaintiff to drive the horse, and she did so, relying upon his representation and warranty that it was perfectly safe for her to do so, and his other assurances of the gentle character of the animal. The defendant was interested in inducing the plaintiff to drive the horse, so that, if it should happen in this instance that the horse should not exhibit any of his unruly and dangerous habits, he might sell him to the plaintiff's husband; and the plaintiff was also interested in the trial, so

that she might have a gentle and safe horse to drive. The defendant assumed all the risks and hazards of the trial, and the plaintiff staked her personal safety on the truth of his representations and warranty, and her severe and permanent injuries were the proximate consequences. This is a very strong case for the application of the principle of the law of warranty. The defendant made his statements as his own actual knowledge, and the plaintiff had no knowledge of the horse or his habits. There is nothing wanting in the case to make the defendant liable, according to the authorities, if the complaint is sustained by the evidence. The case should be tried on the true theory of what the action is and on a correct view of the law that governs it; and there seems to have been great doubt upon the subject at the former trial. Not knowing from the order granting a new trial the grounds of it, this court cannot say that it was an abuse of the discretion of the circuit court to grant it. It would seem to be very proper, under the circumstances, that the action should be tried again. The order is erroneous in not having been made on the terms of the defendant paying all the taxable costs of the former trial. In the absence of any stated grounds for the order, the presumption is that it was made on the ground that the verdict is against the weight of the evidence, or on the merits; and in such case the order should have been made on such terms. *Garny v. Katz* (Wis.) 56 N. W. Rep. 912 (on the present calendar, not yet officially reported); *Pound v. Roan*, 45 Wis. 129; *Smith v. Lander*, 48 Wis. 587; *Schraer v. Stefn*, 80 Wis. 653.

The order of the Circuit Court is reversed, and the cause remanded, with direction to grant a new trial therein, on the terms of the defendant paying all the taxable costs of the former trial.

INDIANA SUPREME COURT.

BOARD OF COMMISSIONERS OF VIGO COUNTY, *Appt.*,

v.

Sidney B. DAVIS *et al.*

(.....Ind.....)

The action of county commissioners on petition under Acts 1893, p. 741, which says the board "may fix and allow a certain sum" within prescribed limits and that any such allowance and the proceedings of the board in relation thereto, "if in conformity with the provisions of this Act, shall be final and conclusive," is an exercise of the discretion of the board and is not a judicial act from which any appeal can be taken.

(McCabe, J., *dissent*.)

(January 11, 1894.)

APPEAL by defendants from a judgment of the Superior Court for Vigo County in favor of plaintiffs upon appeal from a decision of the Board of Commissioners refusing to authorize additional compensation to certain judges. *Appeal from the commissioner's decision dismissed.*

The facts are stated in the opinion.

Mr. Samuel R. Hamill for appellant.

Messrs. Isaac N. Pierce and Sidney B. Davis, *in propria persona*, for appellees.

Hackney, J., delivered the opinion of the court:

The appellees, twenty-one in number, proceeding under the Act of the General Assembly approved March 4, 1893, Acts 1893, p. 341, petitioned the appellant, representing that the salaries, as provided by law, of the Honorable David N. Taylor, judge of the

NOTE.—The above case is valuable, not so much by reason of the exact question decided as the very elaborate discussion of the general question, as to 22 L. R. A

the class of cases in which there is a right of appeal to a court from the decision of officers.

circuit court of Vigo county, and Honorable Cyrus F. McNutt, judge of the superior court of said county, were inadequate compensation for their services as such judges, and that such salaries should be increased as to each of said judges in the sum of \$1,500. The petitioners prayed a hearing as provided in said act, and that said salaries be so increased.

Such proceedings were had before said appellant that, after hearing evidence, the prayer of the petition was denied. From this ruling of the board, the petitioners appealed to the superior court, where the petition was heard by a special judge and the prayer thereof was granted. From the judgment of the superior court this appeal is prosecuted and several errors are assigned, one of which alleged errors is the action of said superior court in overruling the motion of the appellant to dismiss said appeal from the action of the board. The alleged reason for the dismissal of said appeal was that no appeal would lie from the said action of the commissioners.

The character and effect of the action of the commissioners is also presented by the appellee's motion to dismiss this appeal, and we find it our duty at the threshold of this controversy to determine this question, for upon it depends the jurisdiction of this court. It is manifest that if no appeal could lie from the action of the commissioners, the superior court had no jurisdiction, and its proceedings cannot be reviewed here.

Where the duty of the commissioners involves judicial action, an appeal lies from its judgment unless the right of appeal is denied expressly, or by necessary implication from the statute creating the duty. Where that duty does not involve judicial action, but consists in the performance of administrative, ministerial or discretionary powers, no appeal lies from such action unless it is expressly authorized by statute. *Bunnell v. White County Comrs.* 124 Ind. 1; *Farley v. Hamilton County Comrs.* 126 Ind. 468; *Platter v. Elkhart County Comrs.* 103 Ind. 860; *Waller v. Wood*, 101 Ind. 138; *Jackson County Comrs. v. State*, 106 Ind. 270; *Padgett v. State*, 98 Ind. 896; *O'Boyle v. Shannon*, 80 Ind. 159; *Grusenmeyer v. Logansport*, 78 Ind. 549; *Baltimore, O. & C. R. Co. v. St. Joseph County Comrs.* 73 Ind. 218; *Sims v. Monroe County Comrs.* 39 Ind. 40; *Moffit v. State*, 40 Ind. 217; *Bosley v. Ackelmirre*, 39 Ind. 536.

To which class the case in hand belongs must be determined from the act of the legislature under which these proceedings were had, and to that end we set out the act which is as follows:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana that the salaries of the judges of the circuit and superior courts of the state shall be twenty-five hundred dollars annually, payable quarterly out of the state treasury. Provided, that in all judicial circuits of this state containing any city which had a population of more than thirty thousand as shown by the last preceding United States census, whenever twenty or more resident freeholders of the county in which such city is situated shall, by their

petition filed with the board of commissioners of such county, represent that the annual salary of the judge of said circuit or superior court, as otherwise provided by law, is not an adequate compensation for the services of such judge, and should be increased in a sum to be specified in such petition, then it shall be the duty of the board of commissioners of such county, in open session, without delay, and at either a regular or special term of such board, to consider such petition and hear evidence thereon, and thereupon, within the limits of such evidence, but in no event in excess of the sum of fifteen hundred dollars or in excess of the sum specified in such petition, such board of commissioners may by entry of record fix and allow a certain sum as an addition to or increase of the annual salary of the judge of such circuit or superior court.

"Sec. 2. Upon such allowance being made by such board of commissioners, the sum so allowed shall be payable only out of the treasury of the county in which such petition is required to be filed, and shall be payable quarterly upon warrants drawn by the auditor of such county upon the treasurer thereof, and from and after the date of such allowance by such board, the same shall be held as an addition to the annual salary of such judge, as otherwise fixed and provided by law, and shall not be diminished during the term of office of such judge, and any such allowance and the proceedings of any board of commissioners in relation thereto, if in compliance with the provisions of this act, shall be final and conclusive."

The 3d section declares an emergency.

Several features of the act indicate to our minds the intention of the legislature to commit to the board of commissioners a discretionary power as to the increasing of judges' salaries and not as conferring a power the exercise of which could be held mandatory. The language of the act is permissive in that it entrusts to the board a discretion as to the amount to be fixed as representing the increase of salary. The language is that "such board . . . may fix and allow a certain sum." The word "may" has in some instances been construed as the equivalent of the word "shall," but in no instance to which our attention has been called, where it was evident that the act, from other points of view, conferred discretionary powers nor where it was not evident from the whole act that the legislative direction was mandatory.

The application of the rule that "may" is to be interpreted for "shall" depends on what appears to be the true intent of the statute, and the ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provision. *Sedgw. Stat. & Const. L. p. 377; Minor v. Mechanics Bank of Alexandria*, 26 U. S. 1 Pet. 46, 7 L. ed. 47.

It is earnestly contended by counsel for the appellees that the act does not contemplate adversary parties or proceedings in the sense that claims against counties are prosecuted. If it were conceded that this construction is correct, it but argues that the legislature did not intend to deprive the commissioners of

discretion in the matter of granting an increase of salary in any sum. The legislative grant of power to increase salaries certainly involved the duty of judging of the wisdom and propriety not only of the amount to be added, but as to whether any addition should be made. If this duty was not placed upon the commissioners, it had but one other place to rest, and that was upon the twenty petitioners. We cannot bring ourselves to the belief that the legislature intended to place the authority with the petitioners of judging conclusively that an increase of salary was proper and that the only duty or power of the commissioners was to adjudge the will of the petitioners with the incidental right to fix the amount of the additional salary.

Another indicium of the legislative intent to bestow a discretionary power upon the commissioners is found in the last clause of the second section in these words: "Any such allowance, and the proceedings of the board of commissioners in relation thereto, if in compliance with the provisions of this act, shall be final and conclusive." What shall be final and conclusive? Nor only the sum fixed, but the proceedings of the board in relation thereto.

But, it is said, such provision must be held not to imply a discretionary power, but as guarding the proceedings and the result from collateral attack, or from being questioned except by direct proceeding, such as an appeal. To this contention is cited the case of *Grusenmeyer v. Logansport*, 76 Ind. 549, and while we observe that the reasoning of the learned and able judge who wrote the opinion in that case would support the contention here, yet such question was not before the court in that case, and of course the value of the case as authority depends upon the question decided, and not upon the argument, illustrations, or reasoning of the judge when not directed to the point in dispute. See *State v. Hyde*, 18 L. R. A. 79, 139 Ind. 306.

In that case, the language of the statute standing in the place of the clause here quoted, was that the "order shall be conclusive in all suits by or against such incorporation." It was there said that such provisions "should not be regarded as an implied denial of the right of appeal," and with the conclusion reached we fully concur. We think it manifest that the expression there employed was designed to protect the incorporation proceedings from collateral attack. The order was made "conclusive in all suits by or against such incorporation," and it could not be implied that the order of incorporation was one of the suits concluded. The statute under investigation in this case is of a widely different character. The allowance, if any, is "final and conclusive," and the proceedings in relation thereto, regardless of the function involved, whether judicial, administrative, or ministerial, are "final and conclusive." This provision is not confined to other suits, but is sweeping in its effect so far as the particular proceeding is concerned. None of the force of this construction is lost by considering the words, "if in compliance with this act," for the reason that

if not in compliance with the act, such proceedings would be as vulnerable to collateral attack without such words. Nor could this provision, as to the conclusive character of the proceedings, have been intended to create an obstruction to such litigation as might reduce the allowance made, since by another provision of the act such a contingency is provided for. It is equally true that the provision was not intended to operate as a former adjudication against granting an increase within the limits of the maximum sum, because the intention of the act is to provide compensation at any time in proportion to the service performed. To construe the clause as denying the right of appeal and as entrusting the power of fixing salaries, within such limits, leads to the rational conclusion that the legislature would not deem it necessary or even prudent to guard the proceedings against collateral attack when the law is firmly settled and no longer in question that such proceedings could not be the subject of collateral attack if conducted according to the provisions of the act. In view of the now generally accepted doctrine that mere irregularities furnish no ground for collateral attack, and that where jurisdiction exists it will be presumed in all other proceedings to have been properly exercised, we cannot agree with the contention that the legislature ignored this doctrine as existing independent of the act, and then unnecessarily re-established it for the purposes of this special proceeding.

The appellees urge, as we have said, that the statute does not create an adversary proceeding, and this conclusion is obvious. The petitioners, not parties in immediate interest, invoke the power of the board. The power is not so exercised as to constitute an allowance in favor of any party to the record. A definite sum is not directed to be allowed, but a limitation is placed upon the sum which may be allowed. The board is the financial agent of the county, its power being supervisory as to the expenditure of the county, as to the levying of taxes and as to provision to meet the county's obligations. Such is the effect of our form of local government, and the legislature will be presumed to have acted with reference to this rule, unless it is expressly or by necessary implication provided that an exception shall exist. The act under consideration does not create an exception to the general rule.

If the obligations and the resources of the county were to form no part of the consideration of the question of increasing salaries, there was no occasion to have delegated the legislative power to the board to fix such salaries.

The statute under consideration confers the power upon the board to bind the county as by contract, and should be strictly construed. *Robinson, County & Township Officers*, § 38, and authorities there cited.

Rules of construction applicable to legislation in which the public at large are interested require liberality, while with reference to legislation granting powers or privileges to individuals for their own advantage, they require strict construction as against such in-

dividuals. *Ryan v. Vanlandingham*, 7 In. 416, 423; *Bradley v. New York & N. H. R. Co.* 21 Conn. 294.

As granting the prayer of the petition without discretion on the part of the board, the act would require liberal construction in favor of the individual rights and strict construction as against the public rights. But it is insisted that the action of the board in the hearing of evidence, as required by the legislature, is in its nature judicial, and that therefore an appeal lies from such action. While it would appear anomalous to grant the right of appeal to the petitioners, where they fail, and to permit no adversary party, not even the board, with the right of appeal where the petition is granted, yet such is the effect of this contention. While not denying the power of the legislature to so enact, we must observe that such unusual and extraordinary purpose should clearly appear, and should not result from a strained construction. But, for the purpose of the question urged, let us concede that the action of the board is judicial in its character, and then, if we are correct in our conclusion that the clause of the second section making its action final and conclusive precludes an appeal, we have the exercise by the legislature of a power certainly possessed, whereby the right of appeal is cut off, even in a proceeding judicial in its character. But we do not hold that the hearing so provided involves judicial action.

In *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468, it is said: "A judicial act, then, must be an act performed by a court, touching the rights of parties or property, brought before it by voluntary appearance, or by the prior action of ministerial officers."

This definition has been accepted and followed by this court many times and under it there would seem to be no judicial action where the parties whose rights are to be affected are not before the court. *Pennington v. Straight*, 54 Ind. 376.

In considering the effect of conferring the power to hear and examine, and as to whether such power was necessarily judicial in its character, it was said in *Wilkins v. State*, 118 Ind. 518: "If the appellant were correct in his assumption, then every school examiner who examines an applicant for license, every clerk who accepts and acts upon an affidavit, every auditor who accepts an abstract of title when he loans school funds, and every officer when he approves a report, would exercise judicial functions. That they do in some degree act judicially is true, and so does every officer, from the governor to constable, who is invested with discretionary powers; for the governor when he issues a requisition for a fugitive from justice decides many things; and the constable when he executes a writ or warrant, exercises a discretion, but no one of these officers exercises judicial judgment in the sense that a court or judge does," and it is there further said, in quoting from *Flournoy v. Jeffersonville*, *supra*: "An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under

which it is his right and duty to perform the act." See also *State v. Johnson*, 105 Ind. 463.

By sections 2637, 2638, Rev. Stat. 1881, the boards of commissioners of the different counties are charged with the duty of directing, by order of record, what classes of animals may run at large and pasture upon the unenclosed lands and public commons. The parties interested are not required to appear before the board, and the rights of individuals are affected by a compliance with the duty so charged, but this court held that in the performance of such duty, the boards acted in their administrative, and not in their judicial, character. *Farley v. Hamilton County Comrs.* 126 Ind. 468.

The case nearest in parallel with this question that we have been able to find is where the county board, by statute (Rev. Stat. 1881, sec. 4993,) is constituted a board of health, and is charged with the duty of choosing a secretary and fixing the compensation for his service. The performance of that duty is held to involve no judicial action, but to consist in the exercise of discretionary powers, and that no appeal lies in the absence of special statutory provision. *Waller v. Wood*, *supra*. It is there said: "The amount of compensation is a mere matter of discretion with the board of health, and from a decision made in matters of discretion no appeal lies. *Sims v. Monroe County Comrs.* 39 Ind. 40; *Moffit v. State*, 40 Ind. 217; *Grusenmeyer v. Loganport*, 76 Ind. 549."

But, as stated, it is unnecessary to our conclusion that we should find the action of the board did not involve judicial action. The fixing of the amount of increase in the case before us is, as we have already stated, discretionary. The object of hearing testimony is not to require an allowance, but to enable the board to exercise its discretion with a knowledge of the value of the service of the judges, a knowledge which it could not be presumed the board possessed.

Believing, as we do, that the judiciary of the state is not sufficiently compensated, and that the state is less liberal with her judges than states of like character, we regret that our duty requires us to disagree with the position of the counsel for the appellees which would secure for two able, diligent, and conscientious judges a better reward for their labors. As we view the question before us, we are constrained to hold that no appeal lies under the statute under consideration.

The appeal is therefore dismissed.

McCabe, J., dissenting:

I am unable to concur in the conclusion reached in the foregoing opinion. It is contended that there is no right of appeal from the action of the board of commissioners to the superior court, and therefore that there was no jurisdiction in the latter court, and hence none in this court, and so I understand the prevailing opinion to hold. This contention is based on the concluding clause of section 2 of the Act which, referring to the allowance and proceedings of the board, provides that, "if such proceedings are in com-

pliance with the provisions of this act," they "shall be final and conclusive." The words "final and conclusive" either have reference to the right of appeal, or they do not. Let us suppose that they do have reference to the right of appeal. If that is the real meaning the legislature intended the words to have, then it follows that it was intended thereby to deny the right of appeal from the action of the board of commissioners to some extent. To what extent? The only reasonable answer is that the appeal is denied to the extent that the allowance, and the proceedings of the board in relation thereto, are in compliance with the provisions of the act. Because the language of the whole clause reads thus: "And any such allowance, and the proceedings of any board of commissioners in relation thereto, if in compliance with the provisions of this act shall be final and conclusive," so that the final and conclusive character of the allowance and proceedings is conditional and so if the words as we have supposed were intended to deny the right of appeal, then that denial is only conditional, and the condition upon which the denial operates is that the allowance and the proceedings of the board in relation thereto are in compliance with the provisions of the act. In such case the appeal is denied, if our supposition is true, only where the allowance and the proceedings are in compliance with the provisions of the act. Where such allowance and proceedings are not in compliance with the provisions of the act, the right of appeal is not denied. And the right of appeal not being denied by that act, where the allowance and proceedings are not in compliance with the provisions thereof in such cases, the general law applicable to appeals from boards of commissioners would apply. It provides that: "From any decision of such commissioners, there shall be allowed an appeal to the circuit court by any person aggrieved." Rev. Stat. 1881, § 5772.

Now let us inquire what the result of this construction is. The manifest result is that the class of cases in which an appeal is not denied, and which therefore may be prosecuted, are left undefined and unascertained. Whether in a given case the appeal has been denied by this statute does not depend upon the statute alone, but upon the statute and evidence *alunde*. Whether the appeal has been denied, and therefore whether any appeal lies in a given case, if our supposition is true, must depend not so much upon the statute as it does upon the acts of the board and their proceedings; not their proceedings that appear of record only, but all their proceedings, both those appearing of record and those not so appearing. It will not do to say that the reference is to such proceedings as appear of record only, because about the only thing that could appear on the face of the record showing that the proceedings were not in compliance with the act would be where the petition was not signed by the requisite twenty freeholders on which an allowance had been made, or that the allowance was for a sum in excess of the statutory limit of \$1,500. In either event, the allowance would be void for want of jurisdiction. An appeal

in such a case is wholly unnecessary to afford relief against such void judgment. Therefore it is unreasonable to suppose that the legislature would make no provision for the correction of errors and irregularities, however gross, and against which no relief can be had without appeal, and at the same time provide for relief by appeal where it was wholly unnecessary to secure that relief. So, therefore, I hold that relief is provided against errors and irregularities. Who, then, is to tell, and who is to determine the preliminary question whether the allowance and proceedings are not in compliance with the act in order to secure the right of appeal? It cannot be left to the complaining party to decide, because that would be to allow a party to sit in judgment in his own case, and it cannot be supposed that the legislature ever intended to authorize any such anomalous proceeding. There is no one, then, to whom it can be supposed the legislature intended to delegate such power, except the judge of the court to which the appeal is taken. And this leads me to inquire into the theory of the appellees that, as they contend the legislature meant by this statute to authorize a special right of appeal by the party aggrieved making a showing either by affidavit or oral proof of extraneous facts to show that the proceedings of the board had not been in compliance with the provisions of the act. When is that showing to be made? If made before the transcript is filed, the court cannot act on it, because there is no case before the court; there is no jurisdiction, and no judicial action can be taken until the transcript is filed, to give the court jurisdiction to take any judicial step in the case. In other words, according to general principles, the appeal from the board to the superior court must be perfected before the superior court can acquire jurisdiction to take any step in the case. Otherwise, the superior court must proceed to solemnly adjudicate and determine the rights of parties not before it, and judicially determine the right of appeal in favor of one of the parties and against the other on an *ex parte* affidavit, or a mere oral statement under oath, without a complaint, writ, or record. To suppose the legislature intended to authorize such an unheard-of proceeding is to suppose that they were bereft of reason and intelligence. The only escape from such a result in upholding appellee's contention, is to assume that the legislature meant to authorize the court to which the appeal is taken to entertain the inquiry as to whether the proceedings before the board had been in compliance with the act after the transcript had been filed in the superior court. That, however, would not help matters any, unless the appeal had been perfected, and perfecting the appeal would still not clothe the superior court with jurisdiction, unless the appeal was authorized by law. But suppose I am wrong in this, and that the transcript may be filed, and that then the superior court can enter upon inquiry whether the proceedings had been in compliance with the provisions of the act or not. When and how is the trial of that question to take place? According to appellee's con-

tion, the inquiry may extend to the question whether the board had proceeded in compliance with the act in deciding in accordance with, or contrary to the evidence, as well as to determine whether they had complied with the law in other respects. And I think this is true. Because, if the statute intended to authorize an inquiry as to whether the proceedings of the board were in compliance with the act, then as the scope of that inquiry is left wholly unlimited by the language of the act, it necessarily follows that the inquiry extends to the question whether the decision of the board on the evidence was in compliance with the provisions of the act or not. The query then arises, How and when is that question to be tried? Is it to be preliminary to a trial on the merits, that is to be in advance and previous to the trial on the merits? If so, then the merits will have to be tried twice before the superior court, because if it must be determined first that the board did not comply with the provisions of the act in their decisions on the facts, then the facts must be tried twice on the appeal, once to determine whether an appeal lies, and if it is found that the board did not comply with the act in the decision on the evidence, and therefore that the appeal lies, then it must be tried again by the superior court to determine the case on the merits. The first trial of course would necessarily be confined to the evidence that was adduced before the board, because no other or additional evidence than such as was before the board could be adduced on the first inquiry; and on the second trial, if it was found that the appeal would lie, additional evidence might be introduced. If this is not true, then it necessarily follows that the court must proceed to try the merits and the jurisdictional question both at one and the same time, that is, the court must proceed to try the merits before its jurisdiction is established. Such is the result of the construction of the act which holds that it was intended thereby to deny the right of appeal. To say that such a result is absurd is to very mildly characterize it. To say that the framers of the act, and the legislature in passing it, intended such a result is to honor them with an originality of thought that never before entered the mind of a law-maker. And that is the inevitable and only result that can logically follow the construction contended for by appellees in support of their theory of a special right of appeal. It is the only result that can logically follow the construction that the right of appeal is denied by the act at all. If the words "final and conclusive" have reference to the right of appeal then the words, "if in compliance with the provisions of this act," found in the same clause, immediately preceding and closely connected therewith, must necessarily have reference to the same thing.

Sutherland, Statutory Construction, §§ 222, 223, says: "A proviso is something engrafted on a preceding enactment, and is legitimately used for the purpose of taking special cases out of a general class. . . . The nature and appropriate office of the proviso being to restrain or qualify some preceding matter, it

should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter. It is to be construed in connection with the section of which it forms a part, and to which it is substantially an exception. If it be a proviso to a particular section, it does not apply to others unless plainly so intended. *It should be construed with reference to the immediately preceding parts of the clause to which it is attached.* In other words, the proviso will be restricted to the subject it deals with, in the absence of anything in its terms evincing an intention to give it a broader effect." The proviso here is not arranged as provisos are generally arranged, by being placed at the end of the clause in which it is found, but it is placed in the middle of the clause upon which it is to operate. It would have been more orderly to have placed it at the end of the clause. But for the purposes of the question whether its application shall be limited to the clause wherein it is found, the reason for so limiting it is fully as strong, if not stronger, than if it had been placed at the end of the clause. But I need not resort to the rules of construction to confirm the construction I put upon this clause of the act, because, as was said in *Storms v. Stevens*, 104 Ind. 60, by this court: "In the construction of statutes, the prime object is to ascertain and carry out the purpose and intent of the legislature. To do this, the words used in the statute should be first considered in their literal and ordinary signification. . . . The canons of construction require that every word, phrase, and clause of a statute shall be given effect, if possible." "But," says Sutherland on Statutory Construction, at section 287: "First of all, . . . if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition." To the same effect is Endlich on Interpretation of Statutes, § 4. The same author, at section 265, says: "That every clause and word of a statute is presumed to have been intended to have some force and effect." Endlich, Interpretation of Statutes, § 28.

Says Sutherland on Statutory Construction, § 215: "Exceptions, provisos, interpretation, repealing, and saving clauses are often introduced to restrict or qualify the effect of general language." So, then, according to these settled rules of construction, we must presume that the legislature intended the language, "if in compliance with the provisions of this act," to have some meaning, force, and effect. And when the clause is put together, its meaning is so plain that interpretation is wholly unnecessary. That is, if the words "final and conclusive" have reference to the right of appeal at all, then the condition or proviso restricts and qualifies the effect of these words, or if the words "final and conclusive" have reference to something else than the right of appeal, then the condition or proviso likewise restricts and

qualifies the force and effect of the words, no matter what it is that they have reference to. So, therefore, if the words "final and conclusive" have reference to the right of appeal, and it was intended thereby to deny such right, then the condition or proviso, "if in compliance with the provisions of this act," was intended to qualify and restrict such denial of the right of appeal to such cases only as those wherein the allowance and the proceedings in relation thereto had been in compliance with the provisions of the act. It is therefore very clear, both upon reason and authority, that if the words "final and conclusive" have reference to the right of appeal, and deny such right, the conclusion follows irresistibly that such denial is restricted by the proviso, so that the appeal is only denied in such cases as fall within the proviso or condition. If this is not so, then what does the condition or proviso mean? If it does not refer to the right of appeal and restrict the denial thereof, then it can refer to nothing else, unless the words "final and conclusive" have no reference to the right of appeal at all. Whatever the latter words have reference to, the condition or proviso refers to the same. If we were even to concede that the language denies the right of appeal in all cases falling within its terms, it could not cut off the right of appeal in this case. What is it that is made "final and conclusive"? It is "any such allowance and the proceedings of any board of commissioners in relation thereto," and nothing else.

In this case, there was no such allowance, and there were no proceedings of the board of commissioners in relation thereto. Why, then, say the right of appeal in this case is denied by the act? Admitting to the fullest extent that the language employed in the statute was intended to deny the right of appeal in all cases falling within its terms, yet it would be such a broad stretch of that language to hold that the right of appeal is denied where there is no allowance, and where there are no proceedings in relation to such allowance, with all due respect and deference for the opinion of my brethren, seems to me little less than judicial legislation. Such a holding can only be justified by interpolating words into the statute that are not there, or by striking out words that are there. I am not unmindful of the rule so well expressed by Mr. Sutherland in his work already referred to, that "not only may the meaning of words be restricted by the subject-matter of an act, or to avoid repugnance with other parts, but for like reasons they may be expanded." Sutherland, Stat. Constr. § 219.

There is nothing in the subject-matter of the act as to its general scope, purpose or intention, nor is there any repugnance of the language under immediate mention with other parts of the act, requiring the words under consideration to be restricted or expanded to conform to the general intent, or to avoid repugnance. Says the same author, section 288: "When the meaning of a statute is clear and its provisions are susceptible of but one interpretation, that sense must be accepted as the law; its consequences, if evil," 22 L. R. A.

can only be avoided by a change of the law itself, to be effected by the legislature itself, and not by judicial construction. But an interpretation of a statute which must lead to consequences which are mischievous and absurd is inadmissible if the statute is susceptible of another interpretation by which such consequences can be avoided. For this purpose, all parts of a statute are to be read and compared. Still, when the words of a provision are plainly expressive of an intent, not rendered dubious by the context, no interpretation can be permitted to thwart that intent; the interpretation must declare it and it must be carried into effect as the sense of the law." Nor can I concur with the prevailing opinion that a strict construction should be adopted concerning the right of appeal. In *Houk v. Barthold*, 78 Ind. 25, involving the right of appeal from the county board, Elliott, J., speaking for the court said: "The right of appeal from final judgments of inferior tribunals is one which ought not to be abridged by strict construction; but on the contrary, should rather be extended for the provisions of the statute conferring it are clearly remedial." To the same effect are Endlich, Interpretation of Statutes, § 108, and Sutherland, Stat. Constr., §§ 207, 248, 348. But if we even concede that the words of the act already quoted have reference to the right of appeal, and adopt a strict construction of the entire clause as laid down in the prevailing opinion and adhere to the strict letter of the statute, then the right of appeal from the board of commissioners in this case is not denied by the statute, because there was no allowance in this case made by the board. The language is: "And any such allowance, and the proceedings of any such board of commissioners in relation thereto, if in compliance with the provisions of this act, shall be final and conclusive." It is the allowance, and the proceedings in relation to such allowance, that are made final and conclusive, and not the disallowance and the proceedings in relation thereto. A strict adherence to the letter of the act cannot result in the denial of the right of appeal to the superior court; because there is no language in it that can be tortured into meaning that the action of the board shall be final and conclusive where, as here, no allowance has been made, and there are no proceedings of such board in relation to such an allowance. I concede that such a result is both absurd and unjust; absurd because an appeal is denied by the act where the allowance is made, and where no allowance is made there is no denial of an appeal, and by the general statute already referred to, an appeal is authorized. Rev. Stat. 1881, § 5772.

Such result is unjust, because an appeal will lie and is authorized where no allowance has been made, but where an allowance has been made, the heaviest taxpayer in the county cannot appeal. There might have been an allowance in this case of \$3000 saddled onto the taxpayers of the county, and all the taxpayers of the county combined could not have appealed from such allowance; and yet where no allowance is made, the petitioners may appeal. In other words, con-

struing the words "final and conclusive" to have reference to the right of appeal, it results in the absurdity and injustice of allowing the right of appeal where no allowance is made, and denying such right where an allowance is made. What framer of the act with ordinary intelligence, and what legislator, could have conceived the thought of so many absurd results, and so many unjust results as I have pointed out above, and which inevitably must follow that construction which makes the words "final and conclusive" to mean a denial of the right of appeal? It puts the whole act out of joint and makes it incongruous with itself; it makes it impracticable, mysterious, and hard to understand, as any piece of work will generally be and any statute will be when the attempt is made to use or apply it in a mode never designed by its maker or author. Since the construction adopted by the prevailing opinion produces absurd and unjust consequences, the canons of construction require us to look for some other construction as the one probably in the mind of the legislature. The words "final and conclusive" do not necessarily, nor indeed ordinarily, have reference to the right of appeal in a statute like the one under consideration. The act provides that "whenever twenty or more resident freeholders of the county . . . shall, by their petition, filed with the board of commissioners of such county, represent that the annual salary of the judge of said circuit or superior court as otherwise provided by law is not adequate compensation for the services of such judge, and should be increased in a sum to be specified in such petition, then it shall be the duty of the board, etc., . . . to consider such petition and bear evidence thereon, and thereupon, within the limits of such evidence, but in no event in excess of the sum of one thousand five hundred dollars or in excess of the sum specified in such petition, such board, etc., . . . may by entry of record fix and allow a certain sum as an addition to, or increase of the annual salary of the judge of such circuit or superior court."

It will be observed that it is provided that the board shall take the action therein required whenever twenty or more freeholders of the county petition the board, etc. Now it would be very absurd indeed, if the legislature in this language meant literally just what they have said, without any qualification or restriction. If they have, then twenty freeholders can petition the board at this term to make such an order, and go through the trial and hearing of the evidence, which is followed by an entry of record of an allowance, or a refusal to make such an allowance. And at the next term, or, in the language of the act, "whenever" another twenty or more freeholders, who may be dissatisfied with the first order, can by a petition compel the commissioners to go through the same performance again, and so on to the end of the list of freeholders in the county. Because, as admirably stated by Sutherland on Statutory Construction, section 288, that "one who contends that a section of an act must not be read literally must be able to show one of two things, either that there is

some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general purview." It will hardly be claimed by any one that the section last quoted is repugnant to the purview because itself constitutes the principal part of the act. We have already seen that it is one of the canons of construction that an absurd result flowing from a particular construction makes it the duty of the court to explore the act, and find if possible some other construction as the one more probably in mind by the law-maker. The absurd result which the literal reading of the section just quoted leads to is clearly and plainly counteracted and avoided by the clause of section two that we have quoted. In order to obviate the absurd and undesirable result of allowing a fresh petition by twenty new freeholders to be filed after one had been passed upon by the board, and thus compel a trial of the same question times without limit, it is provided that the proceedings shall be "final and conclusive." Now if these words were used by the legislature to cut off the right of appeal, then they were not used to restrain or cut down the full scope and meaning of the first section, allowing the question to be tried as many times as twenty new petitioners should move in the matter. It would not have been necessary to insert such a provision to make the proceedings final and conclusive against the twenty or more freeholders who were parties to the proceeding by having signed the petition. Because it is a general principle of law as declared by this court in *State v. Page*, 63 Ind. 212, that "in a former recovery to be a bar, it must appear that there is an identity between the present and previous cause of action, and that the parties in the present action are the same as in the previous one, or else that they claim under the parties to such previous action."

To the same effect is *Bisland v. McManomy*, 82 Ind. 139. While these general principles of law made it wholly unnecessary to provide in the act that the proceedings should be final and conclusive as to the petitioners that were parties, yet if it was desired to make it final and conclusive as to all others not parties, so as to avoid the absurd result of allowing the question to be tried every three months by new petitioners, it became necessary to provide that the proceedings should be final and conclusive, that is, final and conclusive against collateral or indirect attack in the re-opening of the question before the same tribunal, either many times, or one time. There is no reason, therefore, for saying that in applying the words final and conclusive to mean that the proceedings were intended thereby to be placed merely beyond collateral attack, that such a provision was wholly unnecessary. Section 289 of Sutherland on Statutory Construction, says: "The practical inquiry is usually what a particular provision clause or word means. To answer it, one must proceed as he would with any other composition, construe it with reference to the leading idea or purpose of the whole instrument. The whole and every part must be considered. . . . This survey

and comparison are necessary to ascertain the purpose of the act and make all the parts harmonious. They are to be brought into accord if practicable, and thus if possible give a sensible and intelligible effect to each in furtherance of the general design. . . . It is said to be the most natural exposition of a statute to construe one part by another, for that expresses the meaning of the makers.

. . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted, the act must be construed accordingly, and ought to be so construed as to make it a consistent whole. If, after all, it turns out that that cannot be done, then the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail." Now, if we follow these rules and construe the words "final and conclusive" in the second section to mean only that the proceedings were intended thereby to be placed beyond collateral attack if not appealed from, by preventing a retrial thereof by new petitioners, and that it was not intended thereby to restrict the right of appeal at all, we shall find that such construction assigns a meaning to those words that renders the act a consistent whole, and relieves it from inconsistency, and at the same time leads to no absurd or unjust results. It is no objection to this construction that it makes such proceedings final and conclusive as against persons who were not made parties, because it leaves all those whose rights may be affected on account of their being taxpayers the right to become parties under the general law authorizing appeals from all decisions by filing an affidavit setting forth an interest in the matter decided, and on such appeal, allows the whole question to be tried *de novo*; whereas, the other construction denies such right absolutely and unconditionally to those whose rights have been invaded and taken away by the proceedings.

I have been discussing the question as if it were an open one in this court, but it is not. The question was settled in this court twelve years ago, in a case where the whole subject was reviewed in an able opinion by Woods, J., speaking for the court in *Grusenmeyer v. Logansport*, 76 Ind. 549, wherein a large number of cases were overruled and where it was said: "A further consideration of the subject has brought us to the conclusion that the statement of the rule made in the last-named case is inaccurate in so far as it denies an appeal from an order or judgment in a proceeding wherein the determination of the board is by law declared conclusive merely. The 31st section of the Act for the organization of county boards, . . . (Rev. Stat. 1881, § 5772) gives an appeal 'from all decisions of such commissioners.' The general law in which this provision is found, and which defines the powers and duties of county boards, and such special enactments as have been or may be passed in reference to special proceedings before these boards should be construed as being *in pari materia*; that is to say, as if all were contained in one act. It is only upon this principle that an appeal can be allowed

in any such special proceeding, where the act authorizing it does not expressly give the right of appeal. If the 31st section of the General Law, and the provisions of the act for the incorporation of towns, were found in a single statute, there would hardly arise a suggestion of any inconsistency between the right of appeal given in the one section from all decisions and the conclusive character of the final order or judgment of the board in a particular proceeding, as declared in another section. The latter provision would not be deemed to affect the right of appeal, but would be construed to mean that, unless appealed from and vacated, the order should be held to be conclusive against indirect or collateral attack, and such, we think, is the proper construction of the provision, though found in a separate special act.

. . . . We therefore hold that, under section 31 of the General Law, there is a right of appeal from any decision of a judicial character made by a county board in any proceeding, unless the right is denied expressly or by necessary implication, and such implication does not arise from the fact that the judgment is declared to be conclusive."

I think the prevailing opinion greatly misconceives what was involved and decided in that case. The main and only question that was involved was the right of appeal from the board of commissioners. The appellants in that case presented a petition to the board of commissioners of Cass county for the incorporation of the town of Taberville. The city of Logansport appeared before the board and objected by answer saying the board should not take action in the matter because the territory described in the petition was and had been for nine years within the exclusive jurisdiction of the city of Logansport. Thereupon the board gave judgment rejecting the petition and refusing to order the incorporation of said town. The petitioners appealed to the circuit court, where on motion of the city, the appeal was dismissed. The petitioners appealed to this court from the judgment of dismissal in the circuit court. The dismissal was defended in this court on the ground that the statute authorizing the proceeding before the county board or the incorporation of towns by its terms denied the right of appeal from the action of the board to the circuit court and hence that court had correctly dismissed the appeal. That was the question presented to this court in that case, and that was the question decided. Two other questions incidental to that question were considered and also decided but in such a way as not to weaken the authority of the decision on the main question. One of these questions was whether the board had the right, and was in duty bound to take judicial notice of the incorporation of the city of Logansport under the statute in relation thereto, which provides that the order incorporating such city "shall be held in all courts as conclusive evidence of such incorporation in any suit pending therein." This provision was not urged in opposition to the right of appeal from the action of the board which had, by

order previously entered in its record, incorporated the city of Logansport. The board was justified in taking judicial notice of such incorporation, and that the territory proposed to be incorporated as Taberville was within the corporate limits of the city of Logansport, and hence could not be incorporated into another municipal corporation. It was held in opposition to his contention that though judicial notice should have been taken of the incorporation of the city, yet that whether the territory proposed for incorporation as Taberville was within the corporate limits of the city of Logansport was a question of fact of which the courts could not take judicial knowledge. That holding did not and could not have any effect on the decision of the main question, namely, whether there was a right of appeal from the action of the board to the circuit court. Notwithstanding that holding, if the law gave no right of appeal, the action of the circuit court in dismissing the appeal from the board must have been affirmed, but it was reversed, and it was reversed on the ground that an appeal would lie in such a case. It is true, the learned judge who wrote the opinion incidentally remarks that "the language of the law is, that the order shall be conclusive in all suits by or against such incorporation. An appeal from the order establishing or refusing to establish the incorporation is not a suit by or against it. The reference is to subsequent suits in which it may be a party. We therefore hold that under section 81 of the General Law, there is a right of appeal from any decision of a judicial character made by a county board in any proceeding, unless it is denied expressly or by necessary implication, and such implication does not arise from the fact that the judgment is declared to be conclusive."

The statute quoted from in the above extract is the one for the incorporation of towns, and the one under which the proceedings in that case were instituted and prosecuted, and the one by which it was contended in that case the right of appeal from the order was denied and cut off. And it was attempted thereby to justify the action of the circuit court in dismissing the appeal. Now this court laid down and decided two propositions of law as the ground or foundation of its decision that the right of appeal existed in that case, and as a reason why the circuit court erred in dismissing the appeal. Either of the reasons was sufficient to justify the ruling and decision on the main question. One of these grounds for the conclusion reached was that notwithstanding the statute under which the proceeding was had, made the final order of incorporation conclusive, yet that an appeal would lie from such order. The other ground was that the statute only made the final order of incorporation conclusive in all suits by or against such incorporation, holding that the reference is to subsequent suits by or against the corporation. The question thus decided, that the reference was to subsequent suits by or against it, was not entirely clear from doubt. There was at least room for a difference of opinion on that point. But this court has settled that by deciding

it as one of the grounds of the conclusion reached, it also decided the other proposition as one of the grounds, and the first ground of that conclusion. The prevailing opinion erroneously assumes in substance that only one of these grounds could be valid and binding as a decision and as authority. That is one only of the legal propositions announced and decided incidental to, and as one of the grounds of the conclusion reached can be valid and binding as authority because the other ground was unnecessary to the support of the conclusion reached, and hence not binding and authoritative. I concede that a question decided that is not before the court, and not involved in the case is *obiter dictum*, and not binding authority. But when the court decides incidental questions essential to the support of the conclusion reached, and happens to decide two such questions when one would have been sufficient to support the conclusion, one of such incidental decisions is just as binding a decision and as authoritative as the other. Had one only of those incidental decisions been announced as the only ground in support of the conclusion reached, and that one had been that the appeal would lie notwithstanding the statute under which the proceeding was had, provided the order should be conclusive no one would deny that it would in that case be authoritative, and not *obiter dictum*. It cannot be any the less so because another reason is given in support of the conclusion reached, because another incidental question is decided as an additional ground on which to rest the conclusion reached. To illustrate my meaning: The prevailing opinion is rested upon two grounds to support the conclusion reached. One is that the statute denies the right of appeal; the other is, that the statute called into exercise no judicial power or function, but merely the ministerial or administrative authority of the board. Either ground is sufficient to defeat the appeal, and either ground is amply sufficient to support the conclusion by my brethren. After the prevailing opinion is printed in the reports, a case arises in one of the trial courts involving the right of appeal from the board under a statute providing for a special proceeding before the county board regarding some other subject, with a provision that the order shall be final and conclusive. On a motion to dismiss the appeal on the ground that it is denied by the statute, the moving party reads the prevailing opinion. But the opposite party points to the fact that the decision in saying the statute denies the right of appeal is *obiter dictum*, and shows that the other ground on which the decision was rested, namely, that the question involved before the board was not judicial, but ministerial or administrative, was sufficient to support the conclusion reached, and therefore the point that the statute denies the appeal was wholly unnecessary and *obiter dictum*. He refers to the body of the prevailing opinion to prove that it itself says that the decision cannot be authority on both points. Another case arises involving whether the exercise of similar powers to those called into exercise by the county board are judicial, and if not,

the appeal should be dismissed, and in support of a motion to dismiss the appeal, the prevailing opinion is read, but the attorney on the other side points out that there were two grounds on which the conclusion was rested, and that the other ground being that the statute denied the right of appeal was amply sufficient to support the conclusion, and all that was said about the power exercised being not judicial was unnecessary to the decision, the other ground being sufficient to support the conclusion reached; thus ending in well nigh overthrowing the prevailing opinion as authority on either point. It was said in *Carter v. Dennison*, 7 Gill, 157, that "general views expressed by the court as illustrative of, but not necessarily leading to, the opinion on the point intended to be decided, are not to be treated as conclusive, when similar topics come up directly for judgment. But we are not aware of the authority which will sustain the proposition assumed, . . . that the unanimous opinion of a state court of the highest appellate jurisdiction, directly on the point which is supposed by the court to be presented by the record, and which is elaborately discussed by counsel, and is investigated with care, and solemnly delivered by the court, can be disregarded as *obiter dictum*, merely because it is since discovered that some other point existed on which the judgment rendered might have been rested. If any such authority exists, it has not been referred to." See also 5 Am. & Eng. Encyclop. Law, 664; 17 Am. & Eng. Encyclop. Law, 1.

I therefore am of opinion, not only that my brethren have gravely misconceived the true force of the *Grusenmeyer Case*, but they have made the decision herein self-destructive as authority. Another incidental question was decided, absolutely essential to the decision of the main question, and that was, whether a petition for the incorporation of a town presented to the board of commissioners a case invoking the exercise of judicial power and that therefore the appeal would lie. I do not claim that any of these cases involved a statute like the one involved in the *Grusenmeyer Case* or the one here involved. This holding in no way obviated the decision of the main question, but made the way clear for, and its decision essential to, the final determination of the case in this court. I am therefore clearly of opinion that the right of appeal from the board was directly involved, though the statute made the order appealed from conclusive in that case, and was squarely decided in favor of that right, and that such decision was unavoidable and absolutely essential to the determination of the case in this court. If that does not make it an authoritative decision, then there are no decisions of this court that are authority or binding on anybody. And the only way to avoid its binding force is to overrule it frankly, if it is wrong in principle. But it is too strongly entrenched in sound principle and reason for any one to be bold enough to propose its overthrow.

During the twelve years of its existence, it has not only never been questioned but it has been cited as authority on the point of 22 L. R. A.

the right of appeal by this court in the following and perhaps other cases, namely: *Ricketts v. Spraker*, 77 Ind. 379; *Bryan v. Moore*, 81 Ind. 13; *Marion County Comrs. v. Pressley*, 81 Ind. 366; *Miller v. Embree*, 88 Ind. 186; *Burkam v. State*, 88 Ind. 200; *White County Comrs. v. Karp*, 90 Ind. 238; *Cicero v. Williamson*, 91 Ind. 542; *Padgett v. State*, 93 Ind. 397; *Terre Haute v. Beach*, 96 Ind. 144; *Logansport v. LaRose*, 99 Ind. 127; *Platter v. Elkhart County Comrs.* 103 Ind. 374; *Farley v. Hamilton County Comrs.* 126 Ind. 469; *State v. Tippecanoe County Comrs.* 181 Ind. 94; *Dayton Gravel Road Co. v. Tippecanoe County Comrs.* 181 Ind. 590.

From an examination of these cases it will be found that during the twelve years that *Grusenmeyer v. Logansport*, *supra*, has not only been regarded as an authoritative decision on the right of appeal from the board of commissioners, but the long line of cases citing it on that point places it in the list of leading cases in this court on that question, and shows that it has been steadily growing in favor with the court. In *Platter v. Elkhart County Comrs.*, *supra*, it was said by Elliott, J., speaking for the court, that: "The law as firmly established by our decisions, and they stand on sound principle, is that where the board of commissioners exercise judicial functions, . . . there is a right of appeal but that such a right does not exist where the board acts in a purely ministerial or administrative capacity. The case of *Grusenmeyer v. Logansport*, 76 Ind. 549, recognizes this doctrine, for the language employed by the court in that case, as well as the whole course of reasoning, shows with great clearness that the right of appeal exists only in cases where the board exercises judicial functions. In summing up the result of the review of the cases, the court there said: 'We therefore hold that under section 81 of the General Law, there is a right of appeal from any decision of a judicial character made by a county board in any proceeding.'"

I think it is now too late to say that the *Grusenmeyer Case* does not decide the law correctly, or that it is *obiter dictum* on the question of the right of appeal from a county board. And here I must digress a moment to say what perhaps might have been more properly said when I was discussing what meaning the legislature intended the words "final and conclusive" to have. It will be seen that a judicial interpretation had been given to such language when found in statutes of the kind here involved by the highest court of the state, and that such interpretation had been affirmed and reaffirmed by this court for twelve years when the statute here involved was enacted. It is a universal rule of construction, without an exception, that in enacting statutes, the legislature will be presumed to have acted with reference to the construction given to former statutes couched in substantially the same language, and that they used the words in that sense. *State v. Scope*, 7 Ind. 91; *Wiggins v. Keizer*, 6 Ind. 252; *Broscoe v. State*, 5 Ind. 75; *Bowman v. Com.* 3 Ind. 58; *Carrigus v. Parke County Comrs.* 39 Ind. 73; *Indianapolis, B. & W. R.*

Co. v. Fountain County Comrs. 89 Ind. 215; Endlich, Interpretation of Statutes, p. 12; Sutherland, Stat. Constr. § 424, p. 546.

The conclusion that the legislature meant by the words "final and conclusive" only that the proceedings should thereby be placed beyond indirect or collateral attack, and that they had no intention to deny the right of appeal by that language, seems to me to be overwhelmingly irresistible. But the prevailing opinion holds that the duty imposed upon the board was discretionary, and not judicial, and therefore no appeal would lie even admitting the full force of all the language used in the *Grusenmeyer Case*, *supra*. And that holding seems chiefly to rest on the use of the word "may" in the statute, instead of the word "shall." I am wholly unable to agree with this conclusion. The provision is that "then it *shall* be the duty of the board, etc. . . . to consider such petition, and hear evidence thereon, and thereupon, within specified limits, . . . may fix and allow a certain sum, etc." Now the word "shall" being confessedly imperative and mandatory applies to every duty imposed on the board but one, and that one is fixing and allowing the amount. The command is, *shall* consider such petition, *shall* hear evidence thereon, and *shall* keep within the limits of the evidence, and *shall* keep within the limits of the maximum amount prescribed in the statute, \$1,500, and *shall* keep within the limits of the petition.

Now if the legislature did intend by the use of the word "may" to leave it discretionary with the board whether the last act, the object of all the other imperative mandates, should be left purely to the arbitrary will of the board, the inquiry naturally arises, Why are all the preceding acts made so imperative and mandatory? That would be a useless expenditure of force and authority, if the board was clothed with authority to render it all nugatory and idle. Such a construction renders the section contradictory and inconsistent with itself, and according to the authorities we have cited above, on interpretation such construction must be rejected unless in view of the whole act the language compels such a construction. But it does not. It is easy to see that the framers of the act, and the legislature in passing it had the one leading idea of compelling the increase of judges' salaries in counties falling within the purview of the act where the evidence made such increase just and right. It would be absurd in the extreme to hold that the legislature intended that though the evidence showed clearly and conclusively that the judges' salaries were not adequate compensation for their services, and that all the duties above specified were imperatively required of the board to leave it to the discretion, to the arbitrary will of the board whether they would follow and be governed by the evidence or not. We do not have to resort to the rules of interpretation to reject such a construction, because it is manifestly against the whole act taken together. It is settled law in this state and everywhere else, I believe, where our system of jurisprudence prevails, that the word "may" should be con-

strued as meaning "shall" where public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the power shall be exercised. *Nave v. Nave*, 7 Ind. 122; *Bansemmer v. Mace*, 18 Ind. 27; *Newcastle & A. Twp. Co. v. Bell*, 8 Blackf. 587; *Madison v. Smith*, 88 Ind. 502; Endlich, Interpretation of Statutes, § 810; Sutherland, Stat. Constr. § 461.

The petitioners, being freeholders of the county, were interested in the administration of justice in the county, and the whole population of the county are interested that faithful public servants should be adequately compensated.

I therefore conclude that the duty imposed by this statute is not discretionary and directory merely, but mandatory and imperative. It would follow from what I have said that the duty was therefore judicial in its character. The *Grusenmeyer Case*, *supra*, directly and necessarily decided that precise question in the affirmative. That was a petition to the board to incorporate a town under the statute providing that: "Sec. 5. The board of county commissioners in hearing such application shall first require proof, either by affidavit, or by oral examination of witnesses before them, that said survey, map and census were subject to examination in the manner and for the period required by section three of this act, and if said board be satisfied that the requirements of this act have been fully complied with they shall then make an order declaring that such territory shall, with the assent of the qualified voters thereof, as hereinafter provided, be an incorporated town, etc." This provision does not impose a judicial duty nearly as undoubted as the statute involved in this case, because the judicial inquiry is confined to an inquiry as to whether the preliminary steps had been taken, but here a trial of a question of fact, declared and alleged in the petition to exist, is required. If that does not require the exercise of judicial functions, then there is no such thing in this state. To the same effect is *White County Comrs. v. Karp*, 90 Ind. 236, both as to the judicial character of the inquiry and as to the right of appeal. In *State v. Tippecanoe County Comrs.*, *supra*, there was a decision in the matter of a petition for the purchase of a toll road, the parties claiming to be aggrieved by the final action of the board, and it was held that such action was judicial and that the right of appeal existed. The action appealed from in the case at bar is a great deal more judicial in its character than the case just cited. The case of the *Dayton Gravel Road Co. v. Tippecanoe County Comrs.*, *supra*, was exactly the same kind of a case as the last one, and from the same county, and involved the same question, and it was there held that the action of the board on the petition to purchase involved judicial action and that an appeal would lie therefrom.

And I might go on almost without end, citing similar cases in this court, where similar action by the board was adjudged to involve judicial action. There is a large class of cases, I admit, before county boards involving only the exercise of ministerial or

administrative authority. Such is the character of *Farley v. Hamilton County Comrs.* 126 Ind. 468. That was a case involving the action of the board in directing that certain animals be allowed to pasture or run at large on the unenclosed lands or public commons within the county. It was there said: "The statute requires the board to act, and to direct by an order entered on their order books, what kind of animals shall be allowed to pasture or run at large on the unenclosed land or public commons within the bounds of any township in their respective counties. They act, however, upon their own motion. No petition is needed to invoke the exercise of the power, and they are entirely unrestricted as to the time and manner of exercising it. They may by such order permit all animals to run at large, or none, and they may at any time and in any manner, of their own motion, change, modify or revoke the order." An order for the sale of county property is a ministerial act, calling into exercise the discretionary powers of the board, from which no appeal lies. *Platter v. Elkhart County Comrs.* *supra*.

To the same effect is *Sims v. Monroe County Comrs.*, 39 Ind. 40. So, too, it has been held that a sale of railroad stock belonging to the county, by the county board, is not a decision within the general statute authorizing an appeal, is the exercise of a discretionary power conferred on the commissioners, from which no appeal lies. *O'Boyle v. Shannon*, 80 Ind. 159.

I might extend this opinion, already too long, in citing numerous cases of the same class, where it has been held that the powers invoked and exercised were of a ministerial or administrative character and therefore resting within the discretion of the board, from which no appeal could be prosecuted. It is

manifest that all that class of cases can have no application here whatever.

Before I can conclude in favor of an affirmance of the judgment below, one objection thereto remains to be considered. It is contended by the appellant that the act is in conflict with the 23d section of article 4, of the Constitution of the state, in that the act is local in its operation. The act applies to all counties in the state where there is a city of thirty thousand inhabitants. In cases like this, it has frequently been held that a statute is not in conflict with this section of the Constitution if "its operation should be the same in all parts of the state under the same circumstances and conditions." *Groesch v. State*, 42 Ind. 561; *State v. Reitz*, 62 Ind. 159; *Combs v. State*, 26 Ind. 98; *Anderson v. State*, 28 Ind. 22; *Eitel v. State*, 33 Ind. 201; *Clem v. State*, 33 Ind. 418.

It has been suggested that there are other counties in the state where the necessary services required of judges make them as much entitled to the increase as those counties to which this act applies by having a city of thirty thousand inhabitants, and that for that reason it is contended that the act before us is unconstitutional. That question was decided against appellant in *State v. Reitz*, *supra*.

Besides, that was a question that the legislature had the exclusive right to decide and their decision on that point is conclusive on the courts. *Gentile v. State*, 29 Ind. 409; *State v. Tucker*, 46 Ind. 355; *Kelly v. State*, 92 Ind. 236; *Johnson v. Wells County Comrs.* 107 Ind. 15; *Wiley v. Bluffton*, 111 Ind. 152; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93.

I am therefore of opinion that the judgment ought to be affirmed.

MICHIGAN SUPREME COURT.

William HAMILTON

v.

DWELLING HOUSE INSURANCE CO.,

Plff. in Err.

(.....Mich.....)

1. A vendor in an existing contract of sale has not the "sole and unconditional ownership" of a building which is described as "his dwelling" within the meaning of an insurance policy.
2. Knowledge of an insurance agent that the insured had made a contract for the sale of the property estops a company from denying that he had the "sole and unconditional ownership" required by policy.

(January 23, 1894.)

NOTE.—The authorities on the question whether or not a vendor in a land contract can be held to be a "sole and unconditional owner" for the purpose of insurance seem to be all cited in the above case either in opinion or briefs. On the question 23 L. R. A.

ERROR to the Circuit Court for Genesee County to review a judgment in favor of plaintiff in an action brought to recover upon a policy of fire insurance. *Reversed*.

The facts are stated in the opinion.

Messrs. Hanchett, Stark & Hanchett, for plaintiff in error:

Upon October 20, 1890, and thereafter John W. Shearer was in possession under a valid existing contract of purchase which he could enforce, and which was enforceable against him. Shearer could insure as the unconditional, absolute and sole owner, as the owner in fee simple, while Hamilton was only the holder of the legal title in trust for Shearer, having a lien thereon for an amount owing him. Hamilton's interest was not unconditional, it was a conditional ownership, not individual or sole, but fiduciary, or dual.

Morris v. Hoyt, 11 Mich. 9; *Converse v.*

how far an undivided interest in property is a complete or sole ownership for insurance purposes, see note to *Beebe v. Ohio Farmers Ins. Co.* (Mich.) 18 L. R. A. 481.

Blumrich, 14 Mich. 109, 90 Am. Dec. 280; *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 31 Mich. 357; *Farmers Mut. F. Ins. Co. of St. Joseph County v. Fogelman*, 35 Mich. 482; *Dupreau v. Hibernia Ins. Co.* 5 L. R. A. 871, 76 Mich. 615.

Very clearly then John W. Shearer was the party whose ownership and interest came within the description and condition in the policy.

Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co. supra.

Hamilton, then, not being the unconditional and sole owner, cannot enforce this policy.

Messrs. Durand & Carton, for defendant in error:

Plaintiff was the owner in fee of this property. True, there was an outstanding contract for the sale of it to Mr. Shearer, but Mr. Shearer had defaulted in his payments and left the city. He had not paid nearly as much money as the rent of the property would have amounted to if he had rented it. Mr. Hamilton supposed he had abandoned it. The defendant's agent went to Mr. Hamilton to insure it and without asking a single question in relation to the title except as he says to see if Mr. Hamilton still had enough interest in the property to want to have it insured, without a single false statement or any attempt at fraud on the part of Mr. Hamilton, and for the purpose as he says of keeping the business and obtaining the insurance, he took the risk and issued the policy sued upon. The defendant enjoys the premium money and keeps it and when this loss occurred attempts to defeat the payment of the loss by these unmeritorious technicalities, which have been resorted to.

Unless inquired about an applicant for insurance is not bound to state the exact condition of his title and a mere equitable ownership will support a recital of ownership. The failure to mention incumbrances if not inquired about is immaterial where the application is oral and no deceit is practiced.

Castner v. Farmers Mut. F. Ins. Co. 46 Mich. 15; *Farmers Mut. F. Ins. Co. of St. Joseph County v. Fogelman*, 35 Mich. 481; *O'Brien v. Ohio Ins. Co.* 52 Mich. 131; *Tiefenthal v. Citizens Mut. F. Ins. Co.* 53 Mich. 306; *Guest v. New Hampshire F. Ins. Co.* 66 Mich. 98; *Hall v. Niagara F. Ins. Co.* 18 L. R. A. 135, 93 Mich. 184.

Hoose v. Prescott Ins. Co. of Boston, 11 L. R. A. 340, 84 Mich. 809; *Hall v. Niagara F. Ins. Co. supra*; *Ahlberg v. German Ins. Co.* 94 Mich. 259, hold that the first and important question is, Did the insured have an insurable interest in the property upon which the policy was issued? If so, he is entitled to recover, no matter what may be the character of his interest, unless some fraud has been practiced or false statements made to inquiries as to the condition of the title, or unless the insurer specifically sets out in the policy the particular sort of title which must exist to render the policy valid. If this is not done the policy is valid. The duty rests upon the insurance agent to inquire about the character of the title if he wishes to know about it.

Hooker, J., delivered the opinion of the court:

Plaintiff, being the owner in fee simple of

lot 10, block B, a parcel of land in the city of Flint, contracted to sell the same to John W. Shearer by an instrument in writing dated June 16, 1888, for the sum of \$450. Shearer took possession and made improvements, paid \$75 of the contract price, besides interest, and occupied the premises at the time of a fire, which consumed the dwelling thereon. The plaintiff had previously contracted the premises to one Giles, who had procured insurance upon the building from defendant's agent, though in another company, which insurance was payable to the plaintiff as his interest might appear. This insurance being about to expire, Algoe, the agent, called upon Hamilton, the plaintiff, to see if he wanted to keep it insured. There was nothing to show that Algoe knew anything about the Shearer contract. Algoe testified that Hamilton told him that the property was his, that it had come back to him from Giles, and to insure it in his (Hamilton's) name. Hamilton testified that he thought that he told Algoe that he thought he had a contract out with some people, but they had not been in the place for a long time, and he thought that they had abandoned it, and he would have the policy made in his own name. The policy was dated October 20, 1890. One year's interest had been paid to him on June 18, 1890, and a like payment was made June 16, 1891, by Shearer, who was in possession all of the time after his purchase. The fire occurred October 19, 1891. The policy was a "Michigan Standard" policy, and contained the clause in relation to sole and unconditional ownership. This policy is in the form prescribed by the insurance policy commission under chapter 187, How. Stat. The eighth and ninth assignments of error are based upon the refusal of the court to direct a verdict for the defendant, upon the ground that the policy was void, *ab initio* because plaintiff's interest in the premises was a conditional, and not a sole, ownership.

An elaborate and forcible argument is made by appellant's counsel, based upon the decision of this court in the case of *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346. In this case the insurance company was sued upon a policy issued to the plaintiff. This policy described the property insured as "their one-story frame salt block," etc. It also contained the following, viz.: "If the assured is not the sole and unconditional owner of the property insured or (if said property be a building) of the land on which such building stands, by a sole, unconditional, and entire ownership and title, and if not so expressed in the written portion of the policy, then, and in every such case, the policy shall be void." The company defended upon the ground that when the policy was issued the plaintiff was not the entire, sole, and unconditional owner of the property insured; also that the interest of the plaintiff was not expressed in the written portion of the policy, whereby they claim the policy to be void *ab initio*. This was upon the claim that at the time the policy was issued the premises were occupied by a vendee, who was the equitable owner under

a land contract from plaintiff, fully paid; and the plaintiff had no interest in the premises, except that of trustee of the naked legal title. Proof of these facts being excluded, the case was reversed by this court, which held that the clause describing the property conveyed no other idea than that of complete ownership by the insured, by a sole, unconditional, and entire ownership and title; that the proof offered would have shown Babcock (the vendee) to have had such a title as would have warranted the statement in the policy that the property belonged to him; and that the plaintiffs could not be said to hold by a sole, unconditional, and entire ownership and title when another has so complete a right and interest that he might be rightly considered an owner. The opinion adds: "The point appears too clear to justify elaborate discussion." It is further said that each could not have an absolute interest held by a sole, unconditional, and entire ownership and title. Counsel contends that this case lays down the doctrine that a vendee under a land contract may, under a policy similar to the Michigan policy, safely permit himself to be described as owner, so long as he makes no misrepresentations concerning the condition of the legal title, or of his interest. He strengthens his position by reference to several authorities which support the proposition that a vendor in a land contract cannot be said to be the sole and unconditional owner of the property contracted. *Morris v. Hoyt*, 11 Mich. 9; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 280; *Clay F. & M. Ins. Co. v. Huron Salt & Lumber Mfg. Co.* 81 Mich. 357; *Farmers Mut. F. Ins. Co. of St. Joseph County v. Fogelman*, 85 Mich. 482; *Dupreau v. Hibernia Ins. Co.* 76 Mich. 615, 5 L. R. A. 671; *Hough v. City F. Ins. Co.* 29 Conn. 10, 76 Am. Dec. 581.

In *Farmers Mut. F. Ins. Co. v. Fogelman*, *supra*, it was held that a vendee had such an interest, though the contract was only in part performed by him, as would support a policy issued to him upon the express representation that he was owner. He made no misrepresentation as to the condition of the title, and the agent did not inquire. The court said that "he was the owner by equitable title, and the destruction was his risk. Nobody was under obligation to rebuild for him, and he could protect himself only by insurance." It does not appear whether the clause involved here was a part of the policy or not. But in *Dupreau v. Hibernia Ins. Co.*, 76 Mich. 615, 5 L. R. A. 671, the case arose upon the standard Michigan policy, which does contain it. The case was in other respects similar to the *Fogelman Case*, and the court said: "He was in actual possession at the time of taking the policy and equitably the owner in fee; and we think he may be said at that time to have been the entire, unconditional, and sole owner, within the meaning of the policy." We may therefore agree with counsel that a vendee is, by these decisions, an owner under this clause, though the vendor may hold the legal title to insure performance of the contract. And it would seem to logically follow that the vendor is not such owner, and our attention

is not called to any case where the vendor has been held to be such.

There are, however, two decisions not cited by counsel for either party which should be discussed in connection with this case. The first is the case of *Hoose v. Prescott Ins. Co. of Boston*, 84 Mich. 809, 11 L. R. A. 840. Margaret Hoose, the owner, conveyed the land by deed to Morgan, to secure \$2,000, taking back a contract whereby he agreed to reconvey on payment of that sum with interest. Two years later she insured it as her property. Subsequently she surrendered her contract to Morgan, who at the same time executed a similar one to her daughter, Maggie Hoose, who at the same time took an assignment of the policy of insurance from her mother, with the consent of the agent of the company. It was claimed by the company that the policy was void, because Margaret Hoose was not the sole and unconditional owner of the building, at the time she procured the insurance. The policy read as follows, viz.: "Insure Mrs. Margaret Hoose to the amount of one thousand dollars on the two-story building," etc. The court held that in construing the clause referred to the whole policy should be taken together; that the object sought by the insured was to obtain indemnity against loss of her interest. If the company, which made the policy upon a verbal application, desired to know what interest it was insuring, it should have stated it in that part of the policy pertaining to the risk. It was the intention of the parties to issue a valid and binding contract of insurance, valid and binding from the time of acceptance of the same by the assured, and the court said that, "to give any reasonable force and effect to this clause of the policy, it can only be held to apply to such changes as arise after the policy has been delivered and accepted, in the ownership of the property, and not to an existing state or condition of the property at the time the policy was issued. It looks to the future for protection of the insurer, and not to the present, only so far as the preceding portion of the policy is violated by a misstatement or concealment of any fact material to the risk." The court remarks upon the fact that the policy was issued without stating in the policy what her interest was, and holds that under the policy, construed with the proofs in the case, the defendant must have understood the condition of the title, and intended to insure whatever interest Mrs. Hoose had. It may be suggested in passing that Mrs. Hoose was at the time of insuring either a mortgagor or a vendee under the land contract and, in either event, under the decisions hereinbefore cited, might have been held to be the owner of the premises. The other case referred to is *Hall v. Niagara F. Ins. Co.*, 98 Mich. 184, 18 L. R. A. 135. The policy was issued to "J. C. Hough on his two-story frame dwelling. It was a Michigan standard policy, made upon an oral application. At the time it was issued, Hough held as purchaser under a land contract, the price being partly paid. Soon after, Hough contracted in writing to sell the building insured, with a part of the premises upon which it stood, to Stevens,

giving him possession. Still later, Hough assigned his interest and the policy to Hall, and the agent of the company assented to the indorsement that the policy should be paid to Hall. In July, 1890, a few months after the assignment mentioned, Stevens was given notice to quit the premises, and that the contract was declared void, and the court finds that Stevens' contract was void, and that he was a tenant holding over without permission. So that in this case, like the other, the plaintiff's assignor was, not only when the policy was issued, but at the time the action was brought, a vendee under a land contract, who, as the court expressly states (page 189, 98 Mich. and, page 189, 8 L. R. A.) had such an interest in the property insured as would support the recitation in the policy that it covered "his two-story frame dwelling." This clearly was within the rule of the cases cited.

The differences between the *Hoose Case* and the present one are: (1) That in the former the premises were described as "the dwelling;" in this case, "his dwelling." (2) That in the *Hoose Case* the policy issued to the owner, *i. e.* the mortgagor or vendee, while in this case it issued to the vendor in an existing contract of sale. The *Hall Case* differed from this in the latter particular only. It follows that the *Hall Case* differed from the *Hoose Case* in the first particular. The *Hoose Case*, then, has not gone so far as to hold that the clause in question must necessarily have the construction given in all cases, but only where the circumstances show that the parties mutually intended to insure the interest of the applicant, whatever it may be; and, if the *Hall Case* seems to go further, it is upon the authority of the *Hoose Case*,

which was supposed to involve "precisely the same question." But we think the *Hall Case* does not go to the extent contended for here, for it lays stress upon the fact that the insured had such an insurable interest as warranted the statement that it was his dwelling. By the express terms of this policy the company undertook to insure, not "the dwelling," but "his dwelling." At the time it was issued the plaintiff was not such owner as would support the statement that it was his, under a policy that was to be void if he was not the sole and unconditional owner. The circumstances in the light of which the policy was to be construed do not justify us in saying that it was the intention of the insurer to insure such interest as the applicant might have. Under such a clause an insurer would have a right to understand that it was insuring the one who was the owner, not of an interest of some sort or other, such as that of a mortgage, but of the sole and unconditional title; and in such case it is a reasonable construction to say that the clause in question would refer to the existing condition of the title, and not alone to subsequent changes. But under the proofs it was a question for the jury to determine whether the agent of the company insured the property understanding that the plaintiff "had a land contract out," as testified by him. There is no reason why his interest was not insurable, and if it was done understandingly by the company it is estopped from denying its liability, under the settled law of this state.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

VIRGINIA SUPREME COURT OF APPEALS

NORFOLK & WESTERN R. CO., *Plff. in Err.*,
v.

ADAMS, CLEMENT & CO.

(.....Va.....)

1. A charge to a consignee of \$1 per day after three days for every car remaining

unloaded after notice of arrival is not unreasonable.

2. A reasonable charge for improper delay in unloading cars is not one for transportation, storage, or delivery of freight within Va. Code 1887, §§ 1202, 1203, which provide that no charge other than that provided by law shall be made.

(Lacy and Hinton, JJ., dissent.)

NOTE.—Right of a railroad company to make a charge for detention of its cars by consignees—"demurrage."

This important question has rarely been considered in the state courts of last resort, and has never been decided in the Supreme Court of the United States. In England maritime demurrage has been held only to be chargeable where the bill of lading or other contract provides for such a charge. The reason for such a rule is not apparent, for the charge (whether by a marine or land carrier) is made for an unreasonable detention of the carrier's vehicle not contemplated by the parties at the time of making the contract, and arising entirely from the neglect of the consignee to unload the vehicle. Recognizing the want of soundness of the English rule with regard to marine demurrage the courts of the United States have repeatedly declined to 22 L. R. A.

follow the English rule and have enunciated the doctrine that marine demurrage may be collected even though not provided for in the contract. *Huntley v. Dows*, 55 Barb. 510; *Hawgood v. 1210 Tons of Coal*, 21 Fed. Rep. 581; *The M. S. Bacon v. Erie & W. Transp. Co.* 3 Fed. Rep. 344.

In some jurisdictions, however, the English rule has been adopted, as in Massachusetts, by the decision of *Gage v. Morse*, 12 Allen, 410, 90 Am. Dec. 155. But when the same court in *Miller v. Mansfield*, 112 Mass. 280, came to consider the right of a railroad carrier to make such a charge of \$2 per day after twenty-four hours the difficulties of the situation arising from the ruling in *Gage v. Morse*, *supra*, may have been seen by the court, for in *Miller v. Mansfield*, the court enforced the charge, although there was no mention of such a charge in the bill of lading. The court reached this conclu-

(January 11, 1894.)

ERROR to the Circuit Court for Roanoke County to review a judgment in favor of plaintiffs in an action brought to recover back money which had been paid to defendant, in accordance with a charge made for the detention of railroad cars beyond the period allowed by the rules of the company. *Reversed.*

The company had made a rule, of which plaintiffs had notice, that a charge of \$1 per car per day would be made for every detention of a car for the purpose of loading or unloading beyond seventy-two hours from the time that the car was placed at the disposal of the shipper or consignee, as the case might be. Plaintiffs paid the charges and then sued to recover back the money so paid on the ground that the charges were void under the Virginia Code of 1887, sections 1202, 1203. Section 1202 related to rates of toll on railroads and fixed the maximum charges for

certain specified classes of freight and provided that for the weighing, storage, and delivery of articles at any depot or warehouse of the company, a charge may also be made not exceeding the ordinary warehouse rates charged in the city or town in which, or nearest to which, the depot or warehouse is situated. Section 1203 was as follows: "What charges are prohibited. It shall not be lawful for any railroad company, or its agent, to charge or receive any fee or commissions other than the regular transportation fees, storage, and other charges authorized by law, for manifesting, receiving, or shipping goods or other articles for transportation on such railroad. Any railroad company, or its agent, violating this section shall forfeit \$100. Nothing in this section shall be construed to prevent any railroad company from charging such fees and commissions other than the regular transportation fees for manifesting, receiving, or shipping goods or other articles for transportation on such roads, at

tion by reading into the contract a general rule of the railroad company known to the consignee.

It would seem probable that the English rule of permitting maritime demurrage only where the contract so provides has caused all the confusion which has arisen in the United States with regard to the subject of similar charges by railroad carriers. One of the early cases is *Chicago & N. W. R. Co. v. Jenkins*, 108 Ill. 588, in which it was held that a lien for demurrage did not attach in the case of railroad carriers, unless by contract. A careful examination of this decision will show that the extent of the decision is limited to the proposition that no lien exists upon the goods for the amount of such charges. Another early case is *Burlington & M. R. Co. v. Chicago Lumber Co.*, 15 Neb. 380, in which the Illinois case just referred to is followed as authority without any attempt whatever at argument on the question of demurrage. The Illinois and Nebraska cases therefore hold that no lien for demurrage charges can be created in favor of a railroad carrier unless by a contract, and to that extent these cases are in conflict with the later decisions.

The case of *Crommelin v. New York & H. R. Co.*, 4 Keyes, 90, is another case where the question is considered whether a lien is created for demurrage charges; but this case only decides that there is no lien and does not decide the question of the right to demurrage.

Coming now to the recent cases, we find the following decisions:

In *Miller v. Georgia R. & Bkg. Co.* (88 Ga. 563, 18 L. R. A. 828), decided by the supreme court of Georgia, December 7, 1891, the right of a railroad company to adopt and enforce a rule making a charge of \$1 per day for car after forty-eight hours was affirmed where such rule was known to the carriers' customers before the shipments were made. In that case *Simmons, J.*, said: "The need of regulations of the kind in question is well illustrated by the evidence in this case. The general manager of the plaintiff testified that, before this rule was adopted, consignees were often dilatory in removing freight from the cars in which it was shipped, and the cars were detained day after day, and days lengthened into weeks, until our transportation work was subjected to immeasurable embarrassment. The transportation of the company was well-nigh paralyzed,—not for lack of cars, for we had plenty, but because our cars were converted into warehouses. The trouble grew, and finally culminated in a threatened blockage 22 L. R. A.

throughout the country. It has been a part of our experience to be threatened with suit by the shipper for not moving the freight promptly. We are supposed to always have cars ready to transport any freight that is offered. We endeavor to make proper arrangements to do so; but the trouble was that, when A had freight to ship, B had our cars, and we could not get them."

In *Kentucky Wagon Mfg. Co. v. Louisville & N. R. Co.*, 11 Ky. & Corp. L. J. 49, decided by *Judge Toney* in the Louisville law and equity court, December 20, 1891, a rule was upheld as reasonable making a charge of \$1 per day per car after the lapse of forty-eight hours. In the course of his able opinion *Judge Toney* said: "Promptness, uniformity, and safety in the railroad traffic business of the country can only be secured by the adoption and strict enforcement by railroad companies of uniform and reasonable rules and regulations, which shall be binding upon all shippers and consignees alike with reference to the reception, transportation, and delivery of freight."

Several unreported cases are to the same effect. Thus:—

In *Chicago, M. & St. P. R. Co. v. Pioneer Fuel Co.*, the district court of Woodbury county, Iowa, decided by opinion of *Judge Van Wagenen* January, 1892, that a general rule making demurrage charges may be adopted and enforced by a railroad carrier.

In *Union Pacific, D. & C. R. Co. v. Cooke*, March 25, 1892, the district court of Arapahoe county, Colorado, by *Judge Amos J. Rising*, held:

1. That the railroad companies have the right to adopt and enforce any reasonable rule.
2. That a rule allowing forty-eight hours in which to unload is not unreasonable.
3. That \$2 per car per day is a reasonable charge.
4. That it is not perceived upon what principle the reasonableness of the rule can be affected from the fact that the defendant was not consulted in framing these rules.
5. That the evidence shows that the regulation complained of was well known to the defendant beforehand, and it was immaterial whether the consignee had notice or not; and
6. That the regulation is operative whether indicated upon bills of lading or not.

In *Ohio & M. R. Co. v. Bannon* (June 20, 1892, in the Common Pleas Court of Louisville, Ky.) *Judge Emmet Field* held that a rule of the railway company making a charge for the detention of cars by consignees after forty-eight hours is reasonable, and the rule was accordingly enforced.

intermediate points thereon, between what are known as the regular depots, as may be agreed on between the shipper and such company."

Mr. Thomas J. Kirkpatrick, for plaintiff in error:

It is well recognized now that these are not demurrage charges in the maritime sense, but are charges for the use and detention of cars which have been loaded by the shipper under a contract that they should be unloaded by the consignee, a reasonable time being allowed to the shipper for loading and to the consignee for unloading. The railroad company claims the right to make a reasonable charge for the use of its property, cars, and tracks, beyond such reasonable time.

Miller v. Georgia R. & Bkg. Co. 18 L. R. A. 323, 88 Ga. 563, 50 Am. & Eng. R. R. Cas. 80.

Unless such rules and regulations as these are adopted and enforced the railroad companies will be unable at the busy seasons of the year to furnish transportation to the public as freely and promptly as the public demands. Railroad companies have a right to

adopt such rules and regulations as are reasonable and necessary for the convenient transaction of business between the railroad companies and those dealing with them either as passengers or shippers.

Norfolk & W. R. Co. v. Irvine, 84 Va. 554; *Norfolk & W. R. Co. v. Wyser*, 83 Va. 250.

Sections 1203 and 1208 of the Code do not apply to the case in hand.

Messrs. Watts, Robertson & Robertson, also for plaintiff in error:

A common carrier may make reasonable rules and regulations for the convenient transaction of business between himself and those dealing with him, either as passengers or shippers.

Wheeler, Modern Law of Carriers, 180; *Norfolk & W. R. Co. v. Irvine*, 84 Va. 553; *Norfolk & W. R. Co. v. Wyser*, 83 Va. 250; *Stephen v. Smith*, 29 Vt. 160; *State v. Gould*, 53 Me. 379; *Orocker v. New London, W. & P. R. Co.* 24 Conn. 249; *State v. Chovin*, 7 Iowa, 204; *Sidman v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 766; *Swan v. Manchester & L. Railroad*, 153 Mass. 116, 43 Am. Rep. 432.

In *Milwaukee, L. S. & W. R. Co. v. Lynch* (October 15, 1892, in the circuit court of Oneida county, Wisconsin, and unreported), a demurrage charge after a certain time limit of \$23 for ten days was held reasonable and enforced.

In *Goff v. Old Colony R. Co.* (January 19, 1893, in the sixth district court of Rhode Island), the court affirmed the railroad company's right to hold the freight for demurrage charges and gave judgment for the railroad company accordingly.

It will be seen that the recent course of decision has been uniform in enforcing a reasonable regulation of the railroad carrier making a reasonable charge for the unreasonable detention of its cars by consignees, when by custom or contract the consignees were to unload the goods. That such a rule or regulation is not only manifest justice to the railroad carriers, but is of the highest public importance, can be denied neither upon principle nor authority.

Even the railroad commissioners of some of the states where the trend of legislation is very hostile to railroad companies have repeatedly recognized the importance to the public of the rule laid down in the recent cases on the subject of demurrage. For instance in the case of *Davis v. Missouri, K. & T. R. Co.*, Kansas Railroad Commissioners' Report for 1891, p. 21, the railroad commissioners of Kansas declined to interfere by recommendation with a demurrage charge of \$1 per day per car on every car detained by a consignee in excess of three days.

And in *Rothschild v. Chicago & N. W. R. Co.*, Iowa Railroad Commissioners' report for 1887, p. 783, the railroad commissioners of Iowa decided that under the great demand for cars then existing, a rule making charge of \$3 per day per car after twenty-four hours was reasonable. In the course of the opinion the commissioners said: "The demand for cars upon the Chicago & North Western Railroad Company is unprecedented and many of their customers are facing financial dishonor, simply because this company is unable to furnish them cars. This affects business men, farmers, and all classes seriously. In view of the situation, the determination of the question of demurrage by this board occurs under circumstances that are not especially favorable to the complainants. It is a matter of judgment how long a consignee should be allowed the use of a car without payment. As stated before, the demand for cars should be an element in 22 L. R. A.

its determination. The case before them is probably extreme. Under conditions stated they believe that twenty-four hours after the car has been placed in an accessible position and the consignee notified is a reasonable time for unloading. They are of the opinion that payment for the use of the car (they do not like the term 'demurrage'), should begin after that time. The amount charged, \$3 per day, is not one third they would have earned could they have been in service."

The railroad commissioners of Kansas issued a circular dated July 7, 1891, to the general managers of the Kansas railroads (see Kansas Railroad Commissioners' Report 1891, p. 22), in which appears the following recommendation:

"Distribution and Apportionment of Cars among Shippers.

"Circular No. 5.

"Topeka, Kan. July 7, 1891.

"To General Managers:—

"In view of the present flattering prospect for abundant crops of farm produce in Kansas, and as a means to avoid the possibility of a shortage in transportation facilities, the commission desires to respectfully impress upon you the importance of a thorough and uniform system for the apportionment and distribution of cars among the several stations and shippers along the line of your road. As a means to this end we beg leave to submit the following suggestions, and ask if they meet with your approval, that instructions be issued to your agents accordingly, viz:

"Seventh:—A demurrage charge should be rigidly collected when cars are held an unreasonable time for loading."

When it is remembered that the railroad commissions have been created with a view to regulating railroad carriers in the interests of the public, the force of the opinions of the railroad commissioners as sustaining the rules of car service associations in regard to demurrage will be readily acknowledged. Undoubtedly an expeditious and economical public service by the railroad carriers renders the charging of demurrage absolutely necessary on the ground of public policy alone. The theory of the principal case is sustained by logic, authority, and common sense.

F. M. L.

On the same principle a railroad company may make a reasonable charge for the detention of a car beyond a reasonable time after its arrival at its destination, where such detention is due to the negligence or delay of the consignee. A railroad company may make a contract charging demurrage for the unreasonable delay of cars, and by contract may make such charge a lien on goods transported in the cars.

Baldwin v. Chicago Car Service Assn., opinion by attorney-general of Illinois, April 13, 1891; *Youngblood v. Birmingham Car Service Assn.*, Alabama Railroad Commission, August 10, 1891; *Miller v. Georgia R. & Bkg. Co.* 18 L. R. A. 323, 88 Ga. 563, 50 Am. & Eng. R. R. Cas. 80; *Union Brewing Co. v. Chicago, B. & Q. R. Co.*, Illinois Railroad Commission, December 10, 1891; *Union Pacific, D. & C. R. Co. v. Cooke*, District Court of Arapahoe County, Colorado, March 25, 1892; *Ohio & M. R. Co. v. Bannon*, Kentucky Common Pleas, June 20, 1892; *Milwaukee, L. S. & W. R. Co. v. Lynch*, Wisconsin Circuit Court, October 15, 1892; *Chicago, M. & St. P. R. Co. v. Pioneer Fuel Co.*, Iowa District Court, January, 1892; *Goff v. Old Colony R. Co.*, Rhode Island District Court, January 19, 1893.

A charge of \$1 per day for demurrage for the detention of each car is reasonable in amount.

Miller v. Georgia R. & Bkg. Co. supra; *Davis v. Missouri K. & T. R. Co.*, Kansas Railroad Commissioners' Report for 1891, p. 21.

The enforcement of the demurrage charge for unreasonable delay on the part of the shipper in the detention of cars is in the interest of the public at large.

Kentucky Wagon Mfg. Co. v. Louisville & N. R. Co. 11 Ry. & Corp. L. J. 49; *Chicago, M. & St. P. R. Co. v. Pioneer Fuel Co. supra*; *Miller v. Georgia R. & Bkg. Co. supra*; *Rothschild v. Chicago & N. W. R. Co.*, Iowa Railroad Commissioners' Report for 1887, p. 783. See also *Diphrys Casson State Co. v. Festinog R. Co.* 2 Nev. & Macn. (1873).

Mr. Arthur B. Pugh, for defendants in error:

By section 1202 of the Code (1887) the rates of toll which may be charged by a railroad company for the transportation of persons and property over its lines in this state are minutely prescribed; and provision is made with like minuteness for such further charges as may be lawfully made by such company.

This statute covers the whole subject of transportation, terminal, and storage charges. If there were no other statutory provision on the subject, we think it perfectly clear that any charge other than the charges thus authorized would be unlawful. But by section 1203, the legislature has positively prohibited any railroad company, under the penalty of the forfeiture of \$100 for every violation of such regulation, from making any charges, either as a public carrier, or as a warehouseman, other than the regular transportation fees, storage, and "other charges authorized by law."

The state has the right to make reasonable regulations, prescribing or limiting the 22 L. R. A.

charges that may be made by a railroad company operating within its jurisdiction, except as it may be restrained by some contract in the company's charter, or by the law of interstate commerce.

Stone v. Farmers Loan & T. Co. 116 U. S. 807, 29 L. ed. 636; *Ruggles v. Illinois*, 108 U. S. 526, 27 L. ed. 812; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155, 24 L. ed. 194; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Norfolk & W. R. Co. v. Pendleton*, 86 Va. 1004.

The Norfolk & Western Railroad Company is subject to the statute of this state.

Under the law of this state the Norfolk & Western Railroad Company had no right to make and collect the demurrage charges, which form the subject of this controversy.

Demurrage is an extended freight or reward in compensation for lost earnings, which as a legal right, exists only as to carriers by sea-going vessels.

5 Am. & Eng. Encyclop. Law, 542.

Technically speaking it is confined to the maritime law. The right to it does not attach to carriers by railroads.

Chicago & N. W. R. Co. v. Jenkins, 103 Ill. 588, 9 Am. & Eng. R. R. Cas. 118; *Gage v. Morse*, 12 Allen, 410, 90 Am. Dec. 155; *Burlington & M. R. Co. v. Chicago Lumber Co.* 15 Neb. 391; Jones, Liens, § 282, and note.

Wherever a charge in the nature of demurrage has been made by a railroad company, and the amount of such charge has been allowed by the courts, it has been so allowed, not as demurrage, but as storage, and has been allowed to the company in its character, not as a carrier, but as a warehouseman.

Miller v. Mansfield, 112 Mass. 260; *Miller v. Georgia R. & Bkg. Co.* 18 L. R. A. 323, 88 Ga. 563, 50 Am. & Eng. R. R. Cas. 79.

Various reports and conclusions of certain railroad commissioners of the states of Alabama, Illinois, and Texas are referred to in the company's petition. These rulings, in view of our statute, have no bearing upon the question here, and would certainly not be considered as authority, even if they had.

Fauntleroy, J., delivered the opinion of the court:

The petition of the Norfolk & Western Railroad Company complains of a judgment of the circuit court of Roanoke county, rendered therein at the April term, 1893, in favor of Adams, Clement & Co. against the said Norfolk & Western Railroad Company for the sum of \$488, with interest thereon from September 1, 1891, until paid, in which suit the said Adams, Clement & Co. are plaintiffs and the petitioner is defendant. The suit is an action of assumpsit against the Norfolk & Western Railroad Company to recover back certain sums of money alleged to have been illegally exacted from and paid by the said Adams, Clement & Co. to the said Norfolk & Western Railroad Company, and a verdict was rendered and a judgment entered for the full amount of the plaintiff's claim. The case is here upon a writ of error obtained by the defendant company.

The Norfolk & Western Railroad is a com-

mon carrier, owning and operating a line of railroad in the state of Virginia, and the town of Salem is upon the said line. The plaintiffs are lumber dealers, doing business at the said town of Salem; and between February 16 and August 31, 1891, they received a large number of shipments of lumber in carload lots, consigned to them from points on the line of the said Norfolk & Western Railroad, and from points in the state of Virginia, and other points in other states. These shipments were made with the understanding and agreement that the lumber was to be unloaded by the consignee at Salem depot upon the arrival of the shipments at that point. The railroads of Virginia and of the other states, for their own protection as well as for the protection and benefit of the public, have a car service set of rules, designed and enforced to secure the prompt movement of freight cars; and under the rules of this car service association the Norfolk & Western Railroad Company have a charge of \$1 per car per day for the use of their cars and their side or switch tracks for every day that the cars remain unloaded after notice of their arrival to the consignee and the lapse of three days. Under the abuses that prevailed previous to the establishment of this rule, serious loss and inconvenience were caused both to the shipping public and the railroad company by the unreasonable and protracted delay of consignees in unloading the cars; the railroad company being unable thereby to furnish cars when called upon by shippers of freight, and their side tracks being incumbered, and the movement of freight impeded, causing heavy expense, and a demand for more track room to accommodate idle cars standing unloaded upon their tracks, and the company being unable, therefore, when called upon, to furnish cars for the shipping public. The railroad company, as a common carrier, is bound to furnish cars for transportation of freight; and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless, and an incumbrance. If A. be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B. it is evident that both the railroad company and the shipping public will suffer injury. The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of cars long before the commencement of the account sued upon; and they knew and agreed when the shipments were made that such a charge would be made, unless they unloaded their cars in compliance with the rule of the company which gave to them seventy-two hours in which to unload their freight after notice of the arrival of the cars which they had stipulated to unload. It is well settled in this state and in other states that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it, either as passengers or as shippers. See *Nor-*

folk & W. R. Co. v. Wisor, 82 Va. 250; *Norfolk & W. R. Co. v. Irvine*, 84 Va. 553. That this rule is reasonable and proper, and that the railroad company can make such a charge, has been decided in a number of states; the question never having arisen before in this state. See *Müller v. Georgia R. & Bkg. Co.* 88 Ga. 563, 18 L. R. A. 823; *Müller v. Mansfield*, 112 Mass. 260; *Union Pacific, D. & G. R. Co. v. Cooke*, 50 Am. & Eng. R. R. Cas. 89, note; *Kentucky Wagon Mfg. Co. v. Louisville & N. R. Co.* 50 Am. & Eng. R. R. Cas. 90, note; *Chicago, M. & St. P. R. Co. v. Pioneer Fuel Co.* [Woodbury county, Iowa, District Court, Jan. 1892]; *Beach, Law of Railways*, § 924, and cases there cited; *Jones, Liens*, § 284, and cases cited; 4 *Lawson, Rights, Rem. & Pr.* p. 8146, §§ 1881, 1832; *Wood, Railway Law*, pp. 1592, 1593, 1600; 2 *Waterman, Corp.* pp. 245, 246; 2 *Am. & Eng. Encyclop. Law*, pp. 878-881, and note; *Redf. Railways*, 6th ed. pp. 67-83.

In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various states. In Texas, the railroad commissioner, *Judge Reagan*, after full investigation, made an order fixing \$3 per day per car as a reasonable charge for delay in unloading after forty-eight hours' notice. The railroad commissioner of Illinois, and those of other states, after full investigations, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such charge is apparent. It is contended, however, that the sections of the Code of Virginia of 1887, 1202 and 1203, make such a charge illegal; and the judge of the trial court took the view of the plaintiff, and instructed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not. We think that the trial court erred in so holding, and in so instructing the jury. The charge made by the railroad company for the detention of its cars, and the occupation of its tracks after due notice, and the allowance of three days to the consignee to unload the cars and disincumber the track, is not within the purview, purpose, or prescription of the statute, and is not of the character of weighing, storage, and delivery of articles of freight contemplated by the makers of the statute. The charge is not for transportation, storage, or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars, and the obstruction of their tracks by the consignee, for weeks and months after the contract for transporting and delivering the freight had been fulfilled and ended. It is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the

rates prescribed. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for hire, and can make reasonable rules and regulations and charges for such service as bailee, as it may see fit. Such charges are not carrier charges in the meaning, intentment, or prescription of the statute. Under the head of "Carriers," the American & English Encyclopædia of Law (page 880, vol. 2) : "A carrier fulfilling the duties of a warehouseman is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases; and the consignor (consignee), with notice thereof, will be bound. Whether such terms are or are not reasonable is an irrelevant inquiry." In a note to this section is the following: "We can see no reason why a railroad company, as a common carrier, cannot stipulate, by a contract express or implied, that their liability as carrier shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business." Hutchinson on Carriers (sec. 378) says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe-keeping as the hired bailee of the owner."

The record in this case shows that at the time of the shipments of this lumber the plaintiffs knew that there was a depot at Salem for the ordinary business of the company, but not for the accommodation of carloads of lumber; and that, if they did not unload the cars according to the contemplation of the contract, within seventy-two hours (exclusive of Sunday and holidays) after one day for placing the cars and notice, they would have to pay \$1 per car, per day, thereafter; not for transportation and delivery, but

for the detention of cars, and use and occupation of the tracks of the railroad company. The statute provides solely for the transportation, storage, and delivery of freight to the carrier, to be shipped by it, and delivered at the other end of the journey to the consignee; but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according to such contract as the carrier and the customer may make, express or implied. "A railroad company is not required by law to keep a warehouse or depot at every station along its route or line, and it may stipulate, either expressly or by implication, that it will assume no liability as warehouseman at a flag station where it has no depot or agent; and when the consignee is fully advised, at the time of the shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of \$1 a day for the unreasonable, and even long-continued, detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public, and a stimulus to the consignee to unload the car, and disencumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of \$1 per day; and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record shows was done in this case, in some instances), without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer. In view of the authorities and the facts of this case, we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company, and was due to it by the plaintiffs, Adams, Clement & Co., and that they had no right to recover it back; and that the circuit court of Roanoke county erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled; and this court, proceeding to enter such judgment as the circuit court ought to have entered upon the pleadings, will dismiss the plaintiffs' suit.

Reversed.

Lacy and Hinton, JJ., dissent.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James B. CASE *et al.*, *Appts.*,

v.

William MINOT, Jr., *et al.*, Trustees of
Boston Real Estate Trust.

(158 Mass. 577.)

1. The right of a tenant of upper floors to light and air from a well or open space which is not accessible to the street cannot be obstructed, where it is necessary to the enjoyment of the demised premises.
2. A landlord is liable to a tenant of upper floors for wrongful obstruction of light and air from a well or open space in a building by a chimney constructed by another tenant under the landlord's express authority to erect such chimney for the use of boilers in the basement.
3. The objection of want of parties, when taken by plea or answer, should give the names of the necessary parties when this can be done, and especially where it is peculiarly within the knowledge of the defendants.
4. Other tenants who caused the damages are not necessary parties to an action by tenants against a landlord for interference with the enjoyment of the premises, where the time for injunction has passed and the only relief that can be granted is by way of damages.
5. That the tenant's right to an injunction against the landlord's interference with his enjoyment of the premises terminates pending suit by the expiration of the term will not prevent equity from retaining the suit to assess damages.

(April 4, 1893.)

tion against the landlord's interference with his enjoyment of the premises terminates pending suit by the expiration of the term will not prevent equity from retaining the suit to assess damages.

APPEAL by complainants from a judgment of the Superior Court for Suffolk County in favor of defendants in an action brought to enjoin defendants from permitting the erection of a chimney so as to interfere with the light coming to plaintiffs' windows, and to recover damages. *Reversed.*

From the report of the facts made by the trial court it appeared that:

Defendants own certain premises in Boston bounded southerly on Bedford street and northerly on Avon street. The easterly property line is a straight line, and is coincident with the outer face of the wall of the defendants' building, except along part of the line about the middle of the building where the wall makes a set back from the line for a rectangular air or window space which is wholly on defendants' land. This rectangular space is about 6½ feet by 27½ feet and the entire distance across to the wall of the opposite building as it now stands is about 17 feet.

The plaintiffs are lessees of the defendants of a portion of the defendants' building under written lease expiring December 31, 1892.

NOTE.—*American law as to easements of light, air, and prospect.*

The doctrine that an easement of light or air can be acquired by prescription is almost universally rejected in this country.

In Delaware the doctrine of ancient lights was held in the case of *Clawson v. Primrose*, 4 Del. Ch. 643, to be adopted as part of the common law by force of the constitutional adoption of the common law, and subject to alteration only by the legislature.

But the case of *Clawson v. Primrose* is commented on and distinguished on the facts in *Hulley v. Security Trust & S. D. Co.*, 5 Del. Ch. 573, which seems to regard the question of ancient lights as not entirely settled by that case, although it was the opinion of the able chancellor, as the question had not been passed upon by the court of appeals. It is remarked further that the decision in *Clawson v. Primrose* is the only one rendered in that state on the subject during the whole period of nearly one hundred years after the adoption of the constitution.

In Illinois the early case of *Gerber v. Grabel*, 16 Ill. 217, declared that the doctrine of ancient lights existed in that state, but that to be ancient the use of the light must have existed from a period beyond memory, and that the rule of twenty years' use under the later English statutes, which could not be traced beyond the Statute of 21 James I., did not apply in that state, as the English statutes after the fourth year of James I., were not adopted in that state.

But the doctrine is expressly rejected in later cases. *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570; *Tinker v. Forbes*, 136 Ill. 221; *Dexter v. Tree*, 117 Ill. 582.

The doctrine of ancient lights is recited as if it 22 L. R. A.

were the law in *Manier v. Myers*, 4 R. Mon. 514, but the case did not involve the question, and it was subsequently decided that an easement of light and air cannot be acquired by prescription in Kentucky. *Ray v. Sweeney*, 14 Bush, 1, 29 Am. Rep. 388.

In Maryland there was an obiter recital of the doctrine in *Wright v. Freeman*, 5 Harr. & J. 477.

But the doctrine was expressly repudiated in *Cherry v. Stein*, 11 Md. 1.

The doctrine that an easement of lights can be acquired by prescription was approved in *Robeson v. Pittenger*, 2 N. J. Eq. 57, 23 Am. Dec. 412.

But in this case the building whose lights were in question had been erected by the owner of the lot which they overlooked. *Ibid.*

And later cases establish the law that an easement in light and air cannot be acquired by adverse user in New Jersey. *Hayden v. Dutcher*, 21 N. J. Eq. 217; *King v. Miller*, 8 N. J. Eq. 559, 55 Am. Dec. 246.

In *Mahan v. Brown*, 13 Wend. 261, 23 Am. Dec. 461, it was assumed that the doctrine of ancient lights prevailed in New York, although the court declares that the case involved was not one of ancient lights.

But later cases expressly decide that the doctrine of ancient lights does not obtain in New York. *Parker v. Foots*, 19 Wend. 309; *Knabe v. Levalle*, 23 N. Y. Supp. 518.

In the early Pennsylvania case of *Biddle v. Ash*, 2 Ashm. 211, it was conceded for the purpose of the case that an easement of light might be presumed as a presumption of fact after twenty years' use, but it was held that the facts in that case did not establish any easement.

But there was an obiter disapproval or caution as to the doctrine in *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313, and in *Haverstick v. Sipe*, 33 Pa. 363, it is expressly decided that mere enjoyment of light

At the time of the lease, the rooms on the different floors leased to the plaintiffs were lighted by windows at each end of the rooms overlooking Bedford and Avon streets respectively, and also on the east side opening upon the light and air space above referred to.

There is one floor and a basement underneath the premises leased to the plaintiffs, which had been leased by the defendants to and occupied by Bradford and Thomas, who also had a lease of the other part of said building, which lease had not expired May 20, 1892, but had been modified by agreement of that date.

The plaintiffs are commission merchants doing an extensive business in the sale of goods consigned to them by various manufacturers. Said second floor was used by the plaintiffs not only as a store-room but as a sales-room of the goods consigned to them, and in making such sales it is necessary to have a well-lighted place for customers to examine goods, and the plaintiffs used that part of said second floor directly in front of said side windows for the exhibition of such goods.

For the plaintiffs to have the full enjoyment of the premises as they were when leased to them, it is necessary for them to have the full and undisturbed use of said side windows for light and air, and of said space for opening and shutting said window shutters.

May 20, 1892, the defendants executed an unrecorded lease to Eben D. Jordan and another of the estate owned by them in the locality described, including said building occupied

in part by plaintiffs, subject to the lease of the plaintiffs and subject to the lease to and subsequent agreement with Bradford and Thomas. Said agreement with Bradford and Thomas was made by the defendants to enable them to make said lease to Jordan and another and give said Jordan and another, as lessees, possession of said basement.

Said defendants have not been since the date of the lease to Jordan and another in the occupancy or control of said premises except as landlord under said lease, and have not employed any one to do any work upon said premises as complained of, and have not directed or authorized the doing of any of said work unless the contrary shall be held constructively and as a matter of law on the facts; all of the acts complained of having been done as a matter of fact by said Jordan or by persons employed, paid, directed, and controlled by them.

Eben D. Jordan and another went into possession, under their said lease, on the first of June, 1892.

On and after the said first of June, 1892, the said Jordan and Jordan commenced, by their servants and agents, to place in said basement, boilers and other apparatus designed for an electric light plant, of a capacity of 250 arc lights, as specified in their said lease, and to erect wrought iron pipes or chimneys, and said pipes are now entirely finished.

By the construction of said electric plant, with its said chimneys, the plaintiffs have been greatly annoyed and injured in their said

and air over another's premises for any length of time cannot ripen into an adverse right.

The earlier South Carolina case of *McCready v. Thomson*, 1 Dnd. L. 181, approved the English doctrine, but in *Napier v. Bulwinkle*, 5 Rich. L. 812, it is said that the facts of the earlier case were such that the jury might have found evidence of assent to the claim of right in such easement and the doctrine is expressly repudiated by the later case.

Some other early cases discussed the doctrine of ancient lights in cases to which it was applicable only by way of analogy, and in some instances assumed that this doctrine was the law in this country, but these *obiter dicta* on the subject are so entirely obsolete in view of the numerous decisions to the contrary that they have not been generally referred to in this note.

A comparatively recent case of this sort is *Berkeley v. Smith*, 27 Gratt. 898, in which there is an obiter recital of this doctrine as if it were law, and there does not seem to be any decision in that state on the subject.

In other states the decisions have uniformly rejected the doctrine of ancient lights.

Thus in Alabama. *Ward v. Neal*, 37 Ala. 500.

In Connecticut the doctrine of ancient lights was disapproved in *Ingraham v. Hutchinson*, 2 Conn. 584, but the case did not call for any decision as to lights.

In Georgia the doctrine is rejected. *Turner v. Thompson*, 58 Ga. 288, 34 Am. Rep. 497.

Likewise in Indiana. *Keiper v. Klein*, 51 Ind. 816; *Stein v. Hauck*, 56 Ind. 65, 26 Am. Rep. 10.

And in Kansas. *Lapere v. Luckey*, 23 Kan. 534, 38 Am. Rep. 198.

In Louisiana also it is held that a prescriptive right to light and air for windows cannot be acquired without an express grant or covenant. *Oldstein v. Firemen's Building Assn.* 44 La. Ann. 462.

The doctrine is also rejected in Maine. *Pierre v. Fernald*, 36 Me. 436, 46 Am. Dec. 573.

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The English doctrine of an easement of light and air, based on prescription, is denied in Massachusetts, irrespective of the Statute of 1862, chapter 144, which expressly denied this right. *Rogers v. Sawin*, 10 Gray, 376.

Other Massachusetts cases denying the doctrine are: *Fifty Associates v. Tudor*, 6 Gray, 269; *Carrig v. Dee*, 14 Gray, 683; *Richardson v. Pond*, 15 Gray, 387; *Christ Church v. Lavezziolo*, 156 Mass. 89.

And the court declares that no right to an easement of light and air can exist over the premises of an adjoining owner except by actual grant. *Paine v. Boston*, 4 Allen, 168.

The doctrine of ancient lights is also rejected in Texas. *Klein v. Gehrung*, 25 Tex. Supp. 232, 78 Am. Dec. 565.

And in Vermont. *Hubbard v. Town*, 38 Vt. 205.

And also in West Virginia. *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

The mere fact that a private alley has remained unenclosed and that a person has built a house with doors and windows opening upon it and enjoyed the benefit of the light and ventilation which it afforded so long as the owners chose to leave it open confers no easement which will prevent the owners from closing it. *Dexter v. Tree*, 117 Ill. 532.

No amount of assertion of a right to an easement of light and air can constitute the basis of an adverse right or easement of that kind, so long as the owner of the adjoining premises has had no occasion to make use of his premises in such a way as to conflict with the alleged easement. *Tinker v. Forbes*, 136 Ill. 221.

The reason for the almost unanimous repudiation of the doctrine in this country is suggested in the preceding sentence. It is in nearly all the leading cases on the subject declared in substance that the law of prescription or adverse user is not fairly to be applied to the enjoyment of light and air since there is in its continuance nothing of which the owner of the vacant premises can complain. It is

business and in the quiet enjoyment of said premises leased to them, by reason of the noise and dust caused by said work; and the light at said side windows has been, by said pipes, substantially obstructed, so as to materially interfere with the plaintiffs' said business.

Complainants brought said bill in good faith believing it to be their proper remedy.

Messrs. Charles H. Hanson and William H. Leonard, for appellants:

A covenant for quiet enjoyment is implied in the terms of an ordinary lease.

Taylor, Land. & T. § 304; Wood, Land. & T. 2d ed. § 359; *Leech v. Schroeder*, L. R. 9 Ch. App. 463; *Burnett v. Lynch*, 5 Barn. & C. 609.

To constitute a breach of the covenant, it is sufficient that the lessee's ordinary and lawful enjoyment be substantially interfered with by the acts of the lessor or those claiming under him, though neither the title nor possession of the land be otherwise affected.

Taylor, Land. & T. § 305.

The plaintiffs were entitled to the benefit of an implied grant, and of an easement in the well or jog, and to a right to light and air therefrom.

Phillips v. Low [1892] 1 Ch. 47; *Brande v. Grace*, 154 Mass. 210; *Salisbury v. Andrews*, 19 Pick. 250, 128 Mass. 836; *Parker v. Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *McNeil v. Kendall*, 128 Mass. 251, 85 Am. Rep. 373; *Brown v. Holyoke Water Power Co.* 152 Mass. 463; *Dexter v. Manley*, 4 Cush. 14; *Sherman v. Williams*, 113 Mass. 485, 18 Am. Rep. 522;

Edmison v. Lowry (S. Dak.) 17 L. R. A. 275, and cases; *Thayer v. Payne*, 2 Cush. 327.

And the erection of pipes or chimneys in the well or jog was the erection of a permanent structure upon the premises leased to the plaintiffs, materially changing the character and beneficial enjoyment thereof.

Sherman v. Williams, *supra*; *Upton v. Townsend*, 17 C. B. 30; *Edmison v. Lowry*, *supra*.

If it is in law the act of the landlord, the landlord will be responsible for the effect of such wrongful act, without further proof of unlawful intent.

Royce v. Guggenheim, 106 Mass. 201, 8 Am. Rep. 322; *Upton v. Townsend* and *Sherman v. Williams*, *supra*.

And it is the wrongful act of the defendants. *Sherman v. Williams*, *supra*; *Upton v. Townsend*, 17 C. B. 66; Washb. Real Prop. §§ 342, 343; *Wright v. Lattin*, 38 Ill. 293.

The fact that the lessees, one of the parties to the contract, have done certain acts in alleged pursuance of the contract or lease without objection on the part of the defendants, the other party to the contract, must be taken as showing the understanding of the parties and the correct construction of the lease and of the lessee's authority under it, in the absence of any repudiation or evidence on the part of the defendants that such acts were not authorized.

See *Upton v. Townsend*, *supra*. See also *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 254; *Robinson v. United States*, 80 U. S. 18 Wall. 863, 20 L. ed. 653; *Topliff v. Topliff*, 123 U. S. 121, 30 L. ed. 1110; *Chicago*

therefore putting upon him an unreasonable burden to compel him to build on his own premises in order to prevent the imposition of a servitude upon them.

If an easement of this sort cannot be acquired by prescription, it is clear that no right to light and air over the premises of another can exist in the absence of some covenant, grant, or express creation of the right; so in *Ray v. Lyness*, 10 Ala. 63, an obstruction of light was held not actionable, where there was no claim of ancient lights or grant of easement in the case.

But the right of property entitles the owner to so much light and air as fall perpendicularly on his land. *O'Neill v. Breese*, 3 Misc. 219.

Right of prospect.

For mere interference with prospect, it not being an incident of the estate, no remedy lies apart from contract. *Garrett v. Jones*, 66 Md. 290.

An action does not lie for obstructing view, unless an express covenant not to obstruct can be shown. *Harwood v. Tompkins*, 24 N. J. L. 425.

The legislature cannot authorize municipal authorities to declare that buildings erected by owners of land on their own premises may constitute a nuisance because they obstruct the view of the sea and shut out the sea breezes from other property. *Quintini v. Day* St. Louis, 64 Miss. 488, 60 Am. Rep. 62.

Interference with the prospect of an adjoining owner by a bow window projecting into a street is not ground for an injunction in favor of the latter. *Jenks v. Williams*, 115 Mass. 217.

A veranda the same width of the sidewalk supported by iron columns does not violate the Louisiana law as to servitudes of light and air in respect to an adjoining owner. *Durant v. Riddell*, 12 La. Ann. 746.

Implied grants.

There is some conflict on the question of implied grants of these easements.

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In *Story v. Odin*, 12 Mass. 157, 7 Am. Dec. 48, it was held that the grantor of premises on which a building stands with windows overlooking another lot which he still owns cannot erect any structure which will darken those windows, in the absence of any exception or reservation of a right to do so.

But in a later case this was distinguished and it was held that where the owner of two lots, one of which has a building upon it, sells them both by auction on the same day with the privileges and appurtenances belonging to each, there is no implied easement of light and air belonging to the building, although the sale and conveyance of that tract is made first. *Collier v. Pierce*, 7 Gray, 18, 66 Am. Dec. 453.

And again that an easement of light and air is not granted by implication on a conveyance of a building, where on the same day and as part of the same transaction the grantees and grantors united in a conveyance of the adjoining premises, with a covenant that they are free of all incumbrances, especially where the windows for which the easement was claimed were not necessary to the estate granted. *Randall v. Sanderson*, 111 Mass. 114.

Finally, in *Keats v. Hugo*, 115 Mass. 206, 15 Am. Rep. 30, it is held, on a full review of earlier cases, that no grant of any right of light or air from adjoining lands is to be implied from the conveyance of a house.

It is said in this case that the same doctrine is assumed to be the law of Massachusetts in *Brooks v. Reynolds*, 106 Mass. 81, and *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322.

The case of *Story v. Odin*, *supra*, therefore, which has been a leading one on the doctrine it declared, is no longer authority in Massachusetts.

The rule that an implied easement of light for windows is created by the grant of premises, the windows of a structure on which overlook land retained by the grantor, was approved *arguendo* in

v. Sheldon, 76 U. S. 9 Wall. 54, 19 L. ed. 597; *Jordan v. Dyer*, 34 Vt. 104, 80 Am. Dec. 668; *Grover & Baker Sewing Mach. Co. v. Bulkley*, 48 Ill. 193.

The ordinary remedy for the violation of an easement for a nuisance, or for the breach of an implied covenant for quiet enjoyment, is by bill in equity and an injunction, which in such cases is granted almost as of course.

2 Pom. Eq. Jur. 1st ed. § 1851; *Leech v. Schweder*, L. R. 9 Ch. App. 463, opinion by Sir G. Jessel, *M. R.*; *Salisbury v. Andrews*, 128 Mass. 345; *Brandt v. Grace*, 154 Mass. 210; High, Inj. 2d ed. § 849; *Smith v. Smith*, 148 Mass. 5, and cases.

Where the darkening of the ancient windows of a dwelling house materially injures the comfort of the existence of those who dwell in it, the court will interfere by injunction.

Jackson v. Duke of New Castle, 8 DeG. J. & S. 375, and cases.

Private property cannot be taken, at any price except his own, from the owner for the use of another.

Tucker v. Howard, 128 Mass. 861, and cases; *Leech v. Schweder*, *supra*.

As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.

Foster, Fed. Pr. § 208, and cases; *Adderley v. Dixon*, 1 Sim. & Stu. 607; Blapham, Eq. §§ 875-877.

If the construction of the instrument be clear,

and the breach clear, then it is not a question of damages, but the mere circumstance of the breach of the covenant affords sufficient ground for the court to interfere by injunction.

Foster, Fed. Pr. § 208; *Tipping v. Eckersley*, 2 Kay & J. 264. See also *Manners v. Johnson*, L. R. 1 Ch. Div. 673; *Lloyd v. London, C. & D. R. Co.* 2 DeG. J. & S. 568; *Trustees of Columbia College v. Lynch*, 70 N. Y. 440, 28 Am. Rep. 615.

An injunction to restrain a breach of an implied covenant not to do anything inconsistent with the contract, will be granted, even when affirmative performance cannot be decreed.

Fry, Spec. Perf. § 884 *et seq.*; *Duff v. Russell*, 138 N. Y. 878.

The completion of the work after the plaintiffs had protested against it and had brought their bill for an injunction, was at the risk of the defendants, and did not deprive the court of jurisdiction over the case; nor does the fact that the court below failed to grant an injunction have that effect.

Tucker v. Howard, 128 Mass. 861; *Brandt v. Grace*, 154 Mass. 210; *Duff v. Russell*, *supra*.

The Jordans were not necessary parties. Of the title and rights of one known to be in the actual, open and exclusive possession under such a lease, everybody has notice, constructive at least and conclusive in law.

2 Pom. Eq. Jur. 1st ed. 614 *et seq.*; *Friedlander v. Hewitt*, 9 L. R. A. 700, 30 Neb. 783.

Persons, strangers to the contract, and therefore neither entitled to the rights nor subject to the liabilities which arise out of it, are as

Lampman v. Milks, 21 N. Y. 505, which was in fact a case concerning rights in a stream.

But the New York doctrine is to the contrary and holds that the grant of an easement of light and air is not implied from the grant of a house having windows overlooking land retained by the grantor. *Shipman v. Beers*, 2 Abb. N. C. 425.

In New Jersey the case of *Robeson v. Pittenger*, 3 N. J. Eq. 57, 32 Am. Dec. 412, which declared in favor of ancient lights, has been limited by subsequent cases to the doctrine of an implied easement on the sale of a building overlooking other land of the grantor. This doctrine is adopted in *Sutphen v. Therkelson*, 38 N. J. Eq. 318, in which an easement of light and air for windows of a building (in this case a hotel) is held to be implied on a conveyance of the hotel premises while the grantor retains land overlooked by the windows of the building, if the light and air through these windows is necessary to the enjoyment of the building.

In Pennsylvania it was decided in *Maynard v. Esber*, 17 Pa. 222, that no implied easement of light and air is created on the simultaneous sale of two parcels of land, on one of which is a building with windows overlooking the other,—especially where the sales are made clear of incumbrances.

In a later Pennsylvania case it is held that no implied easement of light or air arises on the sale of part of grantor's land with a building thereon having windows overlooking his other land, unless the use of those windows is a matter of necessity for the enjoyment of the part sold. *Rennysen's App.* 94 Pa. 147, 30 Am. Rep. 777.

The limitation of the implied easement to cases of necessity is made in several states.

Thus in Georgia an implied grant of an easement of light for a building on premises conveyed will be sustained only in cases of real necessity and not when other lights to the building sold can be substituted at a reasonable cost. *Turner v. Thompson*, 58 Ga. 268, 24 Am. Rep. 497.

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This is the doctrine also in West Virginia. *Powell v. Sims*, 5 W. Va. 1, 13 Am. Rep. 629.

But in Ohio as no implied easement of light and air is made on a conveyance of premises with windows overlooking adjoining land of the grantor, even if the use of the windows is necessary to the convenient enjoyment of the property. *Mullen v. Stricker*, 19 Ohio St. 185, 2 Am. Rep. 379.

So in Indiana and Iowa there is no implied grant of light on a conveyance of part of the grantor's premises with a building thereon having windows overlooking the remainder of his land. *Keiper v. Klein*, 61 Ind. 316; *Morrison v. Marquardt*, 24 Iowa, 35, 22 Am. Dec. 444.

In Maryland the main question has not been expressly decided but it is held that there is no implied easement of light on the sale of different tracts not owned by the same person, because the sale of both was made by the same agent. *Cherry v. Stein*, 11 Md. 1.

In Louisiana where the civil law prevails, servitudes of light and air are recognized by the Code, and it is held that, under arts. 763 and 765, a servitude of light and sight is created where the owner of two lots lays out on one of them an alley on which the other lot fronts. *Cleris v. Tieman*, 15 La. Ann. 316.

And likewise the owner of lots on both sides of a division wall by making a window therein creates a "*destination du père de famille*," which results in a servitude as soon as the title to the lots is severed. *Lavillebeuvre v. Coeogrove*, 13 La. Ann. 323.

A sale by an administrator of a dwelling house to one person, with windows opening into a passage 3 feet 9 inches wide on an adjoining lot, which is sold by him to another person, and on which there is another dwelling, implies an easement of light as well as of passage over this way, since the easement was apparent at the time of the sale; but it would be otherwise if the purchaser did not know of the easement. *Durel v. Bolesblanc*, 1 La. Ann. 407.

much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it.

Tasker v. Small, 3 Myl. & C. 69; Fry, Spec. Perf. 3d ed. § 140 *et seq.*; *Willard v. Tayloe*, 75 U. S. 8 Wall. 557, 19 L. ed. 501; *Moulton v. Chafee*, 22 Fed. Rep. 26; *Milkman v. Ordway*, 106 Mass. 232.

Messrs. Francis V. Balch and Felix Rackemann for appellees.

Allen, J., delivered the opinion of the court:

The court ruled that, on the pleadings and facts reported, the plaintiffs were not entitled to any relief, either by way of injunction or damages, against the defendants, and therefore dismissed the bill. The particular ground is not stated, but from the terms of the report and the course of the argument we are led to infer that it was thought that the plaintiffs should have sought their remedy against the Jordans alone, through whose immediate agency the acts complained of were done, and that the present defendants are not responsible therefor. However, we have to consider the whole case.

1. It could not properly be held on the facts reported that as matter of law the plaintiffs were not entitled to any relief against anybody. It is true that the description of the premises demised to the plaintiffs contained no express mention of the well or open space for light and air, and the lease contained no express covenants on the part

of the lessors; but the situation and habitual use of the demised premises were such as to warrant, if not to require, the finding of an implied grant of a right to light and air from the open space, or at least from that portion of it owned by the defendants. It is true that the doctrine of implied grants of easements or privileges connected with real estate is applied with some strictness in this commonwealth, but in this case it might well be found, as it was found, that the right to light and air was necessary to the beneficial enjoyment of the demised premises. The open space was not accessible from the street. Its sole use, so far as the lessors were concerned, was for the benefit of the occupants of their building, and it must have been intended that the plaintiffs should have the benefit of it. There is no other reasonable view to be taken of the facts. The case of *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629, much resembles the present, and fully sustains the plaintiffs' contention on this point; and the general doctrine that there is an implied grant of whatever is necessary to the beneficial enjoyment of the thing granted is familiar. *Salisbury v. Andrews*, 19 Pick. 250; *Thayer v. Payne*, 2 Cush. 327, 831; *Pettingill v. Porter*, 8 Allen, 1, 6, 7, 85 Am. Dec. 871; *White v. Chapin*, 12 Allen, 516, 518; *Oliver v. Pitman*, 98 Mass. 46, 50; *Buss v. Dyer*, 125 Mass. 287; *Hooper v. Farnsworth*, 128 Mass. 487; *Johnson v. Knapp*, 146 Mass. 70, 150 Mass. 267; *Brande v. Grace*, 151 Mass. 210; *Taylor, Land. & T.* § 161; 2

Implied easement of tenant.

An implied grant in a lease of the right to light and air from an open space or well adjoining the rooms leased may arise without any express reference in the lease to the subject, where the situation and habitual use of the premises is such that the right to light and air is necessary to the beneficial enjoyment of the premises leased. See the main case above, *CASE v. MINOT*, with which most of the authorities agree.

KEATING v. SPRINGER, post, 544, denies in general terms that such an implied easement can exist in favor of a tenant, but the authorities cited in support of the statement consist of one case as to an implied easement of a vendee, and the New York cases, *Palmer v. Wetmore* and *Myers v. Gemmel*, *infra*, which are limited by *Doyle v. Lord*, *infra*, establishing the doctrine in New York, in agreement with *CASE v. MINOT*. So that the language of *KEATING v. SPRINGER*, if it is to be upheld to its full extent in Illinois, which seems unnecessary for the purpose of that case, is not in agreement with the law elsewhere.

A lessee of a building can enjoin a grantee of the lessor from erecting a structure which will obstruct light and air which are necessary to the enjoyment of the leased building, unless the lessee has by estoppel lost his right. *Ware v. Chew*, 43 N. J. Eq. 493.

The erection of a party wall by an adjoining owner, darkening the windows of a leased building, does not constitute an eviction, in the absence of any covenant, agreement, or representations by the lessor as to the light, and where the lessor did not own the adjoining land at the time of the lease. If he had owned the land at that time, an implied easement might have existed for the continuance of light to the leased building. *Hazlett v. Powell*, 80 Pa. 238.

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In *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322, the effect of a landlord's erection of a structure adjoining leased premises, darkening the lessee's windows, is to some extent discussed, but it appears in that case that the structure was on a part of the leased premises and was therefore clearly an invasion of the tenant's rights.

A tenant of the lower story of a building used for a store, the rear windows of which were the only means of light, except artificial light, in that part of the store, has an easement in the unobstructed entrance of light through those windows. *Doyle v. Lord*, 64 N. Y. 432, 21 Am. Rep. 629.

But if the use of the windows is not necessary to the enjoyment of the leased premises a landlord is not precluded from building on vacant premises by the fact that he has leased a building with windows overlooking them. *Palmer v. Wetmore*, 2 Sandf. 318; *Myers v. Gemmel*, 10 Barb. 537.

The tenant of a portion of a building acquires a right to light from skylights over his rooms, and where floor lights are placed under a skylight to light a basement under the room over which the skylight is placed, the tenant of the room over the basement has no right to cover the floor lights with carpets or matting to exclude the light from passing down in the basement, which is occupied by a different tenant. *O'Neill v. Breese*, 8 Misc. 213.

A skylight constructed for the use of a leased store is an appurtenance, the right to enjoy the use of which passes under the lease, and the light therefrom cannot be obstructed by tenants of the upper part of the building. *Morgan v. Smith*, 5 Hun. 220.

The tenant of a basement of a building may restrain the occupant of the story above from covering the iron grating in front of the building which protects the windows in the basement. *Spies v. Damm*, 54 How. Pr. 293.

It makes no difference in such case whether the

Washb. Real Prop. 5th ed. 818, 819, 828-381. Without undertaking to define what may in all cases be included as necessary, it is enough to say, that, on the facts reported, light and air from this open space might well be found to be necessary. That being so, the facts reported are sufficient to show or at least to warrant a finding of a nuisance, or a substantial interruption of the plaintiffs' right to quiet enjoyment of the premises (*Fuller v. Ruby*, 10 Gray, 285, 290; *Sanderson v. Berwick-upon-Tweed*, L. R. 13 Q. B. Div. 547; *Jenkins v. Jackson*, L. R. 40 Ch. Div. 71; *Robinson v. Kilvert*, L. R. 41 Ch. Div. 88, 97; *Taylor, Land. & T.* §§ 305, 309, 380), though perhaps not of an eviction, as to which see *Royce v. Guggenheim*, 106 Mass. 201, 8 Am. Rep. 322; *Bartlett v. Far-ington*, 120 Mass. 284; *Brown v. Holyoke Water-Power Co.* 152 Mass. 463; *Brande v. Grace*, *supra*; *Upton v. Townsend*, 17 O. B. 30.

2. Assuming that the plaintiffs had a right to relief against somebody, it could not properly be held on the facts reported that they were not so entitled as against these defendants. This is the point on which most stress has been laid in the argument for the defendants. A brief recital of facts may be made. The plaintiffs' lease would not expire till December 31, 1893. In it they covenanted to make no use of the premises that should be injurious to any person or property, or liable to affect any insurance on the premises, or to increase the premium thereof, and to conform

to such rules and regulations as might from time to time be established by the lessors for the general convenience and safety of the tenants in the building; but the lessors entered into no express covenants. At the time the plaintiffs took their lease, which covered the 2d, 8d, 4th, and 5th stories of the east half of the building, Bradford & Thomas held a lease of the store and basement, under the plaintiffs, which would run for a year longer than the lease to the plaintiffs, and which contained provisions identical with or similar to those in the plaintiffs' lease; and they covenanted not to make any alterations or additions during their term without the written consent of the lessors. On the 20th of May, 1892, the defendants, in order to enable themselves to make another lease, which should include said basement, to the Jordans, and to give possession thereof to the Jordans, bargained with Bradford & Thomas to vacate the same, and to accept other rooms in place thereof, and to permit the enlargement of the chimney then serving the engine room; the expressed consideration therefore being \$10,000 to be paid to Bradford & Thomas in cash, besides certain other considerations connected with the use of the premises. On the same day the defendants executed a lease to the Jordans of the whole premises then occupied in part by Bradford & Thomas, and in part by the plaintiffs, with these provisions, among others: "The lessees take subject to the lease to Case, Dudley & Battelle [the plaintiffs]; and to the

landlord owns to the center of the street or not, or whether the iron grating is or is not in what is commonly denominated the stoop line. *Ibid.*

Express grant or reservation of such easements.

A grantor of land may expressly reserve the free flow of light and air over it for benefit of other property. *Gay v. Walker*, 36 Me. 54, 58 Am. Dec. 784; *Hagerty v. Lee*, 20 L. R. A. 631, 54 N. J. L. 590.

The right to have land unbuild upon for the benefit of the light, air, etc., of neighboring land may be made an easement within reasonable limits by deed. *Ladd v. Boston*, 151 Mass. 535.

An easement to have land remain unbuild upon is created by a clause in a deed saying: "Said grantors agree that no buildings shall be erected," etc., the word "agree" being equivalent to "grant," *Hogan v. Barry*, 143 Mass. 538.

A bond executed by a vendor simultaneously with a deed to the effect that a certain piece of land still owned by the grantor should never be built upon is effective to create an easement of light and air in favor of the premises conveyed. *Hills v. Miller*, 8 Paige, 264, 3 L. ed. 141, 24 Am. Dec. 218.

A statement equivalent to a promise or engagement made to the court and the adverse party in a suit, that the latter might have the light and air from an open space; and that this was for the mutual accommodation of both parties, was regarded in *Banks v. American Tract Soc. & Sanf. Ch.* 438, 7 L. ed. 1163, as a contract with the court which was binding.

A covenant that a certain space should always lay open for a passageway and court for the common use of the parties to the covenant and their respective estates was construed to create not merely a right of way but the right to an open court for light and air, where the parties, while owning the premises in common, had built adjoining the court not only a single dwelling house but a 23 L. R. A.

brick block of four dwelling houses, and their purpose was to make the same use of the remaining land adjoining the court. *Salisbury v. Andrews*, 128 Mass. 536.

One who accepts a deed which reserves an easement of light and air does not thereby make the easement applicable to land which he previously owned. *Dyer v. Sanford*, 9 Met. 395, 43 Am. Dec. 399.

The condition and reservation in a deed of a strip of land one foot in width along the dividing line of adjoining owners that the grantor shall have certain windows "looking out on said lot" in a building to be erected free from any hindrance or obstruction to any other or greater extent than they would be by an existing structure on the grantee's premises, applies only to the strip granted and not to the land previously owned by the grantee. *Cooper v. Louanstein*, 37 N. J. Eq. 284.

A reservation in a deed that the grantee should not erect any building more than one story high in a certain space, reciting the object to be to preserve the right to light for the grantor's premises does not restrict the grantee to the exact height of a one-story building already standing on the space mentioned, and is not violated by raising the height of such building two feet so as to give the same height of ceiling that existed in a room adjoining. *Hobson v. Cartwright*, 14 Ky. L. Rep. 290.

A reservation and covenant in a deed to the effect that nothing shall be built or erected on the lot conveyed to obstruct the light from a certain hall was held to give an easement of light and air to the windows of the whole building and not merely to a certain room therein, the question being the construction of the language as to what was intended by the word "hall." *Pope v. Bell*, 37 N. J. Eq. 495.

The right of way to a stable does not include the

lease to Bradford & Thomas, and to the agreement dated this day between the lessors and said Bradford & Thomas." "Permission is granted for the lessees to put into the basement of the building boilers, dynamos, and other appurtenances sufficient to supply power, light, heat, etc., to the neighboring buildings occupied by them, and to build a chimney of adequate size in connection therewith." The Jordans went into possession June 1, 1892, and proceeded to put in electrical works, under the permission contained in their lease. There is nothing in the facts reported to show that in putting in these works the Jordans made any more disturbance of or interference with the plaintiffs than was necessarily incident to the doing of such work, or that in any respect they exceeded the permission granted to them by the defendants. The contrary is to be assumed. Mr. Minot, one of the defendants, and their active trustee, testified that he could do nothing to stop the work except to say to the Jordans that he would be glad to have anything done to prevent annoyance. The defendants objected to his being asked if the Jordans were doing anything other or different than they were authorized to do under the lease, and the question was excluded. Moreover, in their answer the defendants aver that the Jordans "are regarding the terms and provisions" of their lease. Upon these facts it might well have been found that the defendants sanctioned and authorized whatever the Jordans did, and were answerable for it. They gave express permission, and they did it for a consideration. They bought off Bradford & Thomas for the very purpose of letting the premises to the Jordans, with this permission. The effect was to injure the plaintiffs. This result was the natural

and probable consequence of what the defendants permitted to be done. It was a result which they must have contemplated from the outset. A jury, upon these facts, would not only be well warranted in finding that the defendants were responsible to the plaintiffs, but that view seems to be most in accordance with the facts. The decision in the well-considered case of *Upton v. Townsend* is closely applicable on this point. 17 C. B. 80, 60, 66, 71, 72. See also, *Lufkin v. Zane*, 157 Mass. 117, 17 L. R. A. 251; *Fish v. Dodge*, 4 Denio, 811, 817, 47 Am. Dec. 254.

3. The defendants raise the further objection that the Jordans are not parties to the suit, and that it became apparent during the trial that they were the persons actually causing, and doing the things complained of by the plaintiffs. So far as this ground of defense is set up in the answer, it is found in the averment that the defendants made a lease "to one Jordan and another, which lease was expressly made subject to all the rights of the plaintiffs in the premises, and which lease gave to the lessees therein named, subject as aforesaid, certain rights of repair, renewal, and remodeling; that said lease is now in full force; that, as defendants are advised, their lessees are regarding the terms and provisions thereof; and that the defendants are directing, controlling, or doing no work in or about the premises whatever." This ground of defense seems to be stated in the answer rather by way of exoneration of the defendants than as pleading the want of parties. When the defendants say that they made a lease "to one Jordan and another" it cannot be supposed that they thereby meant to suggest that the plaintiffs must make "one Jordan and another" parties defendant. The

right to light and air for the stable, but only such as may be necessary for the use of the right of way. *Grafton v. Moir*, 130 N. Y. 465. As to the right of building over a right of way, see note to *Hollins v. Demorest* (N. Y.) 15 L. R. A. 487.

The grant of a five-foot passageway, evidently intended as a narrow foot-way, does not necessarily imply a right to have the way kept open to the sky for light, or air, or prospect. *Burnham v. Nevins*, 144 Mass. 88, 50 Am. Rep. 61.

A reservation in a deed of a certain space, "to remain open forever for the benefit of light and air is held to be merely for light and air and not for a right of way. *Oliver v. Pitman*, 98 Mass. 46.

But a clause in a deed expressly stipulating for a passageway of a certain width for light and air grants the right to the open and unobstructed passage of light and air from the ground upward throughout the length of the passageway. *Brooks v. Reynolds*, 106 Mass. 81.

An express reservation in a deed of a right to light and air for a window created by a prior deed precludes one who is privy in estate with the later grantee from setting up a supposed abandonment of the easement by parol before the making of the later deed. *Dyer v. Sanford*, 9 Met. 386, 43 Am. Dec. 399.

An easement of lights granted by covenant in a lease for the renewable term of ninety-nine years passes to the grantee of the reversion with all privileges and appurtenances, but its existence does not constitute a violation of a special warranty in a subsequent deed of the adjoining lot against the 22 L. R. A.

claims and demands of the grantor and all persons claiming by, through, and under him. *James v. Jenkins*, 81 Md. 1, 6 Am. Rep. 300.

An easement for light and air to windows reserved on conveyance of land subject to a mortgage, which is assumed by the grantee, is lost on a foreclosure of the mortgage and its purchase by the wife of the grantee, to whom the land was conveyed through a third person, but who did not assume the mortgage. *Christ Prot. Episcopal Church v. Maack*, 98 N. Y. 488.

An easement of air, light, and vision created by covenant in a deed for the benefit of other lots by the grantor is extinguished if the owner of the easement has made or permitted permanent erections which substantially intercept the air, light, and vision; and, so far as the easement is interfered with by such erections, to that extent it is destroyed. *Lattimer v. Livermore*, 72 N. Y. 174.

Enforcement of right.

On a lease for ninety-nine years renewable forever of the undivided one-fourth part of a vacant lot adjoining a hotel owned by the lessor, with a restriction against building above a certain height made for the benefit of the hotel, the lessor has a right to enforce the restriction for the benefit of his hotel, notwithstanding his subsequent conveyance of the reversion of the leased premises. *Thurston v. Minke*, 22 Md. 487.

An injunction against the erection of a building by a lessee darkening the windows of the leased building was denied, where the lease reserved to

objection of want of parties, when taken by plea or answer, should give the names of the necessary parties where this can be done, and especially where it is peculiarly within the knowledge of the defendants. Story, Eq. Pl. §§ 236, 238, 543. But, waiving the discussion of technicalities, let it be assumed that no injunction could properly be granted without making the Jordans parties; the only result is that the court would, even in the absence of proper pleadings, take notice of the fact, and direct the cause to stand over, in order that the new parties might be added. *Schwoerer v. Boylston Market Asso.* 99 Mass. 285, 295; Story, Eq. Pl. 236, 238; 1 Dan. Ch. Pr. 4th Am. ed. 292. The bill was not dismissed upon this ground, but upon the ground that the plaintiffs were not entitled to any relief, either by way of injunction or damages, against the defendants. The Jordans might have been made parties by an amendment, and might now if an injunction were still sought; but the time has passed when an injunction could properly be issued, and the only question remaining is whether relief by way of damages should be given. So far as this form of relief is concerned, the Jordans are not necessary parties. They have entered into no implied covenant for quiet enjoyment with the plaintiffs. If in any respect the plaintiffs could maintain a claim for damages against them, certainly they are not joint contractors with the defendants; and, if the defendants are liable in damages, there is no rule requiring the Jordans to be joined in a suit to recover such damages. The objection of want of parties is therefore unavailing in the present posture of the case.

4. The only remaining question is whether relief should be granted against the defendants by way of damages. It was held in

Milkman v. Ordway, 106 Mass. 232, that where a plaintiff in good faith brings a suit seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief, even though at the time when the bill was brought he had no right to relief purely equitable, yet the court will afford relief by awarding compensation; *a fortiori*, if the reason for denying the purely equitable relief occurs pending the suit. In the present case, provided in other respects the plaintiffs make out their case, the only reason for not granting an injunction is that, pending the suit, the plaintiffs' lease has expired. The plaintiffs should not for this reason be turned out of court, but the bill should be retained for the assessment of damages. *Woodbury v. Marblehead Water Co.* 145 Mass. 509; *Brande v. Grace*, 154 Mass. 210; Stat. 1887, chap. 383.

Knowlton and Morton, JJ., dissent from that part of the foregoing opinion which holds the defendants legally responsible for the erection of the chimney by Jordan & Jordan, for these reasons: In their view, the defendants are not shown to have had to do with the changes near the plaintiffs' premises, except as appears by their written contracts in regard to the property. They arranged with Bradford & Thomas so as to let Jordan & Jordan into possession much sooner than could have been done without the arrangement. They made a lease to Jordan & Jordan for eight years and seven months, and in the lease they gave permission to make the changes; but they expressly stated in the lease that "the lessees take subject to the lease to Case, Dudley & Battelle, the plaintiffs." Without such permission, Jordan & Jordan would have had no right as against

the lessor the right to build on the adjoining premises, then owned by a third party, but the lessee had himself acquired a lease of the adjoining premises and was proceeding to build thereon. The ground of the decision seems to be that the lessor was not damaged while the lease was existing and that the lessee might remove the building before reversion to the lessor. *Atkins v. Chilson*, 7 Met. 398.

A preliminary injunction against obstruction of light and air in violation of an easement reserved will be denied, unless it is shown that the obstruction will affect anything but unnecessary windows, and where the right to maintain windows has not been established at law. *Hagerty v. Lee*, 45 N. J. Eq. 1, affirmed in *Id.* 265.

No injunction against interference with an easement of light will be granted, unless the interference is material. *Biddle v. Ash*, 2 Ashm. 311; *Ray v. Lynes*, 10 Ala. 63.

Right to light and air from public highway.

Abutting owners of land on a street have easements of light and air from the street, which constitute property rights. Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268; *Obendroth v. Manhattan R. Co.* 11 L. R. A. 634, 122 N. Y. 1; *Kane v. New York Elev. R. Co.* 11 L. R. A. 640, 125 N. Y. 164; *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 268, 45 Minn. 71; *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 498, 30 Minn. 236; *Dill v. Cam-* 23 L. R. A.

den Board of Education, 10 L. R. A. 276, 47 N. J. Eq. 421; *American Bank-Note Co. v. New York Elev. R. Co.* 129 N. Y. 232; *Greene v. New York Cent. & H. R. R. Co.* 65 How. Pr. 154; *Pond v. Metropolitan Elev. R. Co.* 43 Hun, 597; *Foote v. Manhattan R. Co.* 58 Hun, 478.

The easement of an abutting owner to light and air from a street must be upheld, whether his rights depend on the common law or the civil law. *Hine v. New York Elev. R. Co.* 54 Hun, 425.

The doctrine of all the cases above cited on this question, we believe without exception so far as they have touched it, is that these easements are independent of the question of ownership of the fee.

In *Holloway v. Southmayd*, 139 N. Y. 390, three of the seven judges concurred in holding that abutting owners on the old Bloomingdale road in New York city had private easements, including those for the free flow of light and air, independent of ownership of the fee of the road, of which easement they could not be deprived without compensation in closing the road, but the fourth judge, who was needed to make a majority of the court, concurred on the ground that the abutting owners owned the fee of the road, while the other three judges dissented.

Likewise the owner of land adjacent to a canal, which constitutes a public highway, who erects a building with windows facing the canal close to the line, may restrain the erection of a building over the canal which would shut up his windows. *Barnett v. Johnson*, 15 N. J. Eq. 481. B. A. R.

the defendants to make the changes. With it they had and have a right as against the defendants. It cannot fairly be construed as authorizing the Jordans to create a nuisance, or to do anything that would interfere with the plaintiffs' rights as lessees. It amounted to a declaration on the part of the defendants that they gave no right as against the plaintiffs, and that Jordan & Jordan might make the changes after the expiration of the plaintiffs' lease (which then had less than eight months to run), but not before unless they did it with the consent of the plaintiffs, or

in such a way as not to affect the plaintiffs' legal rights. It seems to the dissenting justices that with this construction full effect is given to the language of the contracts, in accordance with the intention of the parties, and that it is unjust to the defendants to charge them as having authorized the work to be done against the rights of the plaintiffs, and to make them pay damages for which, on the plaintiffs' theory, they can have no recovery against the real wrongdoers. Case remanded for further proceedings.

ILLINOIS SUPREME COURT.

Michael KEATING, *Appt.*,

v.

Warren SPRINGER.

(146 Ill. 481.)

1. A landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so.
2. The right to have the light and air enter the windows of a building from an adjoining lot may exist by express grant, or by virtue of express covenant or agreement.
3. Provision in a lease that the lessee shall not build at the rear of the premises nearer than twenty-five feet is not violated by building on one side of the premises, extending beyond the rear wall of the old building but not extending in the rear of the leased premises.
4. A lease providing that the lessee "shall not build at the rear of said premises nearer than twenty-five feet and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises," prohibits any obstruction higher than six feet in any direction from said premises which would obstruct light to them.
5. A tenant must pay rent while he remains in possession, notwithstanding such interference with the enjoyment of the premises as would constitute an eviction for which he might abandon them.
6. A tenant may recoup damages for interference with his possession by the landlord in reduction of the recovery for rent, although he has remained in possession instead of abandoning, when he would have been entitled to abandon.
7. A lessee may recover damages by action for breach of covenant by his landlord, even if this does not amount to an eviction or operate as a bar to the claim for rent.
8. A judgment in forcible entry and detainer is conclusive only as to the right of possession and not conclusive as to the lessee's right to recovery or recoupment for breach of covenant in the lease.

NOTE.—The laws as to easements of light and air, whether created expressly or by implication, is fully reviewed in the note to the preceding case of *Case v. Minot* (Maas), *ante*, 536. The denial in the present case of any implied easement of light for windows on leased premises is not supported to

(June 19, 1893.)

A PPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover for the use and occupation of certain real estate. *Reversed.*

Statement by Magruder, J.:

On March 15, 1884, appellee executed a written lease of certain premises to appellant for the period, extending from April 1, 1884, to April 1, 1894, for \$30,000, payable in monthly installments of \$250 each. The premises are described in the lease as follows: "All those premises situated . . . in the city of Chicago. . . . known and described as follows, to wit: 'The basement of the building known as Nos. 201, 203, and 205 So. Canal street, Chicago, being a space 50 feet by 70 feet, more or less; also the store floor of part of said building, and known as Nos. 201 and 203 So. Canal street, being a space 50 feet by 50 feet, more or less; also a space in the yard at the rear of said building, commencing at the N. W. quarter of said building, then west 25 feet, then south 25 feet, then east 25 feet, to building,—together with steam power not to exceed ten-horse power, said steam power to be furnished ten hours per day, Sundays and holidays excepted. Said premises hereby leased to be used and occupied as a marble works and kindred business, and in no manner as to damage or interfere with tenants of adjoining property.'" The lease contained, among others, the following provisions, to wit: "Party of the first part [Springer] shall not build at the rear of said premises nearer than twenty-five feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises, and party of the second part shall at all times have the use and free access through all now existing alleys leading to rear of said premises." Appellant occupied the premises under the lease from its date until July 17,

its full extent by the prior authorities, which substantially agree with *Case v. Minot* in allowing such an implied easement so far as it is necessary for the enjoyment of the leased premises. See note above referred to under heading "Implied easements of tenant."

1888, when he left them. The building was a two-story and basement frame building, fronting east on Canal street, between Van Buren street, on the south, and Jackson street, on the north, and having a depth of 50 feet. It had windows in the front and rear, and on the north and south sides. The territory around it was practically vacant at the date of the lease. There was then no building to the south of it nearer than 40 or 50 feet, except, perhaps a small shed; none in the rear or to the west of it nearer than about 60 feet; and none to the north nearer than 30 feet, or more. There were some sheds and platforms to the north, and some rubbish to the west, but nothing to obstruct the light needed for cutting and polishing marble. In the space on the south there was an alley running west from Canal street to Clinton street, connecting with which was another alley running north and south in the rear of the premises in question. In 1885 appellee erected a large brick building, called the "Springer Building," having five stories above the basement, fronting 26 feet on Canal Street, and having a depth of 75 feet. Its north wall was immediately against the south wall of appellant's building, called the "Keating Building;" and it extended 25 feet further west than the Keating building, the extension of 25 feet being on the south line of the space in the rear of the Keating building, as described in the lease. The proof tends to show that appellee dug excavations on the lines of the alleys, and built boiler and machine shops in the rear of the Keating building, and placed obstructions of various kinds in the alleys and in the space to the rear of the Keating building. From the differences growing out of these transactions various suits have resulted. Appellee brought against appellant a suit in assumpsit for the use and occupation of said premises, to which nonassumpsit was pleaded; a suit upon a note alleged to have been given for rent, to which pleas of nonassumpsit and set-off were filed; three proceedings of distress for rent, in which the general issue and certain special pleas of set-off and general replications to the latter were filed. And appellant brought an action in case against appellee to recover damages for cutting off his light by the erection of the Springer building and other obstructions, to which the plea of not guilty was filed. The said special pleas set up violations of the covenants of the lease by alleging: that the light was shut off on the south and in the rear of the Springer building, and its extension to the west, and by the erection of shafting and machinery and other obstructions more than 15 feet high; and that the alleys were closed up by the placing therein of iron boilers, castings, engines, building materials, etc.; and that steam power was not furnished, etc. The suit for use and occupation was begun in the circuit court of Cook county. Of the other suits, one was begun in said circuit court, one in the superior court of said county, and three in the county court of said county. The four suits last named were transferred by proper order to the circuit court, and an order was entered by the latter court in the 22 L. R. A.

suit for use and occupation consolidating the other suits with it. A stipulation was entered into between counsel that there should be one trial, which should determine the matters in controversy in all the suits. A jury was waived, and by agreement the consolidation cause was submitted for trial before one of the judges of the circuit court, without a jury. Upon the trial, the plaintiff, Springer, introduced the written lease, and proved the amount of unpaid rent due thereon from October, 1887, to July 17, 1888. A large mass of evidence was introduced by the defendant, Keating, principally in support of the contentions that buildings and obstructions were erected in the rear of the premises nearer than 25 feet, and that the use of the alleys and free access through the same were interfered with and cut off. In contradiction of this evidence a large number of witnesses were examined by the plaintiff. At the close of his testimony thus introduced, the plaintiff offered in evidence, and the court received, over defendant's objection and exception, the proceedings in a forcible entry and detainer suit begun by Springer against Keating before a justice of the peace on April 25, 1888, wherein the complainant alleges that Springer was entitled to the possession of said premises, and that Keating unlawfully withholds the same, wherein judgment was rendered in favor of Springer on May 8, 1888, and an appeal was taken and perfected to the superior court, which appeal was dismissed on July 9, 1888, and a further appeal was taken and allowed to the appellate court upon filing bond and bill of exceptions within twenty days. On October 8, 1891, judgment was entered by the circuit court in favor of Springer for \$2,907.50 against Keating, and in the suit of Keating against Springer the latter was found not guilty. This judgment has been affirmed by the appellate court (44 Ill. App. 547), and the case is brought here by appeal.

Messrs. Haney & Merrick for appellant.

Mr. Allan C. Story for appellee.

Magruder, J., delivered the opinion of the court:

In this case many questions of fact and law are discussed by counsel in their briefs, but the record is not in such shape as to authorize us to consider any of these questions, except that which arises out of the refusal of the trial court to admit certain offered evidence, as hereinafter stated. The trial was, by agreement before the court, without a jury, and resulted in a judgment for the plaintiff, which has been affirmed by the appellate court. The judgment of the latter court is conclusive as to the findings of fact. No "written propositions to be held as law in the decision of the case" were submitted to the court on the trial below by either side, in accordance with section 43 of the Practice Act; and hence no question of law is presented for our determination, unless the errors assigned as to the admission or exclusion of evidence necessarily involve the consideration of such a question. *First Nat. Bank of*

Michigan City v. Haskell, 124 Ill. 587; *Myers v. Union Nat. Bank*, 128 Ill. 478; *Hall v. Cox*, 144 Ill. 532.

The evidence tends to show that a strong light is necessary for such business of manufacturing and polishing marble, as appellant was engaged in, and that the demised premises were selected by the appellant for that business mainly because of their freedom from surrounding obstructions to the supply of light. Accordingly, the defendant below offered to prove that the erection of the Springer building on the south side of the Keating building prevented the entry of light into the latter from the south and west. Upon objection by the plaintiff, the court refused to receive the testimony, and an exception was taken to its rulings by the defendant. The action of the trial court was correct, if there is no express covenant or agreement in the lease obligating the landlord to permit the light to pass over the south lot into the leased premises. The English doctrine is that, "if one who has a house with windows looking upon his own vacant land sell the same, he may not erect upon his vacant land a structure which shall essentially deprive such house of the light through its windows." Washb. Easem. *492, par. 5. This doctrine, however, does not prevail in the majority of the American states. It is held to be inapplicable in a country like this, where the use, value, and ownership of land are constantly changing. Air and light are the common property of all. The owner of a lot cannot be presumed to have assented to an encroachment thereon if he has permitted the light and air to pass over it into the windows of his neighbor's house, situated upon the adjoining lot. The actual enjoyment of the air and light by the latter is upon his own premises only. The prevalent rule in the United States is that an easement in the unobstructed passage of light over an adjoining close cannot be acquired by prescription. 2 Woodfall, Land. & T. *703, and notes; 1 Taylor, Land. & T. §§ 239, 330, and notes; *Keats v. Hugo*, 115 Mass. 204, 15 Am. Rep. 80; *Mullen v. Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379. In the early case of *Gerber v. Grabel*, 16 Ill. 217, this court held that such a right might be so acquired; but in the later case of *Guest v. Reynolds*, 68 Ill. 478, 18 Am. Rep. 570, the *Gerber Case* was, in effect, overruled, and it was held that "prescription right, springing up under the narrow limitation in the English law, to prevent obstructions to window lights," "cannot be applied to the growing cities and villages of this country without working the most mischievous consequences, and has never been deemed a part of our law." It is established by the weight of American authority that a grant of the right to the use of light and air will not be implied from the conveyance of a house with windows overlooking the land of the grantor; and that, where the owner of two adjacent lots conveys one of them, a grant of an easement for light and air will not be implied from the nature or use of the structure existing on the lot at the time of the conveyance, or from the necessity of such easement to the convenient enjoyment of the

property. *Keats v. Hugo*, and *Mullen v. Stricker*, *supra*; 1 Wood, Land. & T. § 209, pp. 422-424, and note; *Morrison v. Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444. "A grant by the owner of two adjoining lots of one of them does not imply the right of an unobstructed passage of light and air over the other." 2 Woodfall, Land. & T. *703, and note. "The law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another." *Mullen v. Stricker*, *supra*; *Haverstick v. Sipe*, 33 Pa. 368; *Keiper v. Klein*, 51 Ind. 316. It follows that a landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. *Myers v. Gemmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. 316; *Keiper v. Klein*, *supra*; 2 Woodfall, Land. & T. *703, and note.

But the authorities all agree that the right to have the light and air enter the windows of a building over an adjoining lot may exist by express grant, or by virtue of an express covenant or agreement. *Hilliard v. New York & O. Gas Coal Co.* 41 Ohio St. 662, 52 Am. Rep. 99; *Brooks v. Reynolds*, 106 Mass. 31; *Keats v. Hugo* and *Morrison v. Marquardt*, *supra*. The question then arises whether the erection of the Springer building could have been regarded as a violation of the express terms of the lease, if proof had been admitted showing that it obstructed the light necessary to carry on the business. The lease contains the following provision: "Party of the first part shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than six feet shall be placed in such manner as to obstruct light to said premises." The meaning of the word "premises," as here used, is not to be restricted to the Keating building alone, but embraces also the space in the rear thereof. The lease speaks of "all those premises . . . described as follows;" and then mentions, as constituting those premises—First, the basement; second, the store floor; "also a space in the yard in the rear," 25 feet deep. The space in the rear is as much a part of the premises demised as the basement and the store floor. Therefore the appellee agreed that he would not build nearer than 25 feet to the west line of the demised space west of the Keating building, which space was 25 feet wide from east to west. The Springer building was 75 feet deep, while the Keating building was only 50 feet deep. It follows that the extension of the former west of the rear of the latter was along the south line of said space in the yard at the rear. The north wall of the Springer building did not extend further west than the west line of said space in the yard, and consequently the whole of the Springer building was south of the demised premises; hence we think counsel for appellee is right in the contention that no part of that building can be considered as an obstruction placed in the rear or to the west of the premises leased to appellant. But we cannot agree with counsel in so construing the language of the provision as to limit

it to obstructions placed in the rear. The landlord does not agree that no obstruction higher than six feet shall be placed in the rear in such manner as to obstruct light to said premises. His agreement is that no obstruction higher than six feet shall be placed, whether to the north or to the west or to the south, in such manner as to obstruct light to said building; that is, to said space in the rear, as well as to said building. The Springer building—a brick structure, five stories high—was so constructed that its north wall joined the south wall of the Keating building, and the south line of the space in the yard at the rear thereof. In view of the express provision in the lease, as above quoted and construed, we are of the opinion that the defendant below was entitled to prove, if he could, that the Springer building was an obstruction placed in such manner as to obstruct light to said premises, and that the trial court should have admitted the proof upon that subject when offered.

It is claimed, however, that the offered evidence was properly rejected, because this suit is for rent accruing during a period while the tenant was in possession. In order to constitute an eviction, it is not necessary that there should be an actual physical expulsion. Acts of a grave and permanent character, which amount to a clear indication of intention on the landlord's part to deprive the tenants of the enjoyment of the demised premises, will constitute an eviction. *Hayner v. Smith*, 63 Ill. 480, 14 Am. Rep. 124. If the acts of the landlord are such as merely tend to diminish the beneficial enjoyment of the premises, the tenant is still bound for the rent, if he continues to occupy the premises. Unless he abandons the premises, his obligation to pay the rent remains. *Skally v. Shute*, 132 Mass. 367. We said in *Chicago Legal News Co. v. Browne*, 103 Ill. 317: "The rule is well settled that the wrongful act of the landlord does not bar him from a recovery of rent, unless the tenant by such act has been deprived in whole or in part of the possession, either actually or constructively, or the premises rendered useless. *Edgerton v. Page*, 20 N. Y. 284; *Halligan v. Wade*, 21 Ill. 470, 74 Am. Dec. 108; *Leadbeater v. Roth*, 25 Ill. 587." To "evict" a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may yet do such acts as will justify or warrant the tenant in leaving the premises. The latter may abandon the premises in consequence of such acts, or he may continue to occupy them. If he abandons them, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction, as against an action for rent. If, however, the tenant makes no surrender of the possession, but continues to occupy the premises after the commission of the acts which would justify him in abandoning them, he will be deemed to have waived his right to abandon, and he cannot sustain a plea of eviction by showing that there were circumstances which

would have justified him in leaving the premises; hence it has been held that there cannot be a constructive eviction without a surrender of possession. It would be unjust to permit the tenant to remain in possession, and then escape the payment of rent by pleading a state of facts which, though conferring a right to abandon, had been unaccompanied by the exercise of that right. *Edgerton v. Page*, *supra*; *Boreel v. Lawton*, 90 N. Y. 293, 48 Am. Rep. 170; *De Witt v. Pierson*, 112 Mass. 8, 17 Am. Rep. 58; *Warren v. Wagener*, 75 Ala. 188, 51 Am. Rep. 446; *Wright v. Lattin*, 38 Ill. 293; 1 Taylor, Land. & T. 8th ed. §§ 880, 881, and *notes*; Wood, Land. & T. 2d ed. § 477, pp. 1104-1106; *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117; *Scott v. Simons*, 54 N. H. 426; *Jackson v. Eddy*, 12 Mo. 209. But though the tenant will not be allowed to plead eviction as a bar to the recovery of rent where he has remained in possession after the performance of the acts which would have justified him in leaving the premises, yet he is not for that reason without remedy. In those states where the doctrine of recoupment is recognized, he may recoup such damages as he may have sustained by reason of the acts of the landlord, against the rent sought to be recovered. 1 Taylor, Land. & T. § 374; 2 Taylor, Land. & T. § 681; 2 Wood, Land. & T. § 477, p. 1107; *Edgerton v. Page*, and *Warren v. Wagener*, *supra*. Taylor, in his work on Landlord and Tenant (sec. 681), says: "By the law of recoupment, as now established in many of the United States, the tenant can avail himself, as a defense *pro tanto* to an action of debt for rent, of the landlord's breach of his covenants." The doctrine of recoupment is recognized in this state, and has been applied in proceedings begun by the issuance of distress warrants, and in actions for rent. *Wright v. Lattin*, *supra*; *Lindley v. Miller*, 87 Ill. 244; *Lynch v. Baldwin*, 69 Ill. 210; *Pepper v. Rowley*, 78 Ill. 262. In *Lynch v. Baldwin*, *supra*, where the landlord had issued a distress warrant, we said: "As to recouping damages for any loss or injury sustained by the tenant, we have no doubt that it may be done, as they grow out of the same transaction. The object of this inquiry is to ascertain the amount of rent due; and, if the acts of the landlord impaired the value of the use of the premises, then the tenant should not pay the same rent as if the landlord had done no act to reduce such value." In *Pepper v. Rowley*, *supra*, which was an action to recover rent due under a lease, we said: "If there has been a breach of any covenant contained in the lease, whatever damage appellee has sustained in consequence thereof may be recouped in this action from the amount of rent due under the lease." In the case at bar the consolidated proceeding not only includes a suit for rent, but also several proceedings begun by the issuance of distress warrants; and the stipulation permits the defendant to introduce, under the general issue, "any defense and also any set-off, whether matter of contract or tort, that he may have, in the same manner . . . as if specifically pleaded." We therefore think that the offered testimony as

to the effect of the erection of the Springer building upon the supply of light should have been received, in order that any damages which the defendant may have sustained thereby might be recouped in reduction of the amount of recovery, and that defendant was not precluded from showing such damages by his failure to surrender possession at an earlier date.

Even if the offered testimony was not admissible as tending to show damages by way of recoupment, it was competent, under the declaration in the action brought by Keating against Springer, to recover damages for cutting off the light by the erection of the Springer building. Under the stipulation, not only were the suits brought by Springer to be tried together, but also with them was consolidated for trial at the same time the action in case which Keating brought against Springer. It is well settled that, although the omission of the landlord to perform his covenants may not amount to an eviction, nor operate as a bar to his claim for rent, yet the lessee has his remedy by an action to recover damages for a breach of the covenant. *Warren v. Wagner*, and *Chicago Legal News Co. v. Browne*, *supra*; *Lounsbury v. Snyder*, 81 N. Y. 514; *Wright v. Laitin*, *supra*; *Royce v. Guggenheim*, 108 Mass. 201, 8 Am. Rep. 322; 1 Taylor, Land. & T. §§ 379,

381, and *notes*; 2 Wood, Land. & T. § 477, p. 1107.

It is furthermore claimed by the appellant that all the matters set up in defense or as ground of recovery by the defendant in the present consolidated suits were extinguished by the judgment in the forcible detainer suit, and that said judgment operates as *res judicata*, so as to bar all appellant's rights of recovery or recoupment. We are unable to yield our assent to this view. The judgment in forcible entry and detainer is conclusive only as to the right of possession, and, in a certain class of cases, as to the existence of the relation of landlord and tenant between the parties, and as to the tenant's wrongful holding over. *Doty v. Burdick*, 83 Ill. 478; *Norwood v. Kirby*, 70 Ala. 397; *Hodgkins v. Price*, 182 Mass. 196, 8 Am. & Eng. Encyclop. Law, p. 176. It was said, in *Robinson v. Crummer*, 10 Ill. 218, that "damages are not recoverable in this action, but the only judgment for the plaintiff is that he have restitution of the premises," etc.

For the error committed in the refusal to receive the evidence offered by the defendant as hereinbefore mentioned, the judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the circuit court for further proceedings, in accordance with the views herein expressed.

NEW JERSEY SUPREME COURT.

STATE of New Jersey, *ex rel.* Charles B. MORRIS *et al.*,

v.

James T. WRIGHTSON, County Clerk.

SAME

v.

William E. O'CONNOR, City Clerk, *et al.*

(.....N. J.....)

1. Citizens who are deprived of as full and effective an elective franchise as they are entitled to under the constitution by an apportionment act have a sufficient interest to prosecute a writ of mandamus to test the statute.
2. The constitutionality of an apportionment act is a subject of judicial inquiry and not a mere political question.
3. The courts cannot overturn a law passed within constitutional limitations on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corrupt means.
4. The election of members of assembly in assembly districts allowing each voter to vote for but one member instead of voting for all the members elected in that county is not in accordance with the constitution of New Jersey, which provides that the members of assembly shall be elected "by the legal voters of the county respectively," and that each shall be an inhabitant of "the county for which he shall be chosen."

5. Long usage and practical interpretation cannot control in the interpretation of the constitution unless the language is obscure and doubtful.

6. Mandamus to compel officers to proceed under prior laws in respect to elections instead of following an unconstitutional statute is not premature because no demand and refusal has been made or the time arrived when it is the duty of the officers to act.

(November 9, 1898.)

APPPLICATIONS for writs of mandamus to the clerks whose official duties required them to prepare ballots for elections to compel them to proceed in reference to an election for members of the general assembly in accordance with the constitutional provisions, and in so doing to disregard an act recently passed by the legislature which attempted to prescribe another course of action. *Granted.*

The facts sufficiently appear in the opinion. Mr. Richard Wayne Parker, for relators:

Election by districts is unconstitutional.

The assemblymen are to be citizens of the county, apportioned "among the counties," not among the districts, elected by "the voters of the counties respectively," not by a few voters of each district.

Even if districts can be made, the District-

NOTE.—For constitutionality of apportionment acts, see *State v. Cunningham* (Wis.) 15 L. R. A. 561, and *note*; *Giddings v. Blacker* (Mich.) 16 L. R. A. 408; *Houghton County Suprs. v. Blacker* (Mich.) 16 L. R. A. 432; *McPherson v. Blacker* (Mich.) 16 L. R. A. 475; *People v. Rice* (N. Y.) 16 L. R. A. 836; *State v. Cunningham* (Wis.) 17 L. R. A. 145; *Par-*

ker v. State (Ind.) 18 L. R. A. 567; *People v. Broom* (N. Y.) 20 L. R. A. 81.

The most noticeable part of the present case is the decision that a county cannot be divided into assembly districts.

ing Act of 1891 is unconstitutional as being without regard to population.

1 Bryce, American Commonwealth, chap. 40, p. 468; Bagehot's English Const. pp. 215, 216; Fiske, Civil Government, pp. 216, 217; *People v. Broom*, 20 L. R. A. 81, 138 N. Y. 95; *Giddings v. Blacker*, 16 L. R. A. 402, 98 Mich. 1; *State v. Cunningham*, 15 L. R. A. 561, 81 Wis. 440.

Lapse of time is no defense. This is because, as Blackstone says, the king is supposed to be so busied with public duties that he may not notice the injury.

Cross v. Morristown, 18 N. J. Eq. 811.

Assembly districting has been held in this state to be extra-constitutional, but its lawfulness has never come before the courts till now.

State v. Newark, 40 N. J. L. 297; *Morland v. Christian*, 52 N. J. L. 588.

Neither under the United States Constitution nor under the constitutions of the several states, has districting ever yet been held to be lawful without an express constitutional provision to that effect.

1 Bartlett, Congressional Contested Elections, p. 47; 2 Bartlett, Congressional Contested Elections, p. 55; 12 N. J. L. J. 368.

Mr. Cortlandt Parker, also for relators: The Constitution, art. 7, § 2, par. 7, provides that sheriffs and coroners shall be elected annually by the people of their respective counties at the annual elections for members of assembly.

Could the legislature make several districts and let the people of each elect one coroner?

Their jurisdiction comprises the whole county. Why? Because of the language of the constitution adopting English laws—which makes each of the coroners as much a man of the county as the sheriff is. The language in case of coroners is that they should be elected by "the people" of their respective counties. That in relation to the assembly that its members should be elected by "the legal voters of the county." Each provision calls for a county vote.

Cooley, Const. Lim. 8d ed. chap. 17, p. 616; *Madison County Ct. v. People*, 58 Ill. 456; *Atty. Gen. v. St. Clair County Suprs.* 11 Mich. 68; *People v. Maynard*, 15 Mich. 468; *Lanning v. Carpenter*, 20 N. Y. 447; *Fort Dodge City School Dist. v. Waukanza Dist. Twp.* 17 Iowa, 86; *Foster v. Scarff*, 15 Ohio St. 583.

Mr. John R. Emery, also for relators:

The Constitution of 1844 requires the election of the assemblymen by the counties, on a general ticket. This appears—

(1) From the plain language of the Constitution, Appendix, p. 15, §§ 1, 2, 3.

(2) From the constitution, as read in connection with the previous constitutions and laws of the state; this method of examination is necessary for proper construction.

Cooley, Const. Lim. 2d ed. 59; *Lord Cornbury's Instructions*, Appendix, p. 2.

(3) From the contemporaneous construction of the Constitution of 1844, shown by the legislative acts to 1852.

The legislation subsequent to 1852, dividing into assembly districts, is not a practical construction adequate to change the express direction of the constitution.

(1) It is equivalent to a real amendment to the constitution, which can be made only in the method prescribed.

22 L. R. A.

(2) It is not a case of doubtful construction, in which practical subsequent legislation is effective.

See Cooley, Const. Lim. §§ 67-69, especially § 69 collecting the cases; *State v. Kelsey*, 44 N. J. L. 1.

(3) The legislative construction has not been uniform, and the construction of the first eight years immediately following the adoption of the constitution is entitled to the greater weight.

(4) The abuse of the power of the legislature has only arisen within recent date (since 1870), and the question therefore was not likely to be raised.

Mr. Thomas N. McCarter also for relators.

Mr. Frederic W. Stevens, for respondents:

The application is prematurely made. It is altogether problematical whether a certificate containing the names of candidates to be nominated on a county ticket will ever be presented to the clerk, and if presented, what his action will be.

High, Extraordinary Remedies, § 12; *State v. Union Twp. Comrs.* 42 N. J. L. 531; *United States v. Elizabeth*, 8 N. J. L. J. 51; *State v. Governor*, 25 N. J. L. 343.

The point that the constitution does not allow a division of the county into districts for the election of members of assembly is no longer open for discussion; it is *res judicata* in this court.

Parker v. State, 18 L. R. A. 567, 138 Ind. 178; *Wise v. Bigger*, 79 Va. 269; *State v. Newark*, 34 N. J. L. 236; *State v. Branin*, 23 N. J. L. 494; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 563, 7 L. ed. 956; *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; *State v. Newark*, 40 N. J. L. 297; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869.

As to the point that the division is not proportional, there is no such principle of giving to the voter an equal voice in the choice of representatives as is here contended for either under the common law or our constitution.

Story, Const. § 661.

Mr. Allan L. McDermott, also for respondents:

The objection that in the apportionment the lines of the assembly districts were not drawn with a proper regard for population cannot have any force in this forum.

The power to divide the counties into election districts being found in the legislature, the exercise of that power is beyond judicial control.

If the legislature has the power to make any division, this court may not review the exercise of that power any more than the legislature could review and set aside the decisions of this court.

The third article of our state constitution defines the repositories of the powers of government, and the lines of demarcation cannot be disturbed by complaints made to one department against the doings, within its exclusive province, of another. The relators must show that the law they attack is violative of constitutional limitation. The moment they step beyond this line of attack they are on political ground beyond the jurisdiction of this court.

Cooley, Const. Lim. 6th ed. pp. 200-206;

People v. Rice, 16 L. R. A. 886, 135 N. Y. 473; *Giddings v. Blacker*, 16 L. R. A. 402, 93 Mich. 1.

Depue, J., delivered the opinion of the court:

The Act of April 16, 1846 (Rev. Stat. 409), entitled "An Act to Regulate Elections," by its first section enacted that on the Tuesday next after the first Monday in November in each year they shall be held in each county to elect for such county such a number of persons to be members of the general assembly as such county shall be entitled to elect. The first act dividing counties into assembly districts was passed March 26, 1852, (Pub. Laws 1852, p. 465). This act was a supplement to the act to regulate elections. The second section of that act enacted that on the day mentioned in the Act of 1846 in each succeeding year an election should be held in each of the said assembly districts for one member of the general assembly, who "shall be a resident of said district." In 1861, at the session of the legislature held next after the federal census of 1860, an act was passed which was also a supplement to the act regulating elections, forming the several counties into as many assembly districts as said counties were respectively entitled to members of assembly. Pub. Laws 1861, p. 529. In 1871 a similar act was passed, with the title of "An Act to Reapportion the Several Assembly Districts of the State of New Jersey." Pub. Laws 1871, p. 45. By the General Election Law of 1876 the first section of the General Election Act of 1846 was amended by requiring an election to be held in the several election districts in each county to elect for such county such a number of persons to be members of the general assembly as such county shall be entitled to elect. Revision, p. 387. Supplements to the Apportionment Act of 1871 were passed March 4, 1878 (Pub. Laws, pp. 40, 542); March 6, 1878 (Pub. Laws, p. 49); March 12, 1878 (Pub. Laws, p. 81); March 29, 1878 (Pub. Laws, p. 570); April 8, 1878 (Pub. Laws, p. 266); April 4, 1878 (Pub. Laws, p. 285); April 4, 1878 (Pub. Laws, p. 287); March 27, 1889 (Pub. Laws, p. 115). Of these acts, all with the exception of the Act of April 8, 1878, were alterations in several of the counties of the assembly districts established by the Act of 1871, and the Act of April 8, 1878, appears to be a general act redistricting all the assembly districts in this state. In 1891 a general act was passed apportioning members of the assembly to the several counties in conformity with the federal census of 1890, and creating new assembly districts in each of the counties. Pub. Laws 1891, p. 146. In 1891 another general act was passed, making a new apportionment of members of assembly among the several counties in conformity with the census of 1890, creating new assembly districts in each of the counties. Pub. Laws 1891, p. 389. By several acts, passed respectively March 7, 1892 (Pub. Laws, p. 52), March 23, 1892 (Pub. Laws, p. 180), March 24, 1892 (Pub. Laws, p. 251), which were supplements of the General Act of 1891, alterations were made in the assembly dis-

tricts of the counties of Mercer, Cumberland, and Burlington. None of this legislation after the Act of 1862 contained an express provision for the election of one member of the assembly in each assembly district. But the second section of the Act of 1862 has not been repealed, and that section expressly provided for the election of one member in each of the districts. The contention in behalf of the relators that, although assembly districts are established, there is no law in existence which purports to confer the right to elect members of the assembly otherwise than by the counties respectively, is without substance.

The question, therefore, arises directly in this proceeding whether the Act of 1891 prescribed a constitutional method of electing members of the general assembly. The consideration arising *in limine* concerns the right and power of the judiciary to take cognizance of the subject. The contention of counsel in resisting the allowance of this writ is that the question is a political question, and not subject to judicial review. The constitution delegates to the legislative department of the government the function of providing for the election of members of the assembly in the manner and subject to the restrictions prescribed by the constitution. A statute in the performance of that function is the exercise of a legislative, and not a political, power; and the constitutionality of the act by which that legislative power is exercised is undoubtedly a subject of judicial inquiry. *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; *Parker v. State*, 183 Ind. 178, 18 L. R. A. 567. The prosecutors who apply for this writ are citizens and legal voters in the county of Essex. The gravamen of their complaint is that by the operation of the Act of 1891 they are restricted in the exercise of the elective franchise in as full a manner as by the constitution they are entitled to enjoy it. The interest the relators have in the subject-matter of this controversy is sufficient to give them a standing in court to prosecute this writ. If the writ be allowed, its mandate will be directed, not to members of the legislature, but to subordinate officers, whose duties in connection with elections are purely ministerial. Recent decisions have furnished weighty precedents affirming the jurisdiction of the courts on the prosecution of citizens and voters over the constitutionality of acts of the legislature making apportionments for the election of its members. *State v. Cunningham*, *supra*; *Giddings v. Blacker*, 93 Mich. 1, 16 L. R. A. 403; *Parker v. State*, *supra*. In *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 821, the court entertained jurisdiction to pass upon the validity of a rule of the house of representatives for determining the presence of a quorum to transact business. In *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, the same court entertained jurisdiction to consider whether a statute of the state of Michigan providing for the choice of presidential electors was in contravention of the constitution. In the argument counsel directly made the point that the controversy was not judicial, because whatever decision that court or any other court might make as to the validity of the state law was subject

to review by other political officers and agencies. To this argument *Chief Justice Fuller*, in delivering the opinion of the court, responded in this language: "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress. . . . The question of the validity of this act as presented to us by the record is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own." In *State v. Cunningham*, *Giddings v. Blacker*, and *McPherson v. Blacker* the writs prayed for were to go to the secretary of state, commanding him to perform the ministerial duty of giving notice that at the next general election electors would be chosen in a certain manner. By statute the city and township clerks are to give public notice of the time and place and purpose of holding an election (Revision, p. 888, § 9), and by the Ballot Reform Act of 1890 it is made the duty of the clerk of the county to receive nominations, and provide official ballots for the election of members of the assembly (Pub. Laws 1890, p. 861). The prayer of the petitioners is for a mandamus directed to these officers in the alternative either to give notice, receive nominations, prepare ballots for the election of the number of members of the assembly apportioned to the county of Essex by the whole body of the legal voters of the county, or to receive nominations, prepare ballots, and to give notice of an election of such members in accordance with the assembly districts created by the Act of 1881. The map marked "Exhibit R, 12" shows the

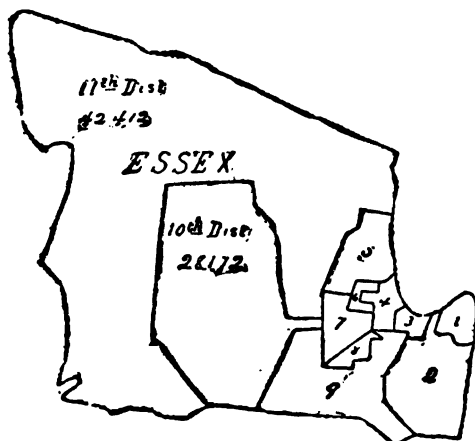
territorial location and extent of the assembly districts created by the Act of 1891. The following table, compiled from the testimony, exhibits the population of these districts respectively, and also the number of voters polled in each district at the election of 1893, and the majority of the members elected in each district:

District.	Population.	Votes.	Majority.	
1892.			Dem.	Rep.
First.....	18,616	3,881	521	
Second.....	14,897	3,634	810	
Third.....	11,349	3,209	587	
Fourth.....	17,748	4,662	596	
Fifth.....	27,431	6,750		1,534
Sixth.....	18,245	3,296	648	
Seventh.....	20,748	6,691	229	
Eighth.....	25,000	5,137	119	
Ninth.....	24,572	6,296		2,130
Tenth.....	28,172	6,454	761	
Eleventh.....	42,412	9,980		1,628
			3,771	5,097

In this construction of districts the eleventh district, with a population of 42,412, and 9,980 qualified voters, is allowed one member of assembly; and the third district, with a population of 11,349, and 3,209 voters, obtains an equal representation in the popular branch of the legislature. A qualified voter of the county of Essex who casts his ballot in the third district has by this act an effect given to it equal to the ballots of three qualified voters of the county cast in the eleventh district. The inequality in the apportionment of the population and qualified voters of the county among the districts by this act is conspicuous. By the census of 1880, Essex county was entitled to ten members of assembly. The Apportionment Act of 1881 created ten districts, having a population ranging from 18,683 to 21,258. The contention of the relators is that the apportionment among the several assembly districts by the Act of 1881 was fair and reasonable, and that the apportionment by the Act of 1891 is unjust and unreasonable, depriving the citizens of the county of the right of equal suffrage secured by the constitution. Hence the alternative prayer of the petitioners is that a writ issue for an election of ten members of the assembly in the districts formed by the Act of 1881 and of one member by the county at large.

We find insuperable obstacles in the way of judicial action of the scope last mentioned. If the legislature, having made an apportionment of members among the counties in conformity with the constitution, has the additional power to create districts within the county for the election of members, its power in that respect is unfettered by constitutional limitation, and consequently beyond the control of the judicial department of the government. The legislature may create new counties. The creation of a new county adds an additional member to the state senate. The power of creating new counties may be resorted to for political or other purposes inconsistent with public welfare, and may be oppressive to taxpayers on whom the burden of supporting a county government may fall, and yet no one would entertain the thought that the remedy for such an unwise or oppressive act vested in the judiciary. The cases in which the courts have intervened to

That map so far as it exhibits Essex County is as follows:



set aside acts of the legislature creating election districts have uniformly gone upon constitutional limitations which had been violated. I know of no precedent or principle that would authorize the court to overturn a law passed by the legislature within constitutional limitations, on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corrupt means. The remedy for legislation that is simply pernicious in its character is with the people. I concur in the views submitted by defendants' counsel in their brief that "the relators must show that the law they attack is a violation of constitutional limitations. The moment they step beyond that line of attack, they are on political ground, beyond the jurisdiction of the court." The issue presented by the record in this case is whether, under the government established by the constitution, the members of the general assembly apportioned among the several counties may be elected otherwise than by the qualified voters of the county at large. The constitutional provisions under consideration are contained in article 4, §§ 1-3, under the title of "Legislature," and article 2, under the title of "Right of Suffrage." Paragraph 1, § 1, art. 4, provides that "the legislative power shall be vested in a senate and general assembly." Section 2 provides that "the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties respectively, for three years." Section 3 provides that "the general assembly shall be composed of members annually elected by the legal voters of the counties respectively who shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. The present apportionment shall continue until the next census of the United States shall have been taken and an apportionment of members of the general assembly shall be made by the legislature at its first session after the next and every subsequent enumeration or census and when made shall remain unaltered until another enumeration shall have been taken; provided that each county shall at all times be entitled to one member, and the whole number of members shall never exceed sixty." Paragraph 2 of section 1 of article 4 provides that "no person shall be a member of the senate who shall not have attained the age of thirty years and have been a citizen and inhabitant for four years, and of the county for which he shall be chosen one year next before his election; and no person shall be a member of the general assembly who shall not have attained the age of twenty-one years, and have been a citizen and inhabitant of the state for two years, and of the county for which he shall be chosen one year next before his election." Article 2, in providing for the right of suffrage, provides that "every male citizen of the United States of the age of twenty-one years who shall have been a resident of this state one year, and of the county in which he claims his vote five months next before his election, shall be entitled to vote for all officers that are now or hereafter may be elective by the people."

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In construing these constitutional provisions, the form of government antecedent to the adoption of the constitution, the manner in which the legislative department was organized, and the mode of electing its members, are important adjuncts in ascertaining the intent of the framers of the constitution. By the instructions of Lord Cornbury and his commission, the instruments which in 1702 established a colonial government, the general assembly for the enacting of laws was constituted, consisting of twenty-four representatives, to be chosen in manner following: Two by the inhabitants and householders in each of the towns of Perth Amboy, and Burlington, ten by the freeholders of East Jersey; and ten by the freeholders of West Jersey. The qualification of the representatives of these divisions was an estate of freehold in "the division for which he should be chosen;" and the general assembly was composed of persons "elected by the major part of the freeholders of the respective counties and places." *Leam. & S. 619-647*. By an act passed April 4, 1709, entitled "An Act Regulating the Qualification of Representatives to Serve as General Assembly in This Province of New Jersey," two representatives were assigned to the towns of Perth Amboy, Burlington, and Salem, respectively, and two to each of the counties into which the colony was divided. This act provided that these representatives should be chosen "by the majority of voices or votes of the freeholders of each county," and that the "representatives for the counties aforesaid" should be freeholders in that division "for which he or they should be chosen." *Allinson, p. 6*. As new counties were created from time to time, each county was given two representatives, to be chosen by the county for representatives of the county. By the first constitution of this state, adopted July 3, 1776, the legislative department was divided into two bodies, a legislative council and a general assembly, the members of which were chosen annually, one member of the legislative council and three members of assembly being chosen by each county. The language of that constitution is that "the counties shall severally choose one person to be a member of the legislative council," and "each county shall also choose three members of the assembly." The qualification prescribed for the members of both the legislative bodies were that the member of the legislative council should be, and have been for one whole year next before the election, "an inhabitant and freeholder in the county in which he is chosen," and that no person shall be entitled to a seat in the assembly unless he be, and have been for one whole year next before the election, an inhabitant "of the county he is to represent." The right of suffrage was provided for in these words: "All inhabitants of this colony, of full age who are worth fifty pounds, proclamation money clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in council and assembly and also for all other public officers that shall be elected by the

people of the county at large." The Constitution of 1776 authorized the legislature to add to or diminish the number or proportion of the members of assembly for any county or counties, as it might judge equitable and proper, on the principles of more equal representation. From time to time acts were passed increasing or diminishing the number of members of assembly in several of the counties; but no effort was made to equalize representation on the basis of population until 1888, when an act was passed entitled "An Act to Provide for the Equal and Just Representation of the Several Counties in This State in the General Assembly," which enacted "that after the next and each subsequent census of this state that shall be taken in pursuance of any law or laws of the congress of the United States each county of this state shall be entitled to elect and send to the general assembly one member for every six thousand inhabitants which such county shall contain at the time of taking such census as near as may be; provided always that no county shall have a less number of representatives than such county is now by law entitled to elect and send to the general assembly." Pub. Laws 1888, p. 57. This act was in force when the Constitution of 1844 was adopted, and the apportionment of members among the counties therein contained was by the constitution continued until the federal census next thereafter should be taken.

In all the legislation on this subject during colonial times, and in the Constitution of 1776 and the legislation thereafter antecedent to the convention which framed the present constitution, members of the popular branch of the legislature were regarded as representatives of the counties, chosen by the legal voters of the counties, and qualified for the office by qualification having relation to the counties for which they were elected. In the convention of 1844 the inequality of representation in the legislature was made the ground of serious complaint. As the result of the deliberations of that body, the equal representation of the several counties in the senate was retained, and equality of representation in the general assembly was provided for by the apportionment of members among the counties according to population. A comparison of the language of the old constitution and the constitution framed by the convention indicates that the purpose of the members of the convention was a modification in some particulars, and not a radical change, in the composition and selection of members of the legislative department. The old constitution provided that "the county shall choose" the members of assembly; the new constitution provides that the members of the general assembly shall be elected "by the legal voters of the counties respectively." The old constitution provided that no person should be entitled to a seat in the assembly unless he be, and have been for one whole year next before the election, an inhabitant of "the county he is to represent;" the new constitution provides that no person shall be a member of the general assembly who shall not have been a citizen and inhabitant of the county for which he shall be chosen one year

next before his election. In providing for the ratio of representation among the counties the method of apportionment adopted in the new constitution was in principle in conformity with the Act of 1888, which regulated the subject under the old constitution. Between the old constitution, with the provisions of the Act of 1888 ingrafted upon it, and the new constitution, there is a similarity of language and expression that indicates that the framers of the latter intended no change in the representative character of members of the general assembly or in the mode of their election. In recasting the section in the old constitution providing for the right of suffrage, the words "for representatives in council and assembly" were omitted. The new constitution having in the section relating specifically to the election of these officers expressly provided that senators and members of assembly should be elected "by the legal voters of the county," the omitted words were superfluous. And for the words, "for all other public officers that shall be elected by the people of the county at large," the new constitution substituted the expression, "shall be entitled to vote for all officers that now or hereafter may be elective by the people;" an expression which includes officers elected in townships, wards, and minor election districts as well as those officers who by force of constitutional prescriptions were made elective by the people, such as governor, senators, members of assembly, county clerks, surrogates, sheriffs, coroners, and justices of the peace, according as these constitutional officers were by the constitution made elective by the people of the state or by the legal voters of the counties or by the people of the several townships. The problem the members of the constitutional convention were dealing with was the equalization of representation in the popular branch of the legislature. The old constitution permitted the legislature, in its discretion, to add to or diminish the number or proportion of members of the assembly for the several counties. This discretionary power in the legislature was discarded in the new constitution, and the apportionment of members among the counties in proportion to population was substituted. In a popular government, representation in proportion to population extending over the area of a state is practically equivalent to representation on the basis of the number of qualified voters. A computation on either basis would, in the main, reach nearly the same result. And it is inconceivable that the distinguished body of men who composed the constitutional convention should have contemplated an apportionment of members within the several counties by means of assembly districts not in proportion to population, or under any other restriction which should give to one qualified voter a voice in the election of members of the assembly equal to that of three, or any indefinite number of voters, who exercise their elective franchise at another voting place within the same county; for, as has been said, if the power to create these districts is possessed by the legislature, it is a power beyond constitutional restraints.

The provisions of the Federal Constitution regulating the choice of presidential electors and the election of members of congress are not apt precedents for the construction of the provisions of our constitution for the election of senators and members of assembly. Paragraph 2 of section 1 of article 2 of the Federal Constitution provides that each state shall appoint, in such manner as the legislature thereof may direct, a number of electors (to vote for president and vice-president) equal to the whole number of senators and representatives in congress. The appointment of electors is left with the several states, to be exercised in such manner as the legislature may direct. Under this constitutional provision the legislatures of the several states have exclusive power to direct the manner in which presidential electors shall be appointed, whether by the legislature directly, or by popular vote in districts, or by general ticket. *McPherson v. Blacker*, 146 U. S. 1, 26 L. ed. 869. In delivering the opinion of the court in the case last cited Chief Justice Fuller said: "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." The provisions in the Federal Constitution for the election of members of congress are also expressed in general terms. Section 2 of article 1 provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." And by section 4 "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state, by the legislature thereof, but the congress may at any time by a law make or alter such regulation except as to the places of choosing senators." In the absence of the interposition of congress, the manner of electing representatives in congress is committed to the state legislature, with no other restriction than with respect to the qualification of the electors. At the second session of the twenty-seventh congress an act was passed for the election of representatives in congress by districts. The debate upon the act was long and earnest. Two representatives of this state, Senator Miller, and Mr. Halsted in the house of representatives, participated in that debate. This discussion occurred in June, 1842. The constitutional convention assembled in May, 1844. The article of our constitution relating to the election of senators and members of the general assembly was reported by Ex-Governor Vroom, than whom no one was more familiar with public affairs, state and national. If the convention which framed our constitution intended to adopt a mode of electing members of assembly in conformity with the election of members of con-

gress under the Federal Constitution, it is reasonable to assume that, with the discussions in congress at the session of 1842 fresh in the minds of its members, the provisions of our constitution on that subject would have been cast in language of similar import with the Federal Constitution; and it is a significant circumstance that the language of the Federal Constitution, which conferred discretionary power on congress, was avoided; the discretionary power possessed by the legislature under the old constitution was taken away, and a fixed rule was adopted that the members of the general assembly should be apportioned among the counties in proportion to population, and be elected by the legal voters of the counties respectively. Grouping together the phrases in which the intent of the constitution is expressed, I think its true construction is beyond controversy. Members of the general assembly are apportioned among the counties. The qualification for membership consists of citizenship of the county for which they shall be chosen, and they are to be elected by the legal voters of the county. The right of suffrage is granted to residents of the county, and each qualified voter is secured by constitutional prescription the right to vote for all officers elective by the people. Members of the general assembly are by the constitutional regulation elective by the legal voters of the counties, and every qualified voter who has for the specified period of time been a resident of the county in which he claims his right to vote is secured the right to a voice in the election of all officers who, by the constitution are elective by the class of legal voters to which he belongs. The constituency by which members of the general assembly shall be elected is designated by the constitution, and the qualifications requisite for the right of suffrage are therein prescribed, and also the elective franchise which shall be enjoyed by each qualified voter. These constitutional provisions were self-executing, and also self-sustaining. *State v. Newark*, 39 N. J. L. 880-888, 40 N. J. L. 558. Nothing was left for legislative action except the apportionment of members among the counties in a fixed ratio, and such regulations as were necessary for holding elections,—the canvassing of the votes, and the certification of the result. When the legislature has once made the apportionment of members to any county, the constituency by which the members so apportioned shall be elected, and the elective franchise of each of the legal voters by whom such members are elective, become subject to constitutional prescriptions which are beyond legislative control. The first apportionment act under the constitution apportioned the members among the counties without making any provision for the manner in which they should be elected. Pub. Laws 1851, p. 289. The act was not imperfect. Without legislative action the mode of electing the members apportioned by the act among the counties was completely provided for by the constitution, which *ex proprio vigore* determines how members apportioned among the counties shall be elected.

Other constitutional provisions which provide for the election of other officers shed a light on the subject under consideration. Paragraph 7, § 2, art. 7, provides that coroners shall be elected by the people of their respective counties. Paragraph 1, § 7, art. 6, provides that there may be elected two, and not more than five, justices of the peace in each of the townships of the several counties, and in each of the wards in cities that vote in wards; the number of justices of the peace a township or ward may have being determined by its population. Paragraph 8, § 2, art. 7, provides that justices of the peace shall be elected by ballot at the annual town meetings of the townships and of the wards, and when elected they shall be commissioned for the county. In these provisions, as in that providing for the election of members of assembly the constitution prescribed the constituency by which coroners and justices of the peace shall be elected; and it could scarcely be contended with any plausibility that an act of the legislature for the election of coroners in election districts, or for the election of the number of justices of the peace a township or ward is entitled to have in a corresponding number of election precincts, would comply with the constitutional prescriptions. It will be observed, also, that throughout the constitution the constituency by which every constitutional officer shall be chosen is defined with precision.

After a careful examination and the most attentive consideration of the important questions presented in this case, with the aid of the learned argument and elaborate briefs of counsel, in my judgment the election of members of assembly in assembly districts is a plain departure from the method of electing these representatives prescribed by the constitution. Instead of the eleven members apportioned to the county being elected by the legal voters of the county, one member is elected in each assembly district by the legal voters of that district, arbitrarily created by the legislature. In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim "*expressio unius est exclusio alterius*." *Stradling v. Morgan*, 1 Plowd. 206, 207; 9 Bacon, Abr. 295; Sedgw. Stat. & Const. L. 80. Where the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive; and it is not competent for the legislature to provide any other mode of obtaining or holding the office. *Cooley*, Const. Lim. 78, note 3; *People v. Albertson*, 55 N. Y. 50, 56; *People v. Bull*, 46 N. Y. 57-63, 7 Am. Rep. 302. The election of one member in one assembly district and one member in another district, and so on through the eleven districts into which the county is divided, is not the election of the members of the general assembly apportioned among the counties by the legal voters of the county. The constituency devised by the

system of assembly districts is another and a different constituency from that prescribed by the constitution, and the qualified voters of the county are restricted in the exercise of the right of suffrage as fully as is guaranteed to them by the constitution. It seems to me that it cannot be affirmed on any defensible ground that a member of the assembly chosen by the voters of an election district within the county is, in the words of the constitution, "elected by the legal voters of the county." An act of the legislature providing that each qualified voter of the county should vote for only one of the members apportioned to the county would be plainly unconstitutional. The assembly district system differs only in form. It segregates the qualified voters of the county into classes, and allows each qualified voter of the class to vote for only one of the members apportioned to the county.

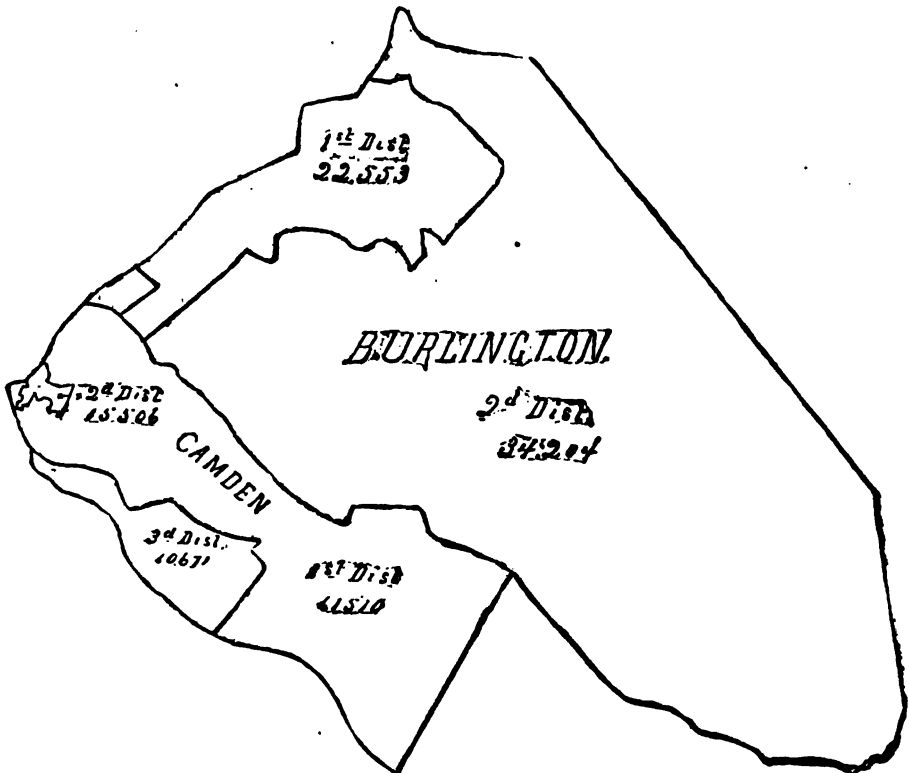
It is contended, in the first place, that the constitutionality of legislation for the election of members of the general assembly in assembly districts is *res judicata*. To sustain this contention, *State v. Newark*, 40 N. J. L. 297, was cited. The proceeding in that case was an application for a mandamus to compel the mayor and common council of the city of Newark to divide the city into wards corresponding in number and boundaries with the assembly districts created by the Act of April 5, 1878. The application was denied, on the ground that acts creating legislative districts were public acts, and did not go into operation until the July succeeding the time they were passed. The case was argued at June term, 1878, and prior to the date when the Act of April 5, 1878, became effective. It appears by the brief of the counsel of the relator in that case that the power of the legislature to divide counties into assembly districts was not put in dispute. His contention was that this power could be exercised only at the time the apportionment of members among the counties was made,—that is, at the session next after the federal census,—and that the districts then formed must remain unaltered until the time arrived for the next apportionment. It was to the aspect in which the question was presented by counsel that the remarks of *Mr. Justice Reed*, with respect to the unfettered power of the legislature to direct the method in which members apportioned among the counties should be elected, were directed. The case was decided on other grounds. In June term, 1890, the constitutionality of the assembly districting acts was mooted before the court of errors and appeals in *Mortland v. State*, 52 N. J. L. 521. In that case the proceeding was in quo warranto to test the defendants' title to the office of chosen freeholders under an election pursuant to an act of the legislature which provided for the election of chosen freeholders in assembly districts. In this case, as well as in *Gardner v. Newark*, the constitutionality of acts creating assembly districts arose collaterally. The title of the defendant to the office under such an election was sustained. But *Mr. Justice Garrison*, in delivering the opinion of the court, used this language: "Referring to the suggestion made

on the argument that the assembly districts, which by this act are referred to as the precincts for the election of freeholders, were not legal legislative creations, inasmuch as the constitution contains no intimation but that members of assembly shall be chosen by the counties at large, it is sufficient to say that we are not now concerned with the legality of such subdivisions of counties. The act under review refers to these districts for the purpose of defining a territorial limit. Such precincts or assembly districts do exist, whether legally or not, and to each of these *de facto* districts a freeholder is assigned. Beyond this we need not at this time go." And the headnote prefixed to the case, prepared by the learned judge who delivered the opinion of the court, is as follows: "Quære, whether assembly districts may have any legal existence as political subdivisions of the county." *Gardner v. Newark*, although decided twelve years before, was not referred to by the court. With this judicial action of the highest court in the state, we are not at liberty to treat this question as *res judicata*.

The contention, in the next place, is that the purpose and intent of these constitutional provisions have, by contemporaneous construction, long usage, and practical interpretation, become established, and at this day the subject is not open for discussion. For the first eight years after the new constitution was adopted—from the fall of 1844 to the fall of 1851, inclusive—the members of as-

sembly were elected by the counties at large. This may be said to be the contemporaneous exposition of the constitution. The Act of March, 1852, first created assembly districts. This act remained in force until after the census of 1860, when, by the Act of 1861, a new apportionment among the counties was made, and to some extent a corresponding change in assembly districts. The districts created by the Acts of 1852 and 1861, which continued to exist until 1871, conformed to county and the then existing township and ward lines. No criticism has been made upon the fairness and equality in population with which these districts were constructed. If the practical interpretation for the years from 1852 to 1870, inclusive, gave construction to the constitution, that construction will not sustain the Act of 1891. The result of the districting in the county of Essex by that act has already been stated. The districts into which the county was divided are unequal in population, and the legal voters of the county are so adjusted in the several districts that of the eleven members apportioned to the county, eight members are elected by majorities aggregating 8,771 votes, and the other three by majorities aggregating 5,097 votes. The inequalities in other counties appear by Map A, on the part of the relators, conspicuous among which are those in the counties of Burlington and Camden,* Burlington being divided into two districts, with the population, respectively,

*As follows:



of 22,555 and 34,204; Camden into three districts, with the population, respectively, of 61,510, 15,506, and 10,671. A new system of constructing assembly districts was introduced by the Act of 1871, plainly for the furtherance of political purposes. Township, ward, and city lines were disregarded, and assembly districts were carved out within the counties without regard to population, and were so devised, by massing together the qualified voters of one political party, as to secure to the minority of qualified voters of the county an unjust advantage in the choice of members of the assembly, the members of that body representing counties being no longer "elected by the legal voters of the counties respectively." This was conspicuously, but not exclusively, the case in the county of Hudson. Exhibit No. 9,³ on the part of the defendants, discloses the result of the first election under that act; and the return of the votes in the second election district of that county illustrates the object that may be effectuated by the arbitrary establishment of districts that shall mass in one district a great body of the qualified voters of one political party. The "Horseshoe District" is as well known in this state as a synonym for (to use a subdued expression) unfair political methods as is the word "gerrymander" throughout the United States.

At the legislative session of 1878 no less than seven different acts were passed altering assembly districts in the several counties. In 1881 a new apportionment was made, and new districts were created, some of which were remodeled in 1889. In 1891 there was a new apportionment among the counties, and new assembly districts were created; and in 1892 three acts were passed altering the districts in three counties. The maps and election returns made exhibits in this case show districts with areas of grotesque shapes, inequalities in population, and the massing in districts of the voters of one political party, to overcome the constitutional rights of the legal voters of the counties to equality in choice of representatives of the county in the general assembly. The maps and exhibits, which, by the written stipulation of counsel, are evidence in these cases, exhibit the capacity that lies in the assembly district system to enable the political party that happens to control the legislature to provide means for its continuance in power. Certain it is that if the legislative usage and practice beginning in 1871 and coming down to the present time has established a construction of the constitution that is now a finality, then it must be conceded that the legislative power and discretion in the premises are unqualified and unrestrained; and, to adopt the language

³That exhibit was as follows:

Vote for Assembly, 1871.

DISTRICTS.

Party.	1	2	3	4	5	6	7	8	Totals.	Population. Census 1870.	Representatives.
Democratic.....	841	1097	988	1283	752	1289	897	982	8129		Dem. 4.
Republican.....	1131	182	1128	951	789	1002	815	1304	7302		Rep. 4.
Independent Democratic.....	208	1040	34				109		1391		
Independent Republican.....			320						320		
Scattering.....	10	7	3	1	2	7	4	5	39		
Totals.....	2190	2326	2479	2235	1543	2298	1825	2291	17,187	129,288	

Vote for Assembly, 1881.

DISTRICTS.

Party.	1	2	3	4	5	6	7	8	9	10	Totals.	Population. Census 1880.	Representatives.
Democratic.....	854	909	1539	977	710	1553	2578	1452	925	1164	12,661		Dem. 7.
Republican.....	1286	351	1083	985	1358	1074	759	742	873	803	9,968		Rep. 3.
Independent Democratic.....		985									985		
Independent Republican.....		200				508	143				851		
Scattering.....	9	2		2	4	1		5			23		
Totals.....	2149	2447	2622	1964	2072	3136	3474	2199	1798	2027	23,888	187,960	

Vote for Assembly, 1891.

DISTRICTS.

Party.	1	2	3	4	5	6	7	8	9	10	11	Totals.	Population. Census 1890.	Representatives.
Democratic.....	2824	1384	1522	1666	2072	1342	1907	1778	2259	1410	2170	19,794		Dem. 10.
Republican.....	1973	2886	1008	1039	1702	424	1627	1350	580	1014	1466	15,089		Rep. 1.
Independent Democratic.....			556			234						790		
Independent Republican.....					304							304		
Scattering.....	2	9	1	21	5		2	151	9	42		242		
Totals.....	4369	4229	3087	2726	4083	2000	3532	3279	2843	2466	3636	36,199	275,126	

of the brief of the defendants' counsel: "There is not any constitutional restriction upon the law-making power controlling or directing the subdivision of counties into assembly districts. The division may be fair or unfair, equal or unequal, proportionate or disproportionate, and this court may not review the exercise of that power." How far contemporaneous exposition, long usage, and practical interpretation shall control in the construction of constitutional provisions is the vital question on this branch of the case. Contemporaneous construction and long usage, and especially the practical interpretation by the various departments of the government, are entitled to great weight in the construction of constitutional provisions. But it is only when the words of the constitution are of doubtful significance, or the meaning is obscure, that resort to extraneous aid is permissible. *Mr. Justice Story*, in his treatise on the Constitution, says: "Where its terms are plain, clear, and determinate they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil." And again: "Contemporary construction is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, to expound an obscure clause. . . . It can never abrogate the text; it can never narrow down its true limitations; it can never enlarge its natural boundaries." 1 Story, Const. §§ 405, 407.

The case most frequently cited to illustrate the effect of contemporaneous construction, long use, and practical interpretation in the construction of constitutional provisions is *Stuart v. Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115. Congress passed an act establishing circuit courts, and designated the justices of the supreme court to hold the circuits. The question before the court was whether congress possessed the power to assign justices of the supreme court to hold circuit courts, or whether the judges of these courts should be specially appointed as such, and have distinct commissions for that purpose. The only provisions of the Federal Constitution relating to the organizing of courts and the mode of appointment are those that provide that the judicial power of the United States should be vested in one supreme court, and inferior courts as congress may from time to time ordain and establish, and that the power of appointing judges of the supreme court, and all other officers of the United States whose appointments were not therein otherwise provided for, should vest in the president by and with the advice and consent of the senate. The constitution had nowhere defined the duties of the justices of the supreme court, nor did it contain any express designation of the persons by whom the inferior courts established by congress should be held. The only other provision there was on the subject was that the judges both of the supreme and inferior courts should hold office during good behavior, and should receive a compensation which should not be diminished during their continuance in office. It being left undefined in the constitu-

tion by what judges these courts should be held, the court considered the practical exposition by long practice and acquiescence to have fixed the construction of the constitution in a matter which the language of that instrument left in a state of uncertainty. *Rogers v. Goodwin*, 2 Mass. 475, is another case in the same line of decision. A statute passed in 1636 authorized the freemen of every town to dispose of their lands, and in the preamble of another statute, passed in 1753, it was recited that the proprietors of lands lying in common have power "to manage, dispose and divide the same in such way and manner as hath been or shall be concluded, and agreed on by the major part of the interested." Under this authority the proprietors of the town made conveyance by deed to a stranger. The point relied on against the validity of this deed was that the proprietors had no authority to sell lands to a stranger. The conveyance was sustained on the legal ground that long and continued usage furnished a contemporaneous construction, which must prevail over the mere technical import of the words. It will be observed that the statute in question contained no provision with respect to the manner in which common lands should be disposed of. The act was silent on that subject. Neither of these cases is pertinent to the subject under discussion, for the constitutional provisions under consideration expressly provide that members of the assembly shall be elected by the legal voters of the county, and qualified voters resident in the county are declared to be entitled to vote for all officers elective by the people. *Judge Cooley* states the controlling principle in this language: "Where no ambiguity or doubt appears in the law, the same rule obtains here as in other cases,—that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers." And the same learned jurist, after citing *Stuart v. Laird*, *Rogers v. Goodwin*, and other cases of similar import, which the author says appear on first reading not to have observed proper limitations, concludes his observations in these words: "It is believed, however, that in each of these cases an examination of the constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to

sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed." Cooley, Const. Lim. 84, 85.

An examination of the cases in the Supreme Court of the United States will disclose the fact that long usage, contemporaneous construction, and practical interpretation have been resorted to in construing statutes and constitutional provisions only to ascertain the meaning of technical terms, or to confirm a construction deduced from the language of the instrument, or to explain a doubtful phrase or expound an obscure expression. *Calder v. Bull*, 3 U. S. 3 Dall. 388, 1 L. ed. 648; *United States v. Wilson*, 32 U. S. 7 Pet. 150, 8 L. ed. 640; *Martin v. Hunter*, 14 U. S. 1 Wheat. 304, 4 L. ed. 97; *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264, 5 L. ed. 257; *United States v. Dickson*, 40 U. S. 15 Pet. 141, 161, 10 L. ed. 689, 697; *Prigg v. Pennsylvania*, 41 U. S. 16 Pet. 539, 622, 10 L. ed. 1061, 1091; *Cooley v. Philadelphia Port Wardens*, 53 U. S. 12 How. 299-315, 13 L. ed. 998-1008; *Hahn v. United States*, 107 U. S. 402-408, 27 L. ed. 527, 528; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 58-57, 28 L. ed. 849-851; *Brown v. United States*, 118 U. S. 568-571, 28 L. ed. 1079, 1080; *McPherson v. Blacker*, 146 U. S. 1-26, 36 L. ed. 869-874. In *United States v. Dickson*, Mr. Justice Story said: "The construction given by the treasury department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intent and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. . . . It is not to be forgotten that ours is a government of laws, and not of men, and that the judicial department has imposed upon it by the constitution the solemn duty to interpret the laws in the last resort; and, however disagreeable that duty may be in cases where our judgment shall differ from that of other high functionaries, it is not our liberty to surrender or to waive it." These observations were made by a learned jurist, with respect to the construction of statutes which are laws subject to alteration or repeal at any time in the discretion of the legislative department of the government. They apply with irresistible force to the fundamental instrument of government,—the constitution,—the supreme and irresistible power to make or unmake which (to quote the language of Chief Justice Marshall in *Cohens v. Virginia*) "resides only in the whole body of the people, and not in any subdivisions of them."

In this state the rule of construction is stated with accuracy and discrimination in *State v. Kelsey*, 44 N. J. L. 1. The subject is discussed by the chief justice in his opinion (p. 22), and Mr. Justice Magie in his dissenting opinion (p. 47) with a citation of authorities. The conclusion reached by the court is stated in the headnote as follows: "A statute of uncertain meaning, which has been enforced in a certain sense for a long

series of years by the different departments of government, will be judicially construed in that sense." The majority of the court, finding the language of the statute broad enough to embrace the meaning contended for, permitted a practical construction of it to that effect for more than fifty years to prevail. The subject was again brought under judicial decision in *Engeman v. State*, 54 N. J. L. 247. The question before the court in that instance was the constitutionality of an act of the legislature passed in 1855, making justices of the supreme court *ex officio* judges of the court of common pleas, orphans' court, and court of quarter sessions. *State v. Kelsey* was cited with approbation by Mr. Justice Van Syckel in delivering the opinion of the court. But it will be observed that the learned judge, on page 252, 54 N. J. L. lays particular stress upon the fact that the constitution gave the legislature power to alter or abolish all these courts, as the public good might require; and that the power to alter or abolish seemed necessarily to imply and carry with it authority to change or modify the structure of the court, as well in the mode of appointment as in the number of judges. The learned judge therefore concluded that the power of the legislature over the controverted subject was unrestrained by the fundamental law. To such a condition of affairs *State v. Kelsey* was properly applied. Neither of these precedents can be invoked as justifying long usage or practical interpretation as controlling the construction of constitutional or statutory law, unless under the exceptional circumstances above mentioned. Nor are we without precedents directly affirming the domination of the constitution, notwithstanding long usage and practical construction to the contrary, and the most conclusive arguments *ab inconvenienti*. I refer to *Scott v. Sandford*, 60 U. S. 19 How. 393, 15 L. ed. 691, and *Hepburn v. Griswold*, 75 U. S. 8 Wall. 608, 19 L. ed. 518. In the first of these cases the federal court, in 1856, decided that the eighth section of an act of congress passed in 1820, and known as the "Missouri Compromise Act," which prohibited slavery in all that part of the territory ceded by France under the name of Louisiana, lying north of the line of 36 degrees and 30 minutes, not included within the limits of Missouri, was unconstitutional and void, notwithstanding the fact that the act was designed as a final settlement of the agitation of the slavery question, and a state had been admitted into the Union under its provisions, and that congress, from its first session down to the year 1848, had repeatedly exercised the power which was denied by that decision; and notwithstanding the doctrine of a practical construction, continued through a long series of years, was invoked by the dissentient judges. The keynote of that decision is expressed by the chief justice (p. 426) in these words: "No one, we presume, supposes that any change in public opinion or feeling should induce the court to give to the words of the constitution a more liberal construction than they were intended to bear when the instrument was framed and adopted. Such an

argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day." Whatever criticisms were made upon the result of this decision or its policy in the discussions that followed its promulgation, the soundness of the doctrine of the supremacy of the constitution whenever invoked, so forcibly expressed by the chief justice, has never been denied or impugned. In *Hepburn v. Griswold*, acts of congress passed in 1862 and 1863, making treasury notes of the United States a legal tender for debts, were in 1869 declared to be unconstitutional. This decision was subsequently overruled in the *Legal Tender Cases*, 79 U. S. 12 Wall. 457, 20 L. ed. 287. But in both of these cases the court rested its opinion on the language in which the constitutional grant of power to congress was expressed. In the decision of the latter case, Mr. Justice Strong, in delivering the opinion of the court, refers to the situation of the country at the time these acts were passed, and the great business derangement, widespread distress, and rank injustice" that would result if these acts were held to be invalid; but he adds: "The consequences of which we have spoken, serious as they are, must be accepted if there is a clear incompatibility between the constitution and the legal tender acts." The authority of congress to pass the acts in question was, in the opinion of the court, (pp. 533, 534,) deduced from the last clause of the eighth section of the first article of the constitution granting the power to congress to make all laws which should be necessary and proper for carrying into execution the powers of the constitution conferred upon congress. "The means or instrumentalities referred to in that clause and authorized," it is said by the learned judge who prepared the opinion of the court, "are not enumerated or defined. They were left to the discretion of congress, subject only to the restrictions that they may be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to congress." Precedents of the same import are numerous in the federal and state courts. I have cited *Scott v. Sandford* and *Hepburn v. Griswold* for the reason that the interests involved in these cases gave these decisions a conspicuous place in the domain of constitutional law.

The constitution contains the permanent

will of the people. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Popular government can be maintained only by upholding the constitution at all times and on all occasions as it was when it came from the hands of the people, by whose fiat it was established as the fundamental articles of government, to abide until altered by the authority which created it. To adopt the language of Chief Justice Bronson in *Oakley v. Aspinwall*, 8 N. Y. 568: "There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. . . . One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." Within the domain of construction there is room for argument and discussion; nay, even for a divergency of opinion; but when the meaning of the constitution, interpreted by its letter and in its spirit, is ascertained, extraneous considerations are of no avail. In the process of construction, long usage and practical interpretation are entitled to great weight if the language be obscure or doubtful; but such extraneous considerations cannot be allowed "to abrogate the text," or "fritter away its obvious sense." I have already said that on a construction of the words of the constitutional provision regulating this subject, fortified by the policy and institutions which prevailed in this state prior to the framing of the constitution, and a comparison of other of its provisions, the constitutional mandate requires the election of members of the general assembly by the legal voters of the counties, respectively, and that the division of counties into assembly districts, and the distribution of the members among these districts for the purpose of electing such members, are in conflict with the constitutional mandate. No one can examine the legislation on this subject from 1871 to the present time and contemplate the results without realizing the evils which have been fostered under this system. Relief from these wrongs through the ballot box cannot be assured if the majority in the legislature is elected by a minority of the legal voters of the state. Precedent has been followed by retaliation, to be repeated from time to time as supremacy in the legislature has passed from one political party to the other. For this condition of affairs the only remedy is by a return to constitutional methods. If it be that the election of members of the general assembly in districts furnishes a more perfect system of popular representation in the popular branch of the legislature, the change devolves upon the people who made, and who alone can alter, the constitutional

method of electing these representatives; and it may be affirmed with considerable confidence that if such a power be conferred upon the legislature it will be accompanied with qualifications and conditions that will secure to each qualified voter equality in the election of representatives as nearly as may be.

The remaining question is whether these proceedings were prematurely instituted, the contention being that a demand and refusal to perform a duty is an essential prerequisite to an application for a mandamus in any case and under all circumstances. There is a distinction between duties of a public nature and duties of a private nature affecting only the rights of individuals. In the latter class of cases, demand and refusal are held to be necessary as a condition precedent to relief by mandamus; in the former class, the duty being of a public nature, there is not the same necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and omission to perform the required duty is equivalent to a refusal. High, *Mandamus*, § 18. To postpone the commencement of these proceedings until the time preceding the annual elections, at which the county clerk and the clerks of the cities and townships of the county are required to perform the duties devolved upon them under the election laws, would effectually prevent their institution being ever practically of any

avail. The testimony of the county clerk and of other election officers, taken under this rule, makes it apparent that these officials intend to conduct elections in the county under the Act of 1891, until otherwise directed, so long as that act is unrepealed. Indeed, the presumption is not to be entertained that these officers would, on constitutional grounds, disregard the act of legislation conforming to precedents of upwards of twenty years' standing, unless the invalidity of the act be first judicially determined. In *McPherson v. Blacker*, the writ was allowed on the answer of the secretary of state denying that he had refused to give the notice of election required by the petition for the writ, but averring that he intended to give notices under the law the constitutionality of which was assailed, as will appear by the report of the case in 146 U. S. 8, 86 L. ed. 870.

The rule to show cause should be made absolute for a peremptory mandamus commanding that all future general elections for members of the general assembly in the county of Essex shall be so conducted that such members shall be voted for throughout the county as prayed for by the relators. To this extent the rule to show cause is made absolute, without costs.

Reed and Lippincott, JJ., concur in this opinion.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Eustace GIBSON, Admr., etc., of Mary Lewis,
Deceased, *Plff. in Err.*,

v.

City of HUNTINGTON.

(.....W. Va.....)

*1. A municipal corporation is absolutely liable for injuries caused by its
*Headnotes by DEB, J.

failure to keep in repair the streets, alleys, sidewalks, roads, and bridges.

2. A municipal corporation is liable for injuries sustained by the negligent management of its corporate property to the same extent that private individuals are liable for the same character of negligence.

3. A municipal corporation is liable for injuries caused by its negligence in the

NOTE—*Rights of children to protection against dangerous condition of highway.*

There seems to be no question in any jurisdiction that so long as the child is a traveler the municipality owes it the same duty of having its streets reasonably safe that it owes to other travelers.

Children may use the street for the purpose of travel, and are entitled to have it safe for such purpose. *Shippy v. Au Sable*, 85 Mich. 280.

And such rule has been acted on at times without being formally stated. *Draper v. Ironton*, 42 Wis. 607.

Whether or not the municipality is bound to anticipate that children may be travelers and exercise on that account a degree of care in making the highway safe which would not be necessary if only adults were to use it does not seem to be determined. But the municipality is not required to exercise such care as will make accidents to children impossible.

If a bridge is reasonably safe for persons exercising ordinary care it is sufficient. No duty rests on the city to make it safe for children to play around or upon. *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99.

The city is not liable if the injury is caused by a fall from an awning post, which the child was at. 22 L. R. A.

tempting to climb without the least shadow of right. *Gaughan v. Philadelphia*, 119 Pa. 503.

The city is not bound to prevent the abutting owner from setting window screens on the sidewalk in front of his premises for the purpose of making the place safe for children. *McLoughlin v. Philadelphia*, 142 Pa. 80.

Statutes requiring simply safety for travelers.

Under the construction which has been given to the Massachusetts statutes, that the municipal corporation is bound to keep the way safe only for travelers, a child injured by a defect in the street while at play therein cannot recover from the municipality. *Blodgett v. Boston*, 8 Allen, 237; *Tighe v. Lowell*, 119 Mass. 472.

Only travelers can recover under the Wisconsin statutes. *Reed v. Madison*, 17 L. R. A. 783, 88 Wis. 171.

When children use a part of the public road for their sports, the town or city through which the way passes is not responsible for injuries received by one of the children so engaged, although the injuries may result from a defect in the road. *Stinson v. Gardiner*, 42 Me. 248.

Under the Wisconsin statutes, if the traveled part of the road is sufficient and safe, no recovery

discharge of, or failure to discharge, such duties as are purely ministerial, and not governmental or discretionary.

4. A municipal corporation is not liable for injuries caused by the negligence of its agents and officers in the discharge of, or omission to discharge, duties which are purely governmental or discretionary.
5. When the injury sued for is alleged to have been caused by the defendant's negligent use of its corporate property, or in the discharge or omission to discharge of a ministerial duty, the burden of proving negligence is on the plaintiff; and if the jury, by its determination, finds that the facts are not sufficient to sustain the charge of negligence, the court cannot disturb the verdict, even though it be of a different opinion. To do so would be a denial of the right of trial by jury guaranteed by the constitution of this state.

(November 11, 1893.)

ERROR to the Circuit Court for Cabell County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. Gibson, Hutchinson & Gibson, for plaintiff in error:

Deceased in this case was not guilty or capable of contributory negligence.

Kansas Pac. R. Co. v. Whipple, 89 Kan. 581; *Com. v. Hayes*, 149 Mass. 83; *Gunn v. Ohio River R. Co.* 36 W. Va. 165.

Negligence of parents cannot be imputed to child.

Gunn v. Ohio River R. Co. supra; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175.

can be had for injuries to a child who has left the traveled portion of the way and has attempted to drink at a well maintained by an individual near the side of the road, but within its limits. *Goelitz v. Ashland*, 75 Wis. 642.

Under this class of statutes the chief question which can arise after the highway is shown to be defective is whether or not the child was in fact a traveler.

That the ulterior purpose of a child in passing along a street or over a bridge is play is not sufficient to defeat a recovery for injuries caused by a defect in the way. *Strong v. Stevens Point*, 62 Wis. 255.

That a child stops a few moments to watch some workmen shingling a roof will not prevent its recovery in case an unsafe fence by the side of the walk falls and injures it. *Hussey v. Ryan*, 62 Md. 426, 54 Am. Rep. 772, 4 East. 463.

Children may be travelers if using the street for exercise, and they will not necessarily be deprived of that character by stopping for a few moments to watch other children at play. *Bliss v. South Hadley*, 145 Mass. 91.

A boy accompanying his father along the highway does not cease to be a traveler so as to lose his right to protection by stepping out of the path for an instant to clasp a post in play. *Gulline v. Lowell*, 144 Mass. 491, 59 Am. Rep. 102.

A child's rolling a hoop before it while passing along a sidewalk does not prevent it from being a traveler entitled to have the sidewalk safe. *Beed v. Madison*, 17 L. R. A. 733, 83 Wis. 171.

In *Graham v. Boston*, 166 Mass. 75, some boys on their way home were playing tag as they went. They stopped a moment for breath and

Playing in streets by children is lawful and does not bar recovery.

Chicago v. Keefe, 114 Ill. 232, 55 Am. Rep. 860; *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65; *Kerr v. Forgue*, 54 Ill. 484, 5 Am. Rep. 140; *Snoddy v. Huntington*, 37 W. Va. 111.

Here was a bank left at the edge of the road. The street commissioner testified that he had seen this excavation in this bank some months before this accident occurred, and that he did nothing to repair this defect, and that he saw it frequently afterward, previous to this accident, and still did nothing to repair it.

There was nothing between the wagon-beaten track in this road and the bank.

Children had been in the habit of playing around this bank for some time previous to this accident.

These facts constitute such negligence as imposes a legal liability for damages against the city.

Niblett v. Nashville, 12 Heisk. 684, 27 Am. Rep. 755; *Indianapolis v. Emmelman, supra*; *Chicago v. Hesing*, 88 Ill. 204, 25 Am. Rep. 378; *Orme v. Richmond*, 79 Va. 86; *Kunz v. Troy*, 104 N. Y. 844, 58 Am. Rep. 508; *Duffy v. Dubuque*, 68 Iowa, 171, 50 Am. Rep. 743; *Bunch v. Edenton*, 90 N. C. 481; *Stafford v. Okaloosa*, 64 Iowa, 251; *Powers v. Harlow*, 58 Mich. 507, 51 Am. Rep. 154; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Biggs v. Huntington*, 82 W. Va. 55; *Chicago v. Major*, 18 Ill. 360, 68 Am. Dec. 553.

Messrs. Campbell & Holt, for defendant in error:

Intestate was not using the road for any purpose for which roads are constructed and devoted, not even for the purpose of play, because it was outside and beyond all limits of

then one started on at a walk, came in contact with a live electric wire and was injured. The court held that amusing himself as he went did not necessarily deprive him of his rights as a traveler, but at all events there was evidence that at the moment of his injury he was actually walking towards home, and that therefore he was a traveler entitled to protection.

Where a boy had stopped before a shop window to look at objects therein and was injured as he turned away, it was held that the question whether or not he was a traveler was for the jury. *Hunt v. Salem*, 121 Mass. 294.

But a child who having gone to walk in the street sits down on the curb has ceased to be a traveler entitled to have the way safe. *Lyons v. Brookline*, 119 Mass. 491.

Absence of statutory rules.

If the statutes do not limit the right of recovery to travelers and the highway is shown to be defective, the question then becomes one of contributory negligence. If the child is so young that its very presence in the street raises the presumption of negligence the question of imputed negligence may arise as shown in *note to Chicago City R. Co. v. Wilcox* (Ill.) 21 L. R. A. 70, otherwise the question is simply one of contributory negligence by the child itself. The mere fact of playing in the street is not of itself sufficient to show negligence.

If the liability rests upon general principles and not upon statute, the fact that the child is playing in the street at the time of the injury is immaterial. *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447, affirmed in 75 Mo. 401.

the road or gutter at the time of the unfortunate occurrence.

When the bank fell no part of the falling dirt reached the road, and only a few clods rolled down to the gutter.

Plaintiff cannot recover under the provisions of section 53 of chapter 43 of the Code, which provides that "any person who sustains an injury to his person or property by reason of a public road, bridge, sidewalk, or alley in an incorporated city being out of repair, may recover all damages sustained by him."

The city need not have erected rails or barriers, under the circumstances of this case, to prevent persons from going out of the road and approaching this bank.

Dent, J., delivered the opinion of the court:

Mary Lewis, an infant four years and five months old, while playing on the side of a road in the city of Huntington on the — day of May, 1892, was killed by the falling of an embankment which had been left along the street or road as a barrier to keep travelers along the highway from driving into the adjacent creek. This embankment had been undermined to some extent by persons digging out sand and gravel, and was in a dangerous condition, as the death of the child bears witness. The street commissioner, after some excavating had been done, (how much, the evidence does not disclose,) put up a notice forbidding the taking of sand and gravel from this place; but afterwards (how long does not appear, nor how long before the accident) a man by the name of Brown excavated sand and gravel, and hauled it away; for what purpose, is not revealed, but, so far as the evi-

dence shows, it was without the knowledge of the municipal authorities. The jury were taken to view the place of the accident.

It is now firmly established, by a long line of well-considered decisions, that a municipal corporation is liable for injuries occasioned by its negligence in the following three classes of cases: (1) Failure to keep its streets, alleys, sidewalks, roads, and bridges in repair, under the statute. (2) In the discharge of ministerial or specified duties, not discretionary or governmental, assumed in consideration of the privileges conferred by charter, even though there be the absence of special rewards or advantages. (3) As a private owner of property, to the same extent as individuals are liable. It would be impracticable to cite all the authorities settling these propositions, but the following are referred to as leading cases: *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 665; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Orme v. Richmond*, 79 Va. 86; *Mackey v. Vicksburg*, 64 Miss. 777; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440. In the first class of cases, negligence is presumed, and notice of defect is not required. In the second and third classes, negligence must be alleged and fully proven. *Chapman v. Milton*, 81 W. Va. 385; *Biggs v. Huntington*, 82 W. Va. 55.

This suit is not proper under the first class, or statutory provision, because it was not caused by any defect or obstruction in the roadbed; but it can be maintained under the two latter classes, because it is made the ministerial duty of the municipality, by law, to protect the public and individuals from anything dangerous, and the embankment that caused the injury was maintained by the city

In an action against a municipal corporation for injuries caused by the fall of an obstruction in a street, it was held no defense that the child was playing in the street, if it did not appear that, in view of all the circumstances of the case, he was guilty of negligence. In other words, the fact of a child's playing in the street is not at all times and under all circumstances negligence. *King v. Troy*, 104 N. Y. 844, 58 Am. Rep. 508.

A child playing in the street is not a trespasser in such a sense as to preclude a recovery in case of injury. *Vicksburg v. McLain*, 67 Miss. 4.

In *McGarry v. Loomis*, 68 N. Y. 108, 20 Am. Rep. 510, a mill-owner abutting on a street had carried a steam pipe under the sidewalk and discharged it so as to cause a pool of hot water to form near the sidewalk. A child four years old fell into it and was scalded. The court in the course of an opinion holding the mill-owner liable for the damages stated that the child was in a lawful place, and that being there, it was not unlawful, wrongful, or negligent for it to play there.

Where an abutting owner had constructed an open area in the sidewalk, into which a child fell while playing on the street, the owner was held liable for the injury, and it was held no defense that the child was at play at the time. *McGuire v. Spence*, 91 N. Y. 308, 43 Am. Rep. 668.

Where a child four years old fell into a tank in the street and was drowned, the court made the question one of negligence. It held that an instruction was properly refused that the city was not liable to provide against an extraordinary occurrence or accident, saying that it cannot be held as matter of law that every time a child four years old steps unattended into the street, the mother is 22 L. R. A.

guilty of such negligence as would authorize the city to expose traps and pitfalls at every corner of the street in which a child may be drowned or maimed. *Chicago v. Major*, 18 Ill. 360, 68 Am. Dec. 553.

Leaving a ditch five feet deep filled with water near the sidewalk with no barrier between them will render the city liable for the death of a four year old child who wanders into the street and falls into it. *Chicago v. Heang*, 83 Ill. 204, 26 Am. Rep. 378.

In *Indianapolis v. Emmelman*, 108 Ind. 530, 58 Am. Rep. 65, a city which made an excavation in a shallow stream where it crossed a highway, at a point where children were in the habit of going to play, was held to owe them the duty of so guarding the excavation as to make it safe for them to be there.

In Illinois, on principles of the common law, an action for damages resulting from negligence will lie against a municipal corporation, if the duty to make repairs is fully declared and adequate means are put within the power of the corporation to perform the duty. Therefore the liability is not limited to travelers but extends to all rightfully on the street. And within this rule a child may lawfully be upon the walk for pleasure only. And the expression seemingly to the contrary in *Chicago v. Starr*, 42 Ill. 177, 39 Am. Dec. 423, is there explained as being on a question of fact and not intended to lay down a proposition of law.

And that rule was followed in *Kunkel v. Chicago*, 37 Ill. App. 325.

A recovery for injuries caused by a defective street to a child exercising therein was sustained in *Brennan v. St. Louis*, 92 Mo. 433. H. P. F.

as its property, in lieu of other barrier along and within the boundaries of a public highway. The city has no more right to erect or keep within or along a public highway an unnecessarily dangerous structure, even though it be for some public purpose, than an individual. It is true that the city did not erect this embankment, but, as the witness said, it was placed there by nature, and the city adopted and maintained it as a barrier to prevent travelers from driving into the creek. Had there been an artificial structure so rudely constructed of stone, wood, or iron as to fall of its own weight, and crush this child, the liability of the city would not have been questioned; and it certainly ought to make no difference whether the city builds or adopts one already there, even though nature was the original builder. It was its ministerial duty, neither governmental nor discretionary, to see that it was not dangerous to any one lawfully using the road, or any part thereof. By leaving the embankment there as such barrier, the council fixed the limits of the road, and any one using it had the right to lawfully use it, up to the limit so fixed, whether it was the traveled part of the road or not.

Was the child using the road for a lawful purpose? Children are not responsible for the choice of their parents, nor the place or condition of their birth. God decides these for them when he breathes into them the breath of life. Poor parents are unable to provide a place of healthful exercise and play for their children, but it requires all their earnings to clothe, feed, and shelter them. The law prohibits them, under the penalty of being trespassers, from entering on the lands of others; and now to forbid them to use the road to its utmost boundary for the purpose of play, when not interfering in any manner with the traveling public, would savor too much of the dark ages of barbarism, when children were subjected to inhuman and diabolical punishments, and their lives were at the mercy of those having charge over them. It is the only commons they now have, and to confine them in the narrow limits of their cheerless tenement houses would be cruel, unjust, and oppressive, blight their young lives, and render their bodies weak, sickly, scrofulous, and vile; and, if they could manage to escape the long list of contagious diseases so fatal to their kind, they would grow up to adult age morbidly despising laws so tyrannous and unworthy a civilized and liberty loving people. It is a right they have immemorially enjoyed, and should continue so to do as long as the public fails to provide them other free commons, where they can have the pure air, bright sunshine, and sportive exercise so necessary to the healthful growth of their sensitive bodies. Horses, cattle, hogs, dogs, and other domestic animals, are all at large in the streets, unless prohibited by special ordinance, and why not children? The public highways can be put to no better use. So I am clearly of the opinion the child had the right to be there, even though out of the beaten path, and only for play. Neither was it old enough to realize the danger it was in, or the dangerous condition of the embankment, and could not possibly be guilty of contributory negligence.

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The most troublesome question is that of negligence. In all cases where the remedy is not given by statute, but the common law, negligence must be proved by the party alleging it. Where the facts are indisputable, and there can be no fair difference of opinion as to whether the inference of negligence should be drawn, the question becomes one of law alone, and the court may decide it, if appealed to for this purpose. But, even where the facts are not disputed, if there may be a fair difference of opinion as to whether the inference of negligence should be drawn, or as to whether the facts sustain the charge of negligence, the jury are the sole judges, and their verdict cannot be disturbed, although the court may be of the opinion that the facts do not sustain it. The litigants have the constitutional right to a trial by a jury of fair and impartial men under the rules of law. Having demanded and had it, they have no right to complain, and the court has no right to interfere. It is a tribunal of their own choosing. It has been held in cases of this character, "that notice to the corporate authorities, either express or implied, must be shown. If the defect causing the injury had existed for such length of time that proper diligence would have discovered it, then no notice need be proven; but if the defect arise otherwise than from faulty structure, or the direct act of said authorities or other agents, and be a recent defect, it is generally necessary to show that the town authorities had knowledge thereof a sufficient time before the injury to have, by reasonable diligence, repaired it, or that they were diligently ignorant of it." *Curry v. Mannington*, 28 W. Va. 14.

The embankment was on the side of the road, in a remote part of the city. The authorities had the right to leave it there as a barrier, provided it was not dangerous to the lawful users of the road. There is no evidence tending to show that it was dangerous when left there, but the evidence shows it afterwards became dangerous by reason of the excavations made under it. The street commissioner, when he found that persons were removing the sand and gravel, posted a notice warning them from so doing, not because he regarded it dangerous, but to prevent it from being destroyed as a barrier,—the city's property. After this notice was put up (how long, the evidence does not disclose, nor how long before the accident, except as a mere conjecture) a man by the name of Brown, without the knowledge or permission of the authorities, and against the express notice posted as aforesaid, did further excavating of sand and gravel, and hauled it away, which, presumably, was the excavating that rendered the bank dangerous. It is not shown that the authorities had notice of this last excavating. On the contrary, it appears from the evidence that they had no notice of it. The witness Brown, for some unexplained reason, is not introduced to show when or by what authority he did the excavating. It is true the street commissioner says he passed along there frequently, but it does not appear that he passed there after Brown had done his work, nor does it appear that there was anything to indicate to him that the embankment was in danger of falling; and none of the plaintiff's witnesses testify that

they had any knowledge beforehand of the dangerous character of the embankment that produced the injury, and one of his principal witnesses says: "I considered it dangerous from falling on top. I didn't know it would cave down on them." From this evidence the jury certainly had a right to conclude that the structure was not rendered dangerous by the direct act of the city authorities; that they had no notice of its dangerous character a sufficient time before the injury to have, by reasonable diligence, repaired it; and that they were not negligently ignorant of it. While we might have found a different one, we have no right to disturb their verdict. Their decision is supreme and final.

But, even if this did not conclude us, there is another question that would; and that is the jury were taken to view the spot and its surroundings. The counsel deemed it necessary.

What effect this had on the minds of the jury in reaching a conclusion, this court cannot say, but that it was material cannot be doubted. The remoteness of the place, the situation and character of its surroundings, and the nature and condition of the embankment, would obviously all be taken into consideration in making up a verdict. None of these things are before this court; and the settled rule is that this court will not disturb the finding of a jury unless all the material evidence touching the matter at issue that was considered by the jury is before it, as the case, as presented to the two tribunals, would be materially different.

No instructions were asked, and no points of law raised; and, there having been a fair hearing before an impartial jury, this court is legally powerless to interfere, and *the judgment of the Circuit Court must be affirmed.*

MINNESOTA SUPREME COURT.

Charles GUSTAFSON, *Appl.*,

v.

Theodore HAMM, *Resp.*

(.....Minn.)

***1. The city council of St. Paul has no authority, either under Gen. Stat. 1873, chap. 24, § 47, or Special Laws 1880, chap. 37, to grant a license to construct and operate a purely private railroad upon or across public streets. These statutes have reference to railroads which perform the duties of common carriers, and are therefore public or quasi public in their character.**

2. As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of street, an easement in the street, to its full width, in front of his lot, for purposes of access, light, and air, which constitutes property, therefore the maintenance and operation of a railroad on any part of the street in front of his lot so as to pollute the air, and thus depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one, he may maintain an action to enjoin it.

(January 30, 1894.)

A PPEAL by plaintiff from a judgment of the District Court of Ramsey County which refused part of the relief demanded by plaintiff in an action brought to enjoin the continued operation of a private railroad in a street adjacent to plaintiff's premises. *Relief granted.*

The facts sufficiently appear in the opinions. *Mr. Owen Morris*, for the appellant: Defendant should be enjoined from main-

*Headnotes by MITCHELL, J.

NOTE.—The above case seems to be an entirely novel one in respect to the right of an abutting owner to prevent the opposite abutting owner from maintaining a private railroad or switch on his own side of the street or which he owns the fee. 22 L. R. A.

taining or operating his track on any part of said street directly in front of our lot.

Defendant has the exclusive use of a part of the public street for his own private purposes. A permission for this is a perversion and not a regulation of the street.

The city assumed to confer unlimited and unconditional authority on a private citizen to erect, maintain, and operate an ordinary commercial steam railroad over a public street and exclusively for his own private advantage. This should not be tolerated.

2 Dill. Mun. Corp. 4th ed. 1890, § 710, *note*; *Koelle v. Knecht*, 99 Ill. 396; *Mikesell v. Durkee*, 34 Kan. 509; *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11; *State v. Trenton*, 36 N. J. L. 79.

The construction and maintenance upon a public street of a railroad operated by animal power for the main purpose of transferring freight cars, is the imposition of an additional servitude upon the street.

Carli v. Stillwater Street R. & Transfer Co. 28 Minn. 373, 41 Am. Rep. 290.

The dedication of land for the use of a highway is not a dedication of it for the use of a railroad company, and the two uses are essentially different.

Williams v. New York Cent. R. Co. 16 N. Y. 97, 69 Am. Dec. 651; *Wager v. Troy Union R. Co.* 25 N. Y. 532.

A person suffering from a public nuisance, an injury special to himself, different from the common injury to the public, is entitled to an injunction of the same.

High, Inj. § 762.

If a railroad not touching one's premises obstructs a street abutting on or leading to them so as to cut off or materially interfere with his only access to them, the inconvenience is deemed to be special and an action lies.

Adams v. Chicago, B. & N. W. Co. 1 L. R. A. 493, 39 Minn. 288; citing *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41; *Lamm v. Chicago, St. P. M. & O. R. Co.* 10 L. R. A. 368, 45 Minn. 71; *Stetson v. Faxon*, 19 Pick. 147, 81 Am. Dec. 123; *Wilder v. DeCou*, 26 Minn.

10; *Newell v. Minneapolis, L. & M. R. Co.* 35 Minn. 114, 59 Am. Rep. 303; *Aldrich v. Minneapolis* (Minn.) Jan. 10, 1893; 2 Story, Eq. Jur. 925.

The maxim, *de minimis non curat lex* is not an applicable answer to an action for violating a clear legal right.

Elliotville & G. V. Pl. Road Co. v. Buffalo & P. R. Co. 20 Barb. 644.

The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages only, often furnishes the very best reason why a court of equity should interfere in cases where the nuisance is a continuous one.

Elliott, Roads & Streets, p. 497; *Clous v. Staffordshire Potteries Waterworks Co.* L. R. 8 Ch. App. 125; *Mikesell v. Durkee*, 34 Kan. 512; *Rea v. Ward*, 4 Ad. & El. 384; *Angell, Highways*, § 235.

Story v. New York Elev. R. Co., 90 N. Y. 122, 43 Am. Rep. 146, was decided upon the assumption that the abutting owner did not own the fee in the street or any part thereof.

See also *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268.

Messrs. Munn, Boyesen & Thygeson, for respondent:

Plaintiff has not shown that he has suffered special or peculiar damage by reason of the construction of the track in question so as to entitle him to maintain an action to enjoin its use.

A court of equity will not interfere by the extraordinary remedy of a peremptory injunction to correct imaginary or simply technical wrongs, nor will it interfere to correct any wrongs by an injunction where the damages suffered are slight and insignificant, but will leave the complaining party to such action as he may have for damages.

Schurmeier v. St. Paul & P. R. Co. 8 Minn. 113, 33 Am. Dec. 770; *Fulton v. Short Route R. Transfer Co.* 85 Ky. 640; *Zabriskie v. Jersey City & B. R. Co.* 18 N. J. Eq. 314; *Booraem v. North Hudson County R. Co.* 40 N. J. Eq. 557; *Hamilton v. New York & H. R. Co.* 9 Paige, 171, 6 L. ed. 658.

The facts show that plaintiff is not entitled to maintain this action at all for the reason that he does not sustain special damage other and different than that suffered by the public generally.

Schaubut v. St. Paul & S. C. R. Co. 21 Minn. 502; *Rochette v. Chicago, M. & St. P. R. Co.* 32 Minn. 201; *Barnum v. Minnesota Transfer R. Co.* 33 Minn. 365; *Carroll v. Wisconsin Central Co.* 40 Minn. 168.

Granting that the abutting owner has an action for damages, it does not, therefore, follow that he can maintain an equitable action for an injunction against the use of the track after it has been constructed. If damages will compensate the owner that is good reason for denying the injunction. An action in equity cannot be maintained where an action at law will give relief.

1 Am. R. R. & Corp. Rep. p. 53, note 7; *Schurmeier v. St. Paul & P. R. Co.* *supra*; *Chicago & P. R. Co. v. Francis*, 70 Ill. 238; *Stetson v. Chicago & E. R. Co.* 75 Ill. 74; *Patterson v. Chicago, D. & V. R. Co.* Id. 588; *Peoria & R. I. R. Co. v. Schertz*, 84 Ill. 135; 23 L. R. A.

Truesdale v. Peoria Grape Sugar Co. 101 Ill. 561; *Savannah, A. & G. R. Co. v. Shields*, 33 Ga. 601; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 483; *Railway Co. v. Lawrence*, 38 Ohio St. 41, 43 Am. Rep. 419; *Pennsylvania R. Co's App.* 115 Pa. 514.

Messrs. C. D. O'Brien and T. D. O'Brien also for respondent.

Mitchell, J., delivered the opinion of the court:

The relief sought in this action, as finally limited on the trial, was an injunction against defendant's maintaining and operating a railroad track across Fauquier street, in the city of St. Paul, immediately in front of plaintiff's premises. The plaintiff owned a house and lot fronting north on this street, which was the only means of access to the premises. Defendant owned a brewery and mill about two blocks south of plaintiff's premises. The Omaha Railroad was about a block north of plaintiff's premises. Defendant had constructed an ordinary commercial railroad track from the Omaha road to his mill and brewery. This was his private track, and was used to carry in supplies to the mill and brewery, and to carry out their products. The only authority for the maintenance of this track was an ordinance of the city, assuming to grant to defendant the privilege to lay, use, and operate the same across the street. This track strikes the north side of Fauquier street directly opposite the center of plaintiff's lot, and runs thence diagonally across the street in a south-westerly direction, striking the south line of the street fifteen feet west of plaintiff's west line. It crosses the center line of the street in such a way as to occupy a small triangular piece of the south half of the street, of which plaintiff owns the fee. This railroad track is operated with ordinary railroad freight cars and locomotives, there being, on an average, about one train a day, which takes about one minute to cross the street. These trains have been operated with reasonable care, but, when they pass, smoke and cinders are emitted and cast on plaintiff's premises, which, to some extent, pollute the air, and interfere with the enjoyment of the property, and depreciate its rental value. Plaintiff never consented to the construction of the track or the operation of trains upon it. The trial court held that the maintenance and operation of this track on the small triangular piece of the street, of which plaintiff owned the fee, was a continuing trespass, which he was entitled to have enjoined; but the court denied the motion of plaintiff for judgment enjoining the defendant from maintaining the track, or operating trains on and over any part of the street, to its entire width, lying immediately north and in front of plaintiff's premises. The correctness of this ruling, upon the facts stated, is the only question in the case.

1. The city had no right or authority to grant defendant a license to construct and operate a purely private railroad upon or across a public street. The provisions, both of Gen. Stat. 1878, chap. 84, § 47, and of Special Laws 1889, chap. 87, must be con-

strued as having reference only to such railroads as perform the duties of public or common carriers, and which are therefore public or quasi public in their character. Even assuming that the legislature has the power to authorize the use of a public street for the purposes of a purely private railroad, it would require very clear and explicit language to that effect to warrant a court in holding that such was the legislative intention. The right to license one necessarily implies the right to license all to use the streets for such private purposes, which would render the streets well nigh impassable by the public, and amount to a perversion of them from their lawful purposes. Hence, if the defendant has the right to maintain and operate this track, he did not acquire it under this ordinance. *State v. Trenton*, 36 N. J. L. 79; *Mikesell v. Durkee*, 84 Kan. 509; *Heath v. Des Moines & St. L. R. Co.* 61 Iowa, 11; *Macon v. Harris*, 75 Ga. 761; Dill. Mun. Corp. 4th ed. § 710, note 2.

2. That the construction and operation of any ordinary commercial railroad on a street is the imposition of an additional servitude, and amounts to a perversion of the street to a use for which it was not intended, which the state or municipality cannot, as against private rights, authorize, the decisions of this court are explicit. *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290; *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493. If this is so as to a public railroad it certainly must be so as to a purely private one. It is merely begging the question to say that defendant, as the owner of the fee of the north half of the street, has the right to use it for any purpose not inconsistent with the public easement. The private right is always subordinate to the public right, and subject to all the limitations and abridgements caused by the exercise of the latter; and hence cannot extend to any use which amounts to a perversion of the street from the uses for which it was intended. The right of an abutting owner, under certain municipal regulations, to use a part of the street for areas, for purposes of access to basements, for the temporary storage of building material, for laying underground pipes to connect with water and gas mains, stands on a different principle. These are all really included in the general right to use a street for purposes of access to the abutting premises, and have been long sanctioned as legitimate street uses. It is not necessary to consider here just what is the precise limit to the uses to which an abutting owner may put a street for purposes of access to his premises. It is at least certain that he cannot use the street in any way or for any purpose that amounts to a perversion of it, or to an invasion upon the private right of property of another in the part of the street so used; and this is as far as it is necessary to go for present purposes.

It is the settled doctrine of this court that the owner of a lot abutting on a public street has, as appurtenant to the lot, and independently of the ownership of the fee in the street, an easement in the street, to its full width, in front of his lot, for the purposes of access,

light, and air, which constitutes property. *Adams v. Chicago, B. & N. R. Co.* 39 Minn. 286, 1 L. R. A. 493; *Lamm v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 71, 10 L. R. A. 268. The act of defendant in maintaining and operating this track on any part of the street, to its full width, in front of plaintiff's premises, so as to pollute the air, and depreciate their value, was, if not a trespass, at least a nuisance, which amounted to a positive invasion upon plaintiff's private property rights, and for which he may maintain a private action. The legal right being clear, and the trespass or nuisance, whichever it be, being a continuing one, he is not confined to successive actions for damages, but may maintain an action to enjoin the constantly recurring grievance; and, where a clear legal right is thus violated, the fact that the actual damages, if substantial, are comparatively small, is not important.

Cause remanded with directions to the court below to amend the judgment, in accordance with plaintiff's request.

Canty, J., dissenting:

I dissent. The majority of the court decide the case mainly on the authority of *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 1 L. R. A. 493, and on the principle there laid down as follows: "The conclusions arrived at are that the owner of a lot abutting on the street has, independent of his fee in the street as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right." The court added to this an easement for access, and this case was approved in the case of *Lamm v. Chicago, St. P. M. & O. R. Co.*, 45 Minn. 71, 10 L. R. A. 268. I am willing to go even further than the court did in those cases in sustaining the rights of the abutting owner to an easement in the whole width of the street, but still I think that those cases do not apply to or control this case. The principle there laid down is mainly on the authority of the *Elevated Railway Cases*. *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268. That principle was not there applied to an ordinary commercial railway at all, but to a mere street railway, which was not of itself an additional servitude on the street, but the permanent structures built to support it were. It was there conceded by the court that if it had been a surface road it would not be an additional servitude, though operated by steam. In the *Story Case* the road was to be constructed upon a series of columns set in the outer edge of the sidewalk, on each side, carrying great girders for the support of cross-ties for three sets of rails, fifteen feet above the street. The structure divided the street into a sort of basement, used by the general public and abutting owners, and a first floor, used exclusively by the railroad company. The court compared the structure to the illegal erection in the street of the house in the case in 6 Johns. Ch. 489, 2 L. ed. 178 (*Corning v. Lowerre*), and of the

freight depot in 94 U. S. 824, 24 L. ed. 224 (*Barney v. Keokuk*). In the *Lahr Case* the elevated road was similar. It is not, in these cases, claimed that the generating of gas, steam, and smoke, and the distribution of cinders, dust, and ashes by a street railway is necessarily an additional servitude on the street, except as it is aggravated by the height from which it is thus distributed and thrown down upon the street. A street railway is not an additional servitude, though operated by steam (*Newell v. Minneapolis, L. & M. R. Co.* 85 Minn. 112, 59 Am. Rep. 808); while an ordinary commercial railway is, though run by horse power. *Carli v. Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290. Yet the former will deprive the abutting owner of much more light and air than the latter. It is lawful to move a house on the street (*Graves v. Shattuck*, 35 N. H. 262, 69 Am. Dec. 536), though it deprives the owner of much more light and air than any railroad train. Unless prohibited by some statute or ordinance, it is held that it is not unlawful to run a traction steam engine on a public highway. *Macomber v. Nichols*, 34 Mich. 212, 23 Am. Rep. 522. What is an additional servitude does not at all depend on the amount of space it necessarily occupies, or the amount of light and air it necessarily excludes, in passing along the street. The street belongs to the local public. In a city, that would include perhaps all the adjacent country tributary to the city by the ordinary highways, and, if the railroad is "in aid of the street," does not destroy its ordinary and usual uses, and does not collect and converge on one street the traffic from any other or greater territory, it is not an additional servitude, no matter how much light and air it necessarily excludes by its moving appliances. If a railroad is not "in aid of the street," or collects and converges on the street traffic from any greater territory, it is an additional servitude, no matter how little light and air it excludes. I think the abutting owner should have the same right to object to an additional servitude on the opposite side of the street as on his own side, without regard to any mere question of light, air, or access. The old theory that the abutting owner could only object to such additional servitude when it encroached on his fee in the street was found to be too narrow, too easily evaded, and no protection to his real rights in the street. Neither do I think that the theory of an easement in the opposite half of the street for light, air, and access merely is a proper test of his rights. When the abutting owner dedicates his own half of the street, it is consideration that the owner opposite and the owners on each side of him will do likewise, and it should be held on broad principles that he has, appurtenant to his premises, an easement in the street, not only to the whole width thereof, but also, at least, immediately on each side of his premises. When his land is taken for a street by condemnation proceedings, the same easement is created for him, and the benefit of it to him taken into consideration in assessing his damages. In my opinion, this easement exists not only for the 23 L. R. A.

purposes of light, air, and access, but also for all purposes that are beneficial to his premises, and not inconsistent with the rights of the public and the private rights of the other abutting owners in the street, and cannot be taken from or interfered with by any additional servitude in the street.

But the right of a railroad to cross the street is a very different question. No one has a right to draw a line on the face of the earth, and, as if it were a Chinese wall, prohibit intercourse across it, whether that intercourse be by railroad or otherwise. Now, suppose that the side track of an ordinary commercial railroad is laid in the street, on the abutting owner's side, up to the line of his fee, and there terminates, would he not have just as much right to object as if it were laid in front of his premises on the opposite side of the street? I think he would. But supposing, on the other hand, that a railroad crossed the street at the same point, running close to, but not encroaching on, his fee in the street, would he have a right to object? Certainly not, unless his access to the street was completely cut off, and not merely interfered with. See the *Adams Case*, page 288, 39 Minn., and page 494, 1 L. R. A., and cases there cited. He would be in the same condition, and subject to the same annoyances, as any other man whose land adjoined that of his neighbors, which had been taken for railroad purposes. Neither does it make any difference whether the railroad crosses at right angles to the line of the street or in a slightly oblique direction. Natural obstacles and other causes often make it necessary to cross in a slightly oblique direction. The abutting owner has no greater rights in the street immediately in front of his fee therein than he has immediately by the side of his fee therein, and the railroad may take either or both in so crossing the street, if it does not encroach on that fee. The sole and exclusive owner of one avenue of public traffic has no vested right that another shall not cross his. That his rights are prior is immaterial. When a highway or a new railroad is laid out across the tracks of an old one, the damages for the cross easement to be awarded to the owner of such old railroad are not assessed on the same principles as are applied in favor of the owner of the fee. In determining the compensation to be paid for such cross easement it is generally held that the value of the land in the cross section covered by such cross easement, and the cost of restoring the crossing, are substantially all that should be considered. The damages to the rest of the track or right of way of the old railroad, whether immediately adjacent to such cross easement or more remote, are not considered; neither are the interruptions or inconveniences occasioned to the old company's business, or any other elements of collateral or consequential damage. *Lewis, Em. Dom.* §§ 489, 491. Then, if the right of the defendant to lay his private track across the street is to be measured by the right to lay the track of an ordinary commercial railroad in the same place, without paying damages to plaintiff, I think that defendant's right must be sus-

tained, notwithstanding the *Adams Case* and the *Lamm Case*. But it seems to me, whether we look at it as a question of what are the rights of the public in the street as against abutting owners, or a question of what are the rights derived through the public, or acquired in connection with it, of one abutting owner as against the other, the judgment of the court below should be sustained. The court below found that defendant is the owner of all the land or the fee of all of the land over which the track passes, except the two or three feet of the corner of plaintiff's fee in the street from which he orders the track removed. Then, what are the private rights of an abutting owner in his own fee in the street? "By the location of a way over the land of any person the public have acquired an easement which the owner may not lawfully extinguish, or unreasonably interrupt; but the soil remains in the owner, although incumbered with a way. And every use to which the land may be applied, and all profits which may be derived from it consistently with the continuance of the easement, the owner can lawfully claim." *Perley v. Chandler*, 6 Mass. 456. This principle is elementary, and too well established to need the citation of authorities. The question to be particularly discussed is, what are the limits of the private uses to which the owner may apply it? The same case further states: "Upon these principles, there can be no doubt but that the owner of the land can sink a drain or any watercourse below the surface of his land, covered with a way so as not to deprive the public of their easement; and a common practice for the owners of water mills or of sites for water mills is to sink watercourses for the use of their mills in their own land under highways, care being taken to cover the watercourses sufficiently so that the highways remain safe and convenient for passengers." Page 457. "If a highway be located over a watercourse, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private lands, if the owner should afterwards open a watercourse across the way, it will be his duty at his own expense to make and keep in repair a way over the watercourse for the convenience of the public." Page 458. The owner of land adjoining a highway may place building material on it for the purposes of erecting a building. *Palmer v. Slocerthorn*, 32 Pa. 65. It was held in *Chamberlain v. Infield*, 48 N. H. 356, that in such a case a pile of lumber on the side of the highway, 75 feet long, from 6 to 11 feet wide, and from 4 to 6 feet high, as testified to by different witnesses, was not necessarily unlawful.

It is hardly necessary to multiply illustrations of such private uses of the street by the abutting owner. It seems to me that the principle involved in these cases warrant the conclusion that this private right of access to

and from the street, and across the street from one part of the abutting owner's premises to the other, is not necessarily unlawful or necessarily a nuisance *per se* though carried on by means of a railroad track, cars, and steam engine. When such private right of access exists, the fact that it is exercised by means of improved appliances does not necessarily make it unlawful.

As I have tried to show, the principal test of what is an additional servitude on the street is not that the traffic is carried on by such improved appliances, but it is the volume of traffic collected and converged on the street, and that such traffic comes from territory which could not be tributary to such street by any system of ordinary highways, however laid out and improved. The principle can be used to illustrate this case. It appears that nothing is carried on this track but what would be ordinarily carried in wagons over the same route, for the same purposes, if the track was not there. Such private switch tracks are a very common means of access to mills, foundaries, machine works, breweries, and other manufacturing establishments; and to hold that they cannot be laid across a street is a serious matter, and will leave the proprietors of such establishments without remedy, as it is generally held that no right of way can be condemned for such private purposes. The right to use such improved appliances for private access does not depend upon any ordinance. It is a right which undoubtedly the city council can regulate and limit to a very considerable extent, but cannot create.

Neither do I question the fact that the circumstances may be such that maintaining and operating such a private track would be a nuisance. I simply claim that it is not a nuisance *per se*, and that the facts found in this case do not prove it to be a nuisance. If it were maintained in a thickly settled or highly improved residence or retail portion of the city, it would be; but if in a wholesale or manufacturing district, it might not be. It would be a question of fact to be decided in each case. In this case it does not appear what kind of a district this is. Nothing appears as to the character of the locality, except that defendant has buildings and improvements and a mill and brewery the width of one street and 185 feet from the rear of plaintiff's lot, and that there is a dwelling house on plaintiff's lot. It nowhere appears that there are any other buildings or improvements in the vicinity. Thus, for the purposes of this case, we must hold that there are no other improvements anywhere in the vicinity. True, it is found that "the operating of trains over said track somewhat depreciates the value of plaintiff's property, and lessens the rental value thereof;" but that is not sufficient. 1 Wood, Nuisance, 8d ed. § 2.

I think the judgment of the court below should be affirmed.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *ex rel.* RAIL-
ROAD COMMISSION,

v.
WESTERN UNION TELEGRAPH CO.,
Appl.

(..... N. C.)

1. The power of railroad commissioners to make rates for telegraph lines includes the power to ascertain what corporation is in the control of such a line.
2. Telegraph messages between points in the same state do not constitute interstate commerce, because of the fact that they traverse another state on the route.
3. The authority of railroad commissioners in North Carolina to regulate telegraph rates does not include the power to direct offices to be opened for commercial business.

(November 21, 1893.)

APPEAL by defendant from a judgment of the Superior Court for Wake County affirming an order of the railroad commission fixing the rate to be charged by defendant for sending telegraph messages, and directing it to keep certain offices open for commercial telegrams. *Modified and affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Strong & Strong and Robert Styles* for appellant.

Mr. Robert O. Burton, for appellee:

Defendant having built a line and equipped an office at Elizabeth City, with an agent ready to receive commercial messages, it has no power to discriminate.

Laws 1891, chap. 320, § 4; *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 18 L. R. A. 393, 4 Inters. Com. Rep. 294, 111 N. C. 478.

To give the railroad the service of its line and refuse it to an individual, is a discrimination against the individual. The common-law principles against discrimination apply as well to new agencies of commerce as to old.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708.

In the absence of legislation providing other means for regulating and controlling a railroad, a court of general jurisdiction has the power to compel it to extend to the public proper facilities for the transaction of business, including the establishment of stations.

Northern Pac. R. Co. v. Territory, 8 Wash. Terr. 303, and cases cited; *Mobile & O. R. Co. v. People*, 132 Ill. 559; *Central U. Teleg. Co. v. Falley*, 118 Ind. 194; *Commercial U. Teleg. Co. v. New England Teleg. & Teleg. Co.* 5 L. R. A. 161, 61 Vt. 241.

The legislature in our state has lodged this power with the railroad commission.

Section 20 of the Commission Act.

If an addition to the company's stations is necessary to promote the security, convenience,

and accommodation of the public, such addition may be ordered.

State v. Chicago, St. P. M. & O. R. Co. 19 Neb. 476; *Railroad Comrs. v. Railroad Co.* 26 S. C. 353; *State v. Mason City & Ft. D. R. Co.* (Iowa) May 23, 1892; *State v. Kansas Cent. R. Co.* 47 Kan. 497.

The interstate question needs no discussion after the *Lehigh Valley* and the Iowa cases.

Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672; *Campbell v. Chicago, M. & St. P. R. Co.* 17 L. R. A. 443, 86 Iowa, —.

Shepherd, Ch. J., delivered the opinion of the court:

The board of railroad commissioners is "authorized and required to make or cause to be made just and reasonable rates of charges for the transmission of messages by any telegraph line or lines doing business in the state." Laws 1891, chap. 320, § 26. It may cause notice to be served upon corporations or persons charged with a violation of the rules prescribed by it in pursuance of the above authority, and upon a hearing may ascertain and direct ample and full recompense to be made by the company, corporation, or person offending; which recompense may be enforced by civil action as prescribed in section 10 of said Act. *Mayo v. Western U. Teleg. Co.* 112 N. C. 343. It is a court of record, with "the powers and jurisdiction of a court of general jurisdiction" as to all subjects embraced in said act by Laws 1891, chap. 498. *Atlantic Exp. Co. v. Wilmington & W. R. Co.* 111 N. C. 463, 18 L. R. A. 393, 4 Inters. Com. Rep. 294; N. C. Const. art. 4, § 2.

The defendant, being served with process, appeared before this court to answer the complaint or petition of Eugene Albea, called plaintiff herein, and filed its answer. Thereupon, a trial was had, and it appearing that the said Albea had tendered no commercial message to any of the offices of the defendant, it was adjudged that he had no cause of complaint, and the proceeding was practically dismissed as to him. The commission, however, having the defendant before it, proceeded, under its general powers, to make rates of charges for the transmission of business by the defendant from and to points in North Carolina, which rate of charges is the same as that applicable to all the offices of the defendant within the limits of the state. The commission, after having disposed of the complaint of Albea, should have amended the proceeding so as to substitute as complainant the state of North Carolina *ex rel.* the railroad commission; but, as it has been fully heard without reference to this irregularity, we have ordered that the amendment be now made, and the proceeding be entitled accordingly. Code, § 273; *Reynolds v. Smathers*, 87 N. C. 24.

The order of the board which is the subject

NOTE.—The question whether or not telegrams constitute interstate commerce by reason of passing through another state in course of transmission between points in the same state is much the 23 L. R. A.

same as that in respect to a similar route of transportation of shipments of freight, as to which, see note to *Campbell v. Chicago, M. & St. P. R. Co.* (Iowa) 17 L. R. A. 443.

of review is as follows: "That the telegraph offices at Edenton and Elizabeth City, and at other points on the Norfolk & Southern Railroad in North Carolina, are offices of defendant, and that said offices shall transmit commercial messages at rates prescribed by the commission to any point in North Carolina." This order is based upon certain findings of fact, some of which are excepted to; but inasmuch as it was agreed that his honor might pass upon these questions in the place of a jury, and as there was evidence sufficient to warrant such findings as, under the view we have taken are material to be considered, they cannot be reviewed in this court. *Battle v. Mayo*, 102 N. C. 413; *Southern Fertilizer Co. v. Reams*, 105 N. C. 283.

It appears, in the language of his honor, "that the defendant owns, controls, and operates a line of telegraph from Edenton, N. C., passing through Elizabeth City, N. C., Hertford, Moyock, N. C., and other places along the track of the Norfolk & Southern Railroad to Berkley and Norfolk, Va.; . . . that the company receives and transmits over this line (commercial) messages at the towns and villages of Hertford, Moyock, and other places along said line to any place in North Carolina where it has an office, at the uniform rate of twenty-five cents per message of ten words, except at Edenton and Elizabeth City," at which two last-named offices the defendant receives no commercial business; the said offices being devoted exclusively to the business of the Norfolk & Southern Railroad Company, in respect to the running of its trains, etc. It is very clear to us that, under the authority given it to make rates for "the transmission of messages by any telegraph line or lines doing business in the state," the commission—subject, of course, to the right of appeal—has the incidental power of ascertaining what particular corporation is at least in the control or operation of the same. This would seem indispensably necessary to a proper exercise of its authority to fix rates, as well as to know against whom to proceed, under section 10 of the Act, in the event of a violation of such regulation.

The exception, therefore, in this respect, must be overruled.

A more serious question, however, is presented by the ruling of the court upon the third conclusion of the commission, which is as follows: "That telegraphic messages transmitted by defendant over its said line from Elizabeth City or Edenton, or other points in North Carolina, to points in said state, do not constitute commerce between states, although traversing another state in the route, and are subject to the rate prescribed by the commission." It appears from the findings of fact that the shortest and only route over the wire of the defendant, by which messages can be transmitted to many points in this state, necessarily "traverses, in part, the state of Virginia, and thence back into North Carolina;" and it is insisted that such messages so transmitted are interstate commerce, and therefore not subject to the tariff regulation of the commission. It is not denied that the offices of the defendant along the line of the Norfolk & Southern Railroad Company, except those at Edenton and Elizabeth City, receive commer-

cial messages for transmission, in the manner described, to various points in North Carolina; and it is plain that such business does not relate to the intercourse of the citizens of this state with those of some other state. It is purely an intercourse between the citizens of North Carolina, through the means afforded by a corporation having extensive facilities of communication within the limits of the said state; and the uniform rates fixed by the commission for the business which the said corporation accepts, or is under legal obligation to accept, in no wise affect or interfere with any business which the defendant undertakes for the citizens of Virginia, either between themselves, or with the citizens of other states. Neither are we able to see how the mere fixing of rates between different points in this state can in any way conflict with any regulation which the state of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, unless it can be found in the fact that, in the transmission of a message, it must traverse a part of the defendant's own line in the state of Virginia. We have been referred to several cases in which it has been held, in respect to the continuous carriage of freight by a railroad company under such circumstances, that a state commission had no power to prescribe rates, and also that a state had no right to levy a tax upon the gross receipts, even as to that part derived from the transportation within its territory. *State v. Chicago, St. P. M. & O. R. Co.* 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519; *Sternberger v. Cupe Fear & Y. V. R. Co.* 29 S. C. 510, 2 L. R. A. 105, 2 Inters. Com. Rep. 426; *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.

Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that, if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, *Ch. J.*) in *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 38 L. ed. 672. The state of Pennsylvania levied a tax on the gross receipts of all railroad companies, derived from the transportation by continuous carriage from points in Pennsylvania to other points in the same state; that is to say, passing out of Pennsylvania into other states, and back again into Pennsylvania, in the course of transportation. The Lehigh Valley Railroad Company has no road of its own from Mauch Chunk, Pa., to Philadelphia, but in transporting its coal and general freight traffic, it uses its own line from Mauch Chunk to Phillipsburg, N. J., from which point it is, under an arrangement for a continuous passage with the Pennsylvania Railroad Company, transported by the latter road, *via* Trenton, to Philadelphia. It was insisted that the state could not tax that part of the gross receipts derived from so much of the transportation as was wholly within the state of Pennsylvania, because the freight, during its entire transportation, was impressed with the character of interstate commerce. The court sustained the tax, and, although it may be said that the de-

cision relates only to that part of the receipts which arose from the transportation within the state, yet it must be apparent, from a perusal of the opinion, that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed, the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it, and especially when it is applied to telegraphic communication, under the peculiar circumstances of this case. The court, in speaking of the grant of power to regulate commerce between the states, remarked: "But, as was said by Chief Justice Marshall, the words of the grant do not embrace that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to nor affect other states. 'Commerce,' observed the chief justice, 'undoubtedly, is traffic, but it is something more: it is intercourse.'" The court further proceeded to say: "The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points, and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate because, in its accomplishment, some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line onto the soil of another state?" Again, in another part of the opinion it is said: "It is simply whether, in the carriage of freight and passengers between two points in the same state, the mere passage over the soil of another state renders that business foreign which is domestic. We do not think such a view can be reasonably entertained, and are of the opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk." The court uses the words "continuous passage," from which it is to be inferred that if, after the freight passed beyond Pennsylvania, it was transferred to another transportation agency in New Jersey, and by this other agency carried to Philadelphia, it would be interstate commerce; and the same, if consigned to a point in New Jersey, and then reloaded to Philadelphia. It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and therefore it is not compelled to transfer its business to any other agency outside of North Carolina, in order that it may reach its destination in this state. In this respect, our case is stronger than the one from Pennsylvania, as the road from Phillipsburg to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the Supreme Court of the United States, whose authority upon such questions is con-

clusive. We will observe, however, that we think the principle laid down by that court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in an instant, and without expense, by so adjusting the wires that messages must go through a part of the territory of another state. We think the exception should be overruled.

The remaining exception which it is necessary to consider relates to that part of the order which substantially commands the defendant to open its offices at Edenton and Elizabeth City for the transmission of commercial messages. It is urged, but not very seriously pressed, that the order only means that the company shall transmit such messages at the prescribed rates whenever it undertakes to do that character of business at those points. The order of the court is not, in our opinion, susceptible of such a construction; but whatever doubt there may be must surely vanish when it is considered in connection with the finding of the commission upon which it is based, and which the court, in its judgment, approves and adopts. This finding is that the operators in said offices "are the agents and operators of the defendant, and that it is their duty to transmit commercial messages, when tendered to them, to points in North Carolina, at the rate prescribed by the commission." It is impossible, without violating all rules of interpretation, as well as destroying the plain import of language, to adopt the view contended for; and it is therefore necessary to determine whether the commission act conferred upon the commission the authority to direct that the said offices should be open for commercial business. That it has no such authority is settled by the court in *Mayo v. Western U. Teleg. Co. supra*, (decided since the trial of this proceeding,) in which it is declared that "there is nothing to show the intent of the statute to give to the commission power to prescribe other rules and regulations for telegraph lines than those directed in section 26 with regard to their charges for the transmission of messages, as neither of the other sections could be made to apply to telegraph, even if the same had been specifically named." Under this decision, so much of the order as is open to the objection referred to must be set aside, but in all other respects it is affirmed. Let it not be understood that we are deciding that a corporation like the defendant, exercising its franchise, the right of eminent domain, and other unusual privileges, under a grant from the state for the benefit of the public, can give any undue or unreasonable preference or advantage to any particular person, company, or corporation. This question may be presented when commercial messages have been tendered and declined at the said offices, but we think it would be going outside of the record to pass upon it now; and especially should we refrain from doing so when the intelligent counsel who appeared for the defendant very properly concluded that the court would not anticipate a point of such importance, and therefore did not deem it necessary to discuss it.

The order of the court is modified and affirmed.

NEBRASKA SUPREME COURT.

Lawrence C. ENEWOLD, *Plff. in Err.*,

v.

Lewis Ferdinand OLSEN.

(.....Neb.)

*1. In law, the name of a person consists of one given name and one surname, the two, using the given name first and the surname last constitute such person's legal name; and to be ignorant of either the given or surname of such a one is to be ignorant of such person's name, within the meaning of section 148 of the Code of Civil Procedure.

2. The law requires that a defendant shall be sued by his true name if the same is known or can be ascertained by the party suing him; and under section 60 of the Code of Civil Procedure a court obtains no jurisdiction over the person of a defendant served with summons by leaving a copy thereof at his usual place of residence, unless such defendant is designated by his true name, except in cases brought under section 28 of the Code of Civil Procedure.

3. Under section 148 of the Code of Civil Procedure if a defendant is sued by any name and description other than his true name, except in actions brought under section 28 of the Code of Civil Procedure, a court acquires no jurisdiction over him by the sheriff leaving a copy of the summons at such defendant's usual place of residence. Accordingly, where E. sued "F. Olsen, (full name unknown)," the sheriff returned that he served the summons on "F. Olsen, (full name unknown)," by leaving a copy thereof at his usual place of residence. The court defaulted "F. Olsen, (full name unknown)" and rendered a personal judgment against him. In proceedings by E. against Ferdinand Olsen to show cause why judgment (the same having become dormant) should not be revived against him.—*Held*, that the court acquired no jurisdiction over Ferdinand Olsen by a copy of the summons left at his usual place of residence, and that the judgment rendered against him in the name of "F. Olsen, (full name unknown)," was a nullity.

4. A person summoned to show cause why a dormant judgment should not be revived against him may interpose the defense that such judgment is void, because the court pronouncing it had no jurisdiction over him, when such lack of jurisdiction appears on the face of the record of such judgment.

(January 16, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendant in a proceeding to revive a prior judgment which was alleged to have been recovered against defendant. *Affirmed*.

The facts are stated in the commissioner's opinion.

Messrs. James A. Powers and Switzler & McInosh, for plaintiff in error:

But one Christian name is recognized by the courts.

*Headnotes by RAGAN, C.

NOTE.—For full presentation of the law as to acquisition and use of name by an individual, see note to *Ladin & R. Powder Co. v. Steytler* (Pa.) 14 L. R. A. 600.

29 L. R. A.

Maxwell, Pl. & Pr. p. 87; *Cohen v. State*, 52 Ind. 847, 21 Am. Rep. 179; *Phillips v. Evans*, 64 Mo. 17.

Where parties are known by different names either one may constitute the Christian name in contemplation of law.

Goodenow v. Tappan, 1 Ohio, 63.

In *Nelson v. Highland*, 18 Cal. 75, the court says: "We do not think it was a good ground of demurrer that the Christian name of one of the plaintiffs does not appear in the record. We cannot judicially know that one of the plaintiffs had either a Christian or a heathen name, or that it is necessarily untrue that he has forgotten it if he had. Judgment reversed and cause remanded."

Bliss on Code Pleading, § 146a, says: "The code does not dispense with the rule which requires the pleader to give the true name, and whether an apparently initial letter will be treated as itself a name must depend upon the manner in which the question is raised. In the absence of anything in the record, or in the pleading or motion to the contrary, the court will be warranted in so treating it. The party who objects to the pleading must do so for misnomer and give the true name."

Section 28, Code of Civil Procedure, provides absolutely for the proper proceeding in suing upon instruments where party has signed himself or herself in a particular style, and then as by reference to another section concludes: "Instead of stating the Christian or first name or names in full," but it does not say that suits cannot be commenced by the initial letter of the Christian name in other cases.

Where names are spelled differently but substantially alike in sound, it will not vitiate the proceeding. Thus *Mars* is *idem sonans* with *Marres*.

Com. v. Stone, 108 Mass. 421.

So, too, *Erwin* with *Irwin*.

Williams v. Hittie, 83 Ind. 303.

So, too, *Brennan* with *Brenham*.

Miller v. Brenham, 68 N. Y. 83; *Maxwell*, Pl. & Pr. p. 88.

In the case of *Johnson v. Jones*, 2 Neb. 131, this court decided that where service was made on Harrison Jones and the return showed served on H. Jones, that judgment against H. Jones would be good, notwithstanding the fact that there might be several parties bearing the name of H. Jones in the same town.

See also *Tweedy v. Jarvis*, 27 Conn. 44; *Jones's Estate*, 27 Pa. 386; *Morse v. Engle*, 28 Neb. 545; *Goodenow v. Tappan*, *supra*; *Scott v. White*, 71 Ill. 287; *Miller v. Brenhan*, *supra*; *Com. v. Gleason*, 110 Mass. 66; *Kemp v. McCormick*, 1 Mont. 423.

Section 148 refers to cases where the identity and full Christian and surname of a defendant is not within the knowledge of the plaintiff and has references to, and was passed for the purpose of reaching a different class of cases than the one at bar.

Rosenoranta v. Rogers, 40 Cal. 491.

Mr. C. P. Halligan, for defendant in error:

A name as defined in *Bouvier's Law Dic-*

tionary is one or more words to distinguish a particular individual.

By the common law since the time of William the Norman, a full name consists of one Christian or given name, and one surname or patronymic, the two, using the Christian name first and the surname last, constitute the legal name of the person.

Schofield v. Jennings, 68 Ind. 233.

Even though the defendant had knowledge of the pendency of suit before rendition of judgment, that alone will not cure a defective service. If it did our courts would be open to fraud and the prerequisites now indispensable to the rendition of a valid judgment would be dispensed with. Where a summons against an individual is served by leaving a certified copy at his usual place of business the court acquires no jurisdiction.

Aultman & Taylor Co. v. Steinan. 8 Neb. 113.

Ragan, C., filed the following opinion:

On the 23d day of December, 1886, Lawrence C. Enewold brought suit on an account in the county court of Douglas county against one Olsen. In the petition filed, Olsen was described as "F. Olsen (full name unknown)." The sheriff's return of the summons in the case was as follows: "On December 23, 1886, I received this writ, and on December 23, 1886, I served, by leaving a certified copy of this writ, and indorsements thereon, at the usual place of residence of the within-named F. Olsen, the defendant, in Douglas county, Nebraska." The further proceedings of the county court in the case were as follows: "January 4, 1887, on the call of the docket, this day, it appearing to the court that the defendant, F. Olsen, has been served with a summons, and has failed to appear, plead, answer, or demur thereto, and is in default: Now, therefore, on motion of plaintiff's attorney, it is ordered that default of the defendant be, and the same is hereby, entered against him." The same day the case came on for trial to the court, L. C. Enewold, the plaintiff, was duly sworn and examined in his own behalf. After hearing the evidence, the court finds that said defendant, F. Olsen (real full name unknown), is indebted to the plaintiff in the sum of \$433.89. It is further considered, adjudged, etc. February 11, 1892, Lawrence C. Enewold filed in said county court a petition against Ferdinand Olsen, praying for a revival of said judgment. On said day the county court made an order that said judgment be revived, unless Ferdinand Olsen should show cause why it should not be. On February 19, 1892, a copy of this order was duly served on Ferdinand Olsen, and he appeared in the county court, and objected to a revival of said judgment, on the ground that the same was void, as he (Olsen) was named in the summons "F. Olsen (full name unknown);" that the court could only acquire jurisdiction over him by the personal service of summons; and that the leaving a copy of the summons at his usual place of residence was not such service upon him as invested the court with jurisdiction over his person. The county court sustained the ob-

jection, and dismissed the application to revive the judgment. Enewold took this order to the district court, where the ruling of the county court was affirmed; and Enewold brings the judgment of the district court here for review.

Section 69 of the Code of Civil Procedure provides: "The service [of summons] shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day." Section 148 of the Code of Civil Procedure provides: "When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name and description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state, in the verification of his petition, that he could not discover the true name and the summons must contain the words: 'real name unknown,' and a copy thereof must be served personally upon the defendant." The law requires that a defendant shall be sued by his correct name if known to the plaintiff suing him, and this section 69 defines what shall be sufficient notice to him when thus sued. But cases may and do arise where the correct name of a party about to be sued is unknown to the plaintiff desiring to bring the action. To meet such cases, this section 148 was enacted, by which the party sued may be designated by any name and description; but, to authorize the suing of a party by a name and description,—i. e. by any other than his correct name,—the statute not only requires that the plaintiff should be ignorant of the correct name of the party against whom he desires the law's process under a pseudonym, but to make oath that he has not been able to discover the party's true name. These prerequisites complied with, the plaintiff may proceed against the party by whatever name and description he chooses, but the summons of such case must contain the words "real name unknown," and be personally served on the defendant sued, except in cases brought under section 28 of the Code of Civil Procedure. The law presumes that a party will see a summons left at his usual place of residence; and if, in such summons, he is notified by his true name that he has been sued, he must appear and make a defense, if he has one; and, if he fails to appear in obedience to the writ's command, he thereby confesses his liability and want of defense to the action, and is concluded by the judgment. But the law does not require Ferdinand Olsen, should he find on his doorstep a summons directed to "F. Olsen," to know that such summons was meant for him. In such a case, to require Ferdinand Olsen to appear in obedience to the command of such summons, or be concluded by the judgment, the summons must be delivered to him personally. Ferdinand Olsen may suspect such summons was intended for him,—may even know it; yet, until a copy of it is personally served on him, he is not notified of a suit against him.

The inquiries here are: What, within the

meaning of this section 148, constitutes a person's true name? And, if Enewold was ignorant that Olsen's given name was "Ferdinand," was Enewold then ignorant of Olsen's true name, within the meaning of said section 148? In *Schofield v. Jennings*, 68 Ind. 233, it is said: "By the common law, since the time of William the Norman, the full name consists of one Christian or given name, and one surname or patronymic. The two, using the Christian name first, and the surname last, constitute the legal name of the person." It follows, then, that a person's legal name is made up of his first or given name and his surname or patronymic, and for one to be ignorant of either is to be ignorant of such person's name, within the meaning of said section 148; and that in order to invest the county court with jurisdiction over Ferdinand Olsen, in the suit brought by Enewold against him under the name of "F. Olsen (full name unknown)," the summons in which Ferdinand Olsen was so designated must have been personally served on him. This not having been done, the judgment rendered by the county court, and which it is here sought to revive, was void. That such summons was left at Ferdinand Olsen's usual place of residence, and that he was aware of it, count for nothing. It might as well have been retained by the sheriff, and Olsen notified by mail of its existence. A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction, and is utterly and entirely void. Black, Judgm. § 230. A statute which allows one party to take a personal judgment against another, on proof that notice of suit was left at the defendant's usual place of residence, ought not to be extended to cases where the party is sued by any other than his true name.

In this proceeding—one to revive a dormant judgment—Olsen is called on to show cause why the judgment should not be revived, and he alleges, as a reason why this should not be done, that such judgment is void, and that this appears from the record itself. Can

Olsen be heard to make this objection in this proceeding? We think he can. In *Wright v. Sweet*, 10 Neb. 190, it is said: "Upon proceedings to revive a judgment which has become dormant, . . . no objection will be heard which seeks to go behind the original judgment." But this case does not decide, nor was it intended to decide, that a person against whom it was sought to revive a judgment might not make the objection that such judgment was void,—that is to say, that there was no such judgment,—and that such fact appeared on the face of the record. Suppose that Olsen had disregarded the notice served on him to show cause why this judgment should not be revived; the conditional order of revivor then would have become absolute, and there are authorities which hold that such order of revivor would estop Olsen from claiming that the original judgment was void, the proceeding to revive being in the nature of a suit on the judgment and the order of revivor itself, a judgment that the judgment revived was valid and in full force. *Comparet v. Hanna*, 34 Ind. 74; *Kelly v. Donlin*, 70 Ill. 378; *Van Fleet, Colateral Attack*, § 236, and cases there cited. This point is not necessary, however to the decision of the case under consideration. It is not raised by counsel in their briefs, and we do not determine it. Nor must we be understood as deciding that a judgment is void because the defendant is sued or summoned or described in the judgment rendered against him by a fictitious name, or because he is designated by an initial letter of his given name. What we do decide is that the judgment rendered by the county court in the case of *Enewold v. "F. Olsen"* (full name unknown)," was void, as a judgment against Ferdinand Olsen, because the summons in the case was not personally served on him.

There is no error in the record, and the judgment is affirmed.

Ryan, C., concurs; **Irvine, C.**, having presided at the trial below, took no part in the decision here.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Mary J. CHENERY
v.
FITCHBURG R. CO.

(.....Mass.....)

1. An invitation to the public to cross a railroad at a certain place at which the company must therefore use reasonable care to protect the crossers is not shown as a matter of law by the fact that people are accustomed to cross there without objection, although the fact of continuous crossing might be evidence to the jury of a license.

2. An implied invitation or license to the public to cross a railroad track at a

NOTE.—For implied license to go upon railroad track, see, in connection with the above case, the note to *Central R. & Bkg. Co. v. Rylee* (Ga.) 13 L. R. A. 634.

22 L. R. A.

certain place can arise only from such appearances or circumstances as would lead ordinarily prudent and intelligent persons to understand that the crossing was public.

(November 29, 1893.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Worcester County made during the trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence, which resulted in a verdict in defendant's favor. *Overruled.*

The case sufficiently appears in the opinion.

Messrs. Rice, King & Rice, for plaintiff:
The plaintiff requested the court to instruct the jury as follows: "If the jury find that Dodge's way of crossing (so called) was a 'travel way,' over which people were

See also 23 L. R. A. 203, 715; 24 L. R. A. 531; 30

accustomed to drive, and against which custom or practice the defendant had made no objection, then the persons in the carriage described in this case were not guilty of trespass in traveling upon said lane, and attempting to cross over defendant's railroad at the said crossing. In such case the defendant is under obligation to use reasonable care to protect persons crossing the railroad."

In support of that ruling, see —

Corrigan v. Union Sugar Refinery, 98 Mass. 577, 96 Am. Dec. 685; *Swift v. Staten Island Rapid Transit Co.* 128 N. Y. 645; *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 400; *Norfolk & W. R. Co. v. Carper*, 88 Va. 558; *Hooker v. Chicago, M. & St. P. R. Co.* 76 Wis. 542; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 687; *Clampitt v. Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71; *Campbell v. Boyd*, 88 N. C. 129, 43 Am. Rep. 740; *Barrett v. Midland R. Co.* 1 Fost. & F. 361.

It was an error to impress upon the minds of the jury that the care, judgment, and prudence of the plaintiff in determining whether as one of the public she was invited to pass over the crossing, must necessarily be the judgment of an ordinarily intelligent and prudent man. The plaintiff should not be called upon to exercise more than the judgment of an ordinarily intelligent and prudent woman.

Whether the care, judgment, intelligence, and prudence of the plaintiff regarded as an ordinarily prudent and intelligent woman would be equal to that exercised by an ordinarily prudent and intelligent man in any particular case, could not be stated as matter of law.

This is akin to the principle on which the degree of care exercised by children is held not equal to that exercised by adults.

O'Connor v. Boston & L. R. Corp. 185 Mass. 352; *Brown v. Sherer*, 155 Mass. 88; *Johnson v. Kelleher*, 155 Mass. 125; *O'Shaughnessy v. Suffolk Brew. Co.* 145 Mass. 569; *Mattley v. Whittier Mach. Co.* 140 Mass. 337; *Munn v. Reed*, 4 Allen, 431. See *Bethmann v. Old Colony R. Co.* 155 Mass. 852.

Messrs. W. S. B. Hopkins and Frank B. Smith for defendant.

Holmes, J., delivered the opinion of the court:

This is an action for running down the plaintiff at a point on the defendant's track where it is crossed by a private way along which she was traveling. The plaintiff asked for an instruction to the effect that if people were in the habit of using the crossing, and the defendant had made no objection, the plaintiff was not a trespasser, and the defendant was bound to use reasonable care to protect her. The judge refused this, but instructed the jury in substance that if, taking the whole condition of things into account,—the physical condition of the crossing, the width of it, the extent to which it was traveled, etc.,—a reasonably intelligent and prudent man would have understood that the defendant by implication declared that the crossing was public, and that he as a member of the public might pass over it, the defend-

ant was bound to do what was reasonable and necessary to do in order to protect an ordinarily intelligent and prudent man who was rightfully there. The plaintiff excepted to the refusal to rule as requested, and excepted in a general way at the end of the charge.

The general exception to the charge adds nothing to the exception to the refusal to rule as requested, except, perhaps, to make explicit an implied exception to rulings inconsistent with the one requested; and it seems doubtful whether the refusal of the plaintiff's request was understood at the time to be more than a refusal to adopt the precise form of words, or to indicate a difference of view upon the criteria of liability. However, there is a difference between the two rules as stated, although no attention was drawn to it.

The ruling asked for lays it down as matter of law that if people are accustomed to cross a railroad track at a certain place, and the company makes no objection, this imports a license from the company, and that such a license imposes a duty to use reasonable care to protect the crossers. But, even if we are to assume the use of the crossing to be with knowledge of the company, it seems a strong thing to say that the very state of facts which, if continued twenty years, would create a right of way, on the presumption that the user was adverse, that is, without a license; *Johanson v. Boston & M. R. Co.*, 153 Mass. 57, 59, shall be presumed, up to the very last moment of the twenty years, to have been with license. We are aware that language has been used in other states which seems to sanction the plaintiff's proposition, *Barry v. New York Cent. & H. R. R. Co.* 92 N. Y. 289, 292, 44 Am. Rep. 377; *Swift v. Staten Island Rapid Transit R. Co.* 128 N. Y. 645, 649; *Taylor v. Delaware & H. Canal Co.* 113 Pa. 162, 175, 57 Am. Rep. 446; but we think it would be going quite as far as is possible if the fact of continuous crossing, standing alone, were allowed to be considered by a jury as evidence of a license. See *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 374, 87 Am. Dec. 644. Usually, and in the present case, that fact does not stand alone, but there are other circumstances which will aid in determining whether the use is adverse, and therefore wrongful unless with title, or is permissive. All these facts were left to the jury, including the extent to which the crossing had been traveled, and this was as much as the plaintiff could ask.

If the plaintiff was a trespasser, the defendant was not liable. *McEachern v. Boston & M. R. Co.* 150 Mass. 515; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 80 Am. Rep. 686. The analogy of spring guns and mantraps does not apply. In those cases the defendant does an act which contemplates the presence of the plaintiff on the spot, and which not only produces its effect after he is there, but is intended to do so. His actual intent makes the defendant the last wrongdoer. He intervenes between the wrongful act of the plaintiff and the result complained of as much as if he had assaulted him in person. But when the act complained of is done with a different intent, such as the ordinary running of its

trains by a railroad, the defendant has the right to assume that wrongdoers will not be upon its premises, and will be presumed not to have anticipated them until the fact is shown to have been otherwise. *Hayes v. Hyde Park*, 153 Mass. 514, 12 L. R. A. 249.

If the plaintiff was a licensee, and nothing more, her case stands no better. As against a bare licensee, a railroad company has a right to run its trains in the usual way without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late. *Hanks v. Boston & A. R. Co.* 147 Mass. 495, 496; *June v. Boston & A. R. Co.* 153 Mass. 79, 82.

If the circumstances did give warning of the plaintiff's probable presence, it was because the mode in which the crossing was prepared, coupled with the other facts in evidence, showed an "invitation," as that word commonly has been used and understood. *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 868, 87 Am. Dec. 644; *Murphy v. Boston & A. R. Co.* 183 Mass. 121; *Holmes v. Drew*, 151 Mass. 578; *Plummer v. Dill*, 156 Mass. 426, 430; *Stevens v. Nichols*, 155 Mass. 472, 15 L. R. A. 459. The judge rightly instructed the jury mainly with reference to a possible finding that there was such an invitation, although, as we have stated, he also used language importing that the defendant would be liable in case of a license. No attention seems to have been directed to the distinction by any one.

In explaining to the jury what he meant by a "reasonably intelligent and prudent man," the judge said that they were not to inquire what conclusion a woman or child would come to with reference to the way,

but that the test was whether an ordinarily intelligent and prudent man would understand that there was an invitation to use the crossing as a public way. This expression was selected for criticism in argument, but no exception was taken to it except the general exception to a charge which fills three quarto pages of print. As we have intimated, such an exception is not enough to raise the point. *Curry v. Porter*, 125 Mass. 94. If, however, we were to consider it, we should see no error. Theoretically, at least, there must be a line at which the preparation of the face of the earth will express the owner's assent to its being entered upon, and short of which it will not express such assent. The theory is the same when the facts relied on are more complicated. But as the law is not prepared with an infinite number of plans, pictures, and explanations to meet all possible cases, it has to adopt some short test. What, then, is it fair to require of an owner as against strangers? If they enter without his license, they are trespassers, however incompetent and wanting in judgment they may be. What must he do to diminish his rights? Clearly, it is not enough that he puts something on his land which may tempt or allure a child or a fool. *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 18 L. R. A. 248. It must be something which by a general standard of understanding gives leave to enter. That standard is the understanding of the ordinarily prudent and intelligent person; not man as against woman, but a person possessed of ordinary intelligence and prudence as against one who has less than the ordinary. This is what the judge meant, and we think that he was right.

Exceptions overruled.

INDIANA SUPREME COURT.

Mary E. HAGGART *et al.*, *Appts.*,

v.

John STEHLIN *et al.*

(.....Ind.....)

1. A statute providing for the licensing of liquor sellers is not unconstitutional on the ground that it is to promote their business or that it confers a privilege to do an unlawful act since in the absence of any statute on the subject the business would be open to all.

3. A saloon constitutes an actionable nuisance to neighboring property owners, whose property is largely depreciated in selling and rental value by reason of the proximity of the saloon, frequented by persons for the purpose of drinking intoxicating liquors therein, when it is established in a residence neighborhood that had been previously free from

such business and which, aside from residences, included little except churches, schools, a female college and an orphan asylum, and in which the people are largely opposed to saloons.

3. The lessor of a building for use as a saloon, which will constitute an actionable nuisance to neighboring property owners, is liable to them for the damage resulting from such use.

4. A saloon keeper's license for the sale of intoxicating liquors is no defense against liability to adjoining property owners, as to whom his saloon may constitute an actionable nuisance.

5. An injunction will not lie in all cases to prevent the maintenance of a nuisance causing damage to private property, but the remedy may be by an action for damages.

(Howard, Ch. J., and Hackney, J., dissent.)

NOTE.—The above case is one of extraordinary interest and importance. It is none the less a new departure or advance because it applies to the case old and well established principles such as are presented in *Bohan v. Port Jervis Gas Light Co.* (N. Y.) 9 L. R. A. 711, and *note*. But it will be noticed that the decision while establishing the doctrine that a licensed saloon may constitute an actionable nuisance

to neighboring property owners, is far from deciding that a saloon is a nuisance. The same question of fact exists in other cases as to what degree of annoyance and injury will constitute a nuisance. It is present here and open for decision in every case where a saloon is alleged to be a nuisance.

400; 40 L. R. A. 423, 552.

(January 26, 1892.)

APPEAL by plaintiffs from judgment of the Circuit Court for Marion County in favor of defendants in an action brought to enjoin defendants from maintaining a liquor saloon in such close proximity to plaintiff's property as to amount to a private nuisance to plaintiffs. *Reversed.*

The facts are stated in the opinions.

Mr. Eli F. Ritter, for appellants:

The point at issue here is the validity of that act so far as its license features are concerned.

This act does undertake to control, regulate, and to restrict the sale of intoxicating liquors, but in that connection it does license, authorize, and sanction the sale and the saloon by the license for which it provides, and the control, the regulations, and restrictions in the act are in the interest of and do promote the interests and business of saloon keeping and the saloon business, and the saloon is the creature and institution established, sanctioned, and protected by this system.

The wisest and most effectual way to promote, encourage, and protect any special enterprises, has been found to be by licensing, regulating, and restricting the same.

There could not be a license system without prohibition, regulations, and restrictions in it that would be of any force whatever.

The first act established by the governor and judges who composed the legislative body in the northwest territory was a license saloon system.

There was no man in that day, I dare say, who contended that that was an act in restraint of the liquor traffic, but the act itself with all its surrounding history shows that it was intended in the interest of and to build up what was considered a great industry.

The legislature in the passage of an act adopting or continuing a measure or policy that has been long in existence and thoroughly tried in our state and elsewhere in the world and has made for itself a history as to the workings, the effect, and results of the measure will be presumed to intend what the history of the measure has shown to be the effect and results of such legislation.

If a man cannot conduct the saloon business, as he cannot, without license, and can conduct the saloon business, as he can, with license, then the license is the authority, protection, approval, and sanction for the deadly business that he conducts.

There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States.

Crowley v. Christensen, 187 U. S. 86, 84 L. ed. 620.

A business that a man cannot conduct without license, and may conduct with license, is a business founded solely upon the license and authorized by the license, and the license is the consent, sanction, and approval of the business.

Inherent or natural or inalienable rights, all meaning the same thing, are the only rights that may be regulated and restricted.

Acquired rights, such as the right to keep

a saloon, are not regulated and restricted, for such rights are only rights so far as they are acquired and conferred.

Whatever they may formerly have been thought to be the place, the proprietor, and the business have now come to be known as the saloon, the saloon keeper, and the saloon business. Each with an unbroken record and history which have established character and reputation by testimony in which there is no conflict. Of this the courts in this government long ago took judicial knowledge.

Thurlow v. Massachusetts, 46 U. S. 5 How. 504, 12 L. ed. 256.

By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram-shop where intoxicating liquors in small quantities to be drunk at the time are sold indiscriminately to all parties applying.

Crowley v. Christensen, *supra*.

All that is said or claimed in candor from the business itself is by way of excuse, that it is a necessary evil; but the constitution of Indiana, as well as public policy, recognizes no such thing as a necessary evil.

If the saloon business is, in fact, what the civilized and Christian sentiment of our country have declared it to be, certainly an act of a state legislature cannot provide for the maintenance and continuance of such a business.

The mistake and unconstitutionality of the act lies in the false theory that the business is laudable and the enterprise to be protected; when, in fact, the business itself is criminal under any intelligent contemplation of crime, and therefore should be dealt with on the theory that it is criminal, and instead of being provided for, should be provided against.

The act that accomplishes such disastrous results is certainly in conflict with the constitution of Indiana and public policy and is void.

The legislature is charged by the constitution of Indiana with the duty of improving and encouraging by all suitable means, moral, intellectual, scientific, and agricultural improvements, etc.

See Const. art. 8, § 1.

If the legislature, instead of providing for the promotion of specific objects, as required by the constitution, does in fact provide a system the working of which is a disturbance, destruction and defeating of these objects, such legislation cannot claim the protection of the constitution.

Blackstone says: "A law is a rule of action prescribed by the supreme power of the state, commanding what is right and prohibiting what is wrong."

That defines the fundamental principle in every constitutional provision and legislative act.

Salus populi suprema lex.

What may be considered as a lawful institution or business at one period under given conditions may be considered as an unlawful institution or business at another period under other conditions.

Stone v. Mississippi, 101 U. S. 814, 25 L.

ed. 1079; *Phalen v. Virginia*, 49 U. S. 8 How. 163, 12 L. ed. 1030.

The Indiana territorial government on the 29th day of November 1806 (see Laws, 2d Sess. 1st General Assembly, p. 6), by legislative action chartered Vincennes University at Vincennes, Indiana, and in the charter provided for a lottery.

The present constitution of Indiana, adopted in 1851, prohibited lotteries, but the supreme court of Indiana in 1879, in the case of *Kellum v. State*, 66 Ind. 588, held that under the original charter to the Vincennes University, the lottery provided for therein could not be disturbed by even a constitutional provision, and must remain a valid institution. Afterwards the Supreme Court of the United States rendered a decision upon this question in the case of *Stone v. Mississippi*, *supra*, expressing its judicial knowledge, and the civilized and Christian sentiment of the people.

Then the question of the Vincennes lottery feature came again before the supreme court of Indiana, in 1883, in the case of *State v. Woodward*, 89 Ind. 110.

And the court proceeded to declare that the Vincennes lottery must go, or words to that effect, overruling its former decision on that subject.

Lotteries, being regarded as mischievous games, are common nuisances, and any person setting up a lottery or selling tickets therein is punishable for a common nuisance at common law.

Wood, Nuisance, § 53.

What has been said, and can be truthfully said, about the evil nature and injurious effects of lotteries, has been and can be far more strongly said of saloons.

The Supreme Court of the United States, in deciding the case of *Mugler v. Kansas*, and other cases consolidated with it, 123 U. S. 623, 31 L. ed. 205, apply the same principle to the liquor traffic which they have heretofore applied to a slaughter-house in the wrong place, and a lottery in any place.

A house need not be noisy to constitute a disorderly house. It is not necessary that the public peace of the neighborhood would be disturbed. It is enough if it is resorted to for any immoral purpose.

People v. Rowland, 1 Wheel. Crim. Cas. 286; *Harvey v. Dewoody*, 18 Ark. 252; *Meeker v. Van Rensselaer*, 15 Wend. 397; *Manhattan Mfg. & Fertilizing Co. v. Van Keuren*, 23 N. J. Eq. 251; *Coe v. Schulte*, 47 Barb. 67; *Bishop*, Non-Cont. L. p. 490.

In considering whether any act is a nuisance, regard must be had, not only to the thing done, but to the surrounding circumstances. What would be a nuisance in one neighborhood might not be so in another.

Rodenhausen v. Oraven, 141 Pa. 546; *Sturges v. Bridgman*, L. R. 11 Ch. Div. 852; *Hurlbut v. McKone*, 55 Conn. 31; *Dennis v. Eckhardt*, 3 Grant. Cas. 390; *McCaffrey's App.* 105 Pa. 253; *Dallas v. Art Club*, 44 Phila. Leg. Int. 512; *Wallace v. Auer*, 33 Phila. Leg. Int. 238; *Harrison v. St. Mark's Church*, 3 W. N. C. 384; *Burke v. Myers*, 10 W. N. C. 481; *Dillon v. States*, 11 W. N. C. 18.

Even though the appellee's saloon might

be a necessary institution (which we do not admit by any means) in some locality, yet it would be a nuisance in the locality where it is.

Wood, Nuisance, §§ 6-12.

A law, the effect of which is to defeat the ends and purposes of the government and constitution, should be declared void by the courts.

Jones v. People, 14 Ill. 196; *Thurlow v. Massachusetts*, 46 U. S. 5 How. 504, 12 L. ed. 256; *Beebe v. State*, 6 Ind. 536, 63 Am. Dec. 391.

If the act, whatever may have been the intention of the legislature, does in fact defeat and thwart the purpose of the constitution in the promotion of public morals, public intelligence, public health, and public peace, then the court must exercise its function and protect the public by declaring such an act void.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

The Supreme Court of the United States says: "No legislature can bargain away the public morals and the public peace. The people themselves cannot do it."

There is no escape from the fact, saying the very least that can be said, that this act does provide for a license, or a temporary lease, or a consent, or a permit, whatever it may be called, to abuse the public morals, and the public health, and the public peace.

There never was any constitutional law in Indiana for the establishment and existence of the most heartless, devastating, and cruel tyranny, the saloon, and that it is an outlaw from the beginning.

The life of a law is the reason or necessity for its enactment.

Beebe v. State, *supra*.

If there ever was a reason for such a law as contemplated in the act of the Indiana legislature referred to, that reason long ago ceased.

A license saloon system has survived, without material change, this one hundred years of progress in all things else. The act of the Indiana legislature upon which the appellees in this case depend for defense, is the same act in substance with the first act adopted by the Northwest Territory more than one hundred years ago. One hundred years have tested this theory of legislation. After one hundred years of trial of this measure, the Christian and civilized sentiment of the whole nation, and the highest judicial tribunal in its judicial knowledge, declare the places established thereby to be universal public enemies, and that "the statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained in these retail liquor saloons than to any other source."

Of all the systems and theories of legislation upon any subject, that the worst and most destructive should survive is beyond comprehension. It is upheld and defended only by that element in society that profits by its deadly work.

The greatest rules of law which express the highest wisdom and justice, have not come to us through legislation, but through

the courts. The wicked institution of slavery in the United States would never have been abolished by legislation. But by a constitutional proceeding that deadly foe was slain at a blow by the Emancipation Proclamation in an emergency to save the government.

On petition for rehearing.

The right of the legislature to regulate and control and to license the sale of intoxicating liquors was specifically and distinctly conceded in my original brief in this case and in my oral argument before the court. That question was in no way put at issue in this case, yet, with all due respect for the opinion of this court as rendered in this case, I urge that the court has decided very clearly and very conclusively and very satisfactorily that particular question.

My objections are made to the license, the authority, and the sanction given by the act, to the person, the place, and the conduct of the saloon business. I am talking about the saloon business solely; the place where intoxicating liquors are sold and drunk, where persons are invited to meet and drink, the place and the business authorized and sanctioned by law.

This question that is at issue is not passed on in the opinion rendered by the court.

The appellants in the institution of this action sought damages for injury to their property and the disturbance to their enjoyment of the premises, and sought relief by injunction, also, from the further continuance of the same.

If the legislature were to pass an act which was against education, or an act against public intelligence, or an act against the interests of agriculture, such an act would be void, and it would be the duty and province of the courts to declare it so. If the act in fact worked an injury that was ruinous to the subject contemplated by Const. art. 8, § 1, the courts must pass on the effect and result of the act, sustain or declare it void in accordance with the effect and result it in effect has, however laudable might be the intention of the legislature in the passage of the act.

If the legislature, as it might do, were to establish a license system for slaughter-houses with regulations and restrictions and without any exception as to locality, it would not be insisted that under such general license law a slaughter-house might be established on the main street in the heart of Indianapolis.

The legislature might provide a system for licensing pest-hospitals with regulations and restrictions, and without any exceptions as to locality, but it would not be contended by the legal profession that a man might establish a pest-house on the main street and in the heart of the city of Indianapolis.

On the principle of law recognized and established, how can a saloon be established in the neighborhood described in the complaint in this case, and be maintained and protected.

While the legislature, I concede, may by

a constitutional act license, regulate, and restrict the sale of liquor, it could not, in connection with the sale of liquors, license gambling or any other immoral thing.

It is no more necessary to license a saloon in connection with licensing, regulating, and restricting the sale of liquor, than it is to connect gambling and other vices with the same.

The proposition that the authority to license, regulate, and restrict the sale of liquor carries with it the authority to license a saloon, cannot be maintained.

Any legislation that causes the evil effects and consequences growing out of the use of intoxicating liquors to be prevented, mitigated, or reduced is within the scope of the constitutional provision. Any legislation upon this subject which aggravates and multiplies the evils and disastrous effects growing out of the use and abuse of intoxicating liquors is in violation of the constitution.

The question whether the purpose of the constitution which requires that the legislature shall, by the best means, provide for morality, is being carried out by an act of the legislature, is a question addressed to the court, comes within its duty, and from which there is no escaping the responsibility.

The court cannot avoid the judicial knowledge, that the act of the legislature providing for a saloon license system is against the interests of public morals. The constitution and this act with the history and results of such legislation cannot be reconciled. The saloon is clearly within the definition of a common-law nuisance, and classed under wrongs *malum in se*.

Wood, Nuisance, § 24.

Instead of licensing a saloon, in connection with the licensing the sale of intoxicating liquors, instead of conferring the authority to open a place where persons are invited to assemble, wherein intoxicating liquors may be sold and drunk, that is the very thing that ought not to be licensed in connection with such sale.

The statutes concerning nuisances are ample both in their civil and criminal provisions to give relief and protection to these appellants, if the appellees were left to their inherent rights. Probably the most important case, considering the circumstances and effects, ever decided in England, was the case of *Somerset v. Stewart*, in king's bench, decided June 22, 1771, see *Loft's Reports*, Easter term, 1st case.

About fifty years before that date *Lords Hardwicke*, *Talbot*, and *York* had held that African slaves might legally be held in England, and from that date to the date of the decision in that case, that had been accepted as the law.

That case was *habeas corpus* for the release of a slave. The argument of the question before the court was lengthy, and participated in by numerous advocates, in which was made very prominent, that the growth of Christian and civilized sentiment and public intelligence was such, that the law of England could not then be declared to be what it had been declared and understood to be fifty years before.

Lord Mansfield delivered the unanimous opinion of the court. He said in the language of that day, among other things: "The setting fourteen to fifteen thousand men at once free, loose by solemn opinion, is much disagreeable in the effect it threatens."

If the parties will have judgment, *fiat justitia, ruat cælum*, let justice be done, whatever be the consequences.

Mr. Stewart may end the question by discharging or give freedom to the negro.

But if the parties will have it decided, we must give our opinion.

Compassion will not on the one hand, nor inconvenience on the other, be decided, but the law."

The slave was liberated. There had been no act of parliament, no decision of court, upon this question intervening for fifty years, and, since the declaration of law, directly the opposite.

That decision freed every slave then held in England. The dire consequences of such a decision, predicted in the argument, to commerce, domestic affairs, and social order, did not follow. The Christian civilization so adjusted the affairs that the effects of the decision came like a providential blessing to the whole people.

Messrs. Kern & Bailey for appellees.

Elliott, Ch. J., delivered the opinion of the court:

One question, and only one, is here presented; all others are excluded by the statements of counsel and by the record. That question is this: Is the Statute of March 17, 1875, regulating the liquor traffic, requiring a license and imposing a tax upon dealers in the form of a license fee, unconstitutional?

The assault upon the statute comes from a quarter different from that whence all assaults have come in the past, for it comes from citizens and property owners who are not engaged in the traffic; not from those whom the law requires to take out a license and against whom penalties are denounced for a failure to pay the fee prescribed and to obtain the license which is required of all who engage in the business of dram selling. The position of the appellants is a novel one; there is no instance in the books where such a position has been assumed. We are asked to overthrow a principle of law which has prevailed not merely for years, but for centuries. So far as we can ascertain, the power of the legislative department to regulate the liquor traffic by exacting a license has never been challenged by parties other than those of whom a license was exacted until now. In every reported case the power has been asserted to exist. The state courts have without a break in the current of opinion affirmed the validity of such statutes, but no court has asserted their validity in stronger or more emphatic terms than the Supreme Court of the United States. There is absolutely no diversity of opinion. There is, therefore, no room for doubt, no question as to our duty for we are bound by the law as it exists. We are not law-makers and hence are without power to change the law. A change can be made only by the law-making department of the government. The question is so free

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from difficulty, and so firmly settled, that there is really no room for discussion; but we have concluded that it is due to the able and elaborate argument of counsel to consider somewhat in detail the points upon which a reversal of the judgment is asked.

The position that a license is required of liquor sellers for the promotion of their business is untenable. It has been asserted again and again by the courts and by the text-writers that a license is required for the protection of the community not for the benefit of the liquor dealers. The object of license laws is to restrict the traffic to the few, not to open it to all without restriction or restraint. But whether the policy of the law is good or bad is a question for the legislature, not the courts. In the *License Tax Cases*, 72 U. S. 5 Wall. 462, 18 L. ed. 497, it was said: "This court can know nothing of public policy except from the constitution and the laws. . . . It has no legislative powers. It cannot amend or modify any legislative acts." No court can decide such a question without a flagrant violation of duty and an usurpation of authority that no principle will justify nor any precedent excuse. We begin our quotations from the text-writers and the courts with one from a work of excellent repute, Mr. Tiedeman's work on the Police Powers. This author says that: "Since the primary object of such a law would be to operate as a restriction upon the trade, and not to raise a revenue, the incidental increase in the revenue would constitute no valid objection to the law." Tiedeman, Pol. Powers, 277.

In the case of *State v. Cassidy*, 22 Minn. 312, 21 Am. Rep. 765, the court said: "Regarding the law as a precautionary measure, intended to operate as a wholesome restraint upon the traffic, and as a protection to society against its consequent evils, the exacted fee is not unreasonable in amount."

The court of appeals of New York, in the case of *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323, said: "The right of the state to regulate the traffic in intoxicating liquors, within its limits, has been exercised from the foundation of the government, and is not open to question. The state may prescribe the persons by whom, and the conditions under which, the traffic may be carried on. It may impose upon those who act under its license such liabilities and penalties as in its judgment are proper to secure society against the dangers of the traffic."

In the case of *Welch v. State*, 126 Ind. 71, 9 L. R. A. 664, our own court said: "That the state of Indiana possesses the power to regulate and control the traffic in intoxicating liquors has never been an open question." It was also said: "All laws regulating and imposing burdens on the business are prohibitory in their character. There is no difference between an absolute prohibitory law, a law providing for local option, and license law, except in the extent to which they prohibit the manufacture and sale of intoxicating drink. An absolute prohibitory law deprives all within its reach from engaging in the business, while a local option law prohibits all within a given locality from selling with-

In that locality; while a license law prohibits all within the state, who have not obtained a license, from engaging in the business of retailing intoxicating liquors. Each of these is a restriction upon the common-law right of the individual citizen."

In asserting the right of a city to exact a license of a person not a resident of the municipality in the case of *Emerich v. Indianapolis*, 118 Ind. 279, the court said: "Liquor-sellers are subjected to the payment of a special tax, because the object of this class of legislation is to restrict the business, and not because its object is to secure to the liquor-sellers the benefit or protection of the municipal government. The liquor-seller is compelled to pay a special tax, in the form of a license fee, in order that the business may be restricted to fewer persons, and not be open, like other pursuits, to every one without the payment of any special tax. The theory of the legislation upon this subject is, that the business is one which requires restraint because it is harmful to society, and a license fee is exacted for the purpose of restricting the business and not for the purpose of increasing the traffic. *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *Lutz v. Crawfordsville*, 109 Ind. 466. The law in exacting a license fee does not grant a privilege that did not before exist, but, on the contrary, lays a special tax upon a pursuit which, but for the statute, might be followed without paying any special tax."

Many other cases in our own reports declare the same general doctrine. *Frankfort v. Aughe*, 114 Ind. 77; *Vinson v. Monticello*, 118 Ind. 103; *Wagner v. Garrett*, 118 Ind. 114; *Moore v. Indianapolis*, 120 Ind. 483; *Harrison v. Lockhart*, 25 Ind. 112.

It would be an easy task to multiply quotations sustaining the doctrine we have stated, but it would inexcusably prolong this opinion to do so, and we shall do no more than make an extract from the only case adduced by appellant's counsel in support of his position. The case to which we refer is that of *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620. The question in that case was as to the constitutionality of a statute requiring the payment of a license fee and the obtaining of a license, and that is the question in this case. The only difference in the cases is this: In the case before us the statute challenged is one authorizing the issuing of licenses by county officers, while in that case the question was upon a statute authorizing the officers of a municipal corporation to exact a license. The court in that case affirmed the constitutionality of the statute as strongly and decisively as it was possible for a court to do. In the course of the opinion it was said: "As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of the regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on and to issue licenses

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for that purpose. It is a matter of legislative will only."

It is impossible to conceive how a decision could be more directly or conclusively against the appellant's position than the one from which we have quoted and upon which they rely.

Counsel seize upon a fragmentary expression in the opinion from which we have quoted, and isolating it from its associated words, affirm that it sustains the contention that the state has no power to regulate the liquor traffic by providing that dealers shall take out a license. . . . In affirming this, one of the plainest and most elementary principles of logic and of law is violated by counsel, for a clause or sentence is always to be considered in connection with the words with which it is associated.

The part of the opinion in *Crowley v. Christensen*, *supra*, which counsel quote is this: "There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or a citizen of the United States." The context plainly and unequivocally shows the sense in which this language was used. The meaning is, that because the business is hurtful to society there is authority to regulate it, and that the right to conduct such a business is not one that is beyond legislative control. If the right to sell liquor were one of the inherent rights of personal liberty, such, for instance, as the right of a farmer to sell his corn, wheat, or potatoes, the legislature could neither burden nor abridge it by imposing a special tax or requiring a special license. The legislature can burden those engaged in the liquor traffic because the right to conduct such a business is not an inherent attribute of personal liberty inasmuch as such a pursuit is hurtful to the community and requires special regulation and restraint. If it were harmless and not inimical to the good of society, it could not be subjected to special burdens, restrictions, or regulations, but to such burdens, restrictions, and regulations it may be subjected for the reason that if it is not regulated and restricted society may suffer. If there were no statute regulating and restricting dram selling the business would be open to all, for it is settled beyond controversy that where there is no such statute any citizen may engage in the business without hindrance or restraint. If the statute regulating the traffic should be overthrown the business might be conducted by anyone who chose to engage in it, free from any of the liabilities and restrictions which the statute has thrown around it. As said by the Supreme Court of the United States in the *License Tax Cases*, 73 U. S. 5 Wall. 462-472, 18 L. ed. 497-501: "These licenses give no authority; they are mere receipts for taxes." The object of exacting the tax is stated by the same great court in *Perreay v. Massachusetts*, 72 U. S. 5 Wall. 475-490, 18 L. ed. 608, 609: "The object of the law," said the court, "was to protect the community against the evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxi-

eating liquors, without license, is the usual mode adopted in many, perhaps all, of the states. It is wholly within the discretion of state legislatures."

Judgment affirmed.

A petition for rehearing was subsequently granted after which on December 14, 1893, **McCabe, J.**, on behalf of the court, delivered the following opinion:

Suit by appellants against appellees for damages on account of an alleged nuisance, and for a perpetual injunction against the same. A separate demurrer by appellee Heidt was sustained and a separate demurrer by appellee Stehlin for want of facts was overruled to the complaint; a demurrer to his answer was overruled and appellants refusing to plead further, appellees had judgment on the demurrers. The only errors assigned and noticed in appellants' brief are the sustaining appellee Heidt's demurrer to the complaint and overruling appellants' demurrer to the answer of appellee Stehlin. "The substance of the complaint is that appellants have for five years owned and resided in, and still reside in, a dwelling house on lot 9 in block 21, in Johnson's heirs addition to the city of Indianapolis situated on College avenue, in the second ward of said city, that the people of the locality named have been distinguished for fifteen years for a high grade of morality, good order, and sobriety, and until the acts hereinafter complained of, there was not a saloon, where persons could assemble to buy and drink intoxicating liquors in said second ward, nor where intoxicating liquors were sold to be drunk on the premises within said ward; that said ward has within its boundaries nine churches, an orphan asylum, where about one hundred children were kept and cared for, when the acts hereinafter complained of began, another orphan asylum enterprise under way, and a female college, the public school largely attended, all in the neighborhood of the premises aforesaid; that the neighborhood of said premises is settled and composed largely by religious church-going people, who are opposed to saloons and places where persons are invited to assemble and buy and drink intoxicating liquors; that the real estate and residences in that locality prior to the acts hereinafter complained of were sought for by a class of people whose views and sentiments were in harmony with the aforesaid conditions and facts, and real property situated therein had an enhanced value because of said facts, both intrinsically and for rental purposes, that plaintiff's property is situated where it was most favorably affected by the conditions aforesaid; that there are no manufacturing establishments or business houses, excepting a few small groceries, meat shops, and drug stores in the neighborhood; that on a lot adjoining plaintiff's premises there is a house, coming out to the sidewalk and fronting on College avenue, and only ten feet between said building and plaintiff's said residence; that on June 17, 1890, defendant Stehlin established a saloon upon said premises, and has ever since continued the business of selling intoxicating liquors, and permit-

ting the same to be drunk on the premises; that he advertised his said business by causing to be printed on the front of said building the words 'Aurora Beer Hall'; also on the front windows the words, 'Stehlin's Sample Room'; and on the south along the side of said building in letters a foot in length the word 'Saloon,' that he provided an entrance thereto from the front on said College avenue, from the side on said Seventh street, and by the rear from an alley on the east, all of which have ever since been maintained by him; that persons have continually ever since been invited and received by said defendant upon said premises to, and do buy from him and drink intoxicating liquors, and meet together upon the said premises for the purposes of drinking intoxicating liquors, and are seen by the public going in and coming out of said premises at each of said entrances to the same for the purpose aforesaid; that the said saloon business, the place established where persons are invited to go, to meet and drink intoxicating liquors, the said advertisements, the meeting of persons and their drinking intoxicating liquors at such place, and the other acts and conduct aforesaid, are severally and altogether exceedingly odious and offensive to these plaintiffs and to the persons who seek residences in said locality, and to persons who desire to purchase real estate therein, and are great injuries and disturbances to the good order, morals, and peace of said community, that plaintiff's enjoyment of their said premises by reason of the acts aforesaid, has been greatly disturbed and lessened; that their premises which would have rented for \$35, per month, have been so damaged in their rental value that they would not, so long as said saloon business shall be continued where it is, rent for more than \$20, per month, that said premises would readily have sold for and were of the value of \$5,500, but because of the aforesaid facts would not sell for more than \$3,000; that defendant Heidt owns said premises and rents them to defendant Stehlin for the purposes aforesaid for \$50, per month, which would not rent for \$25, for any other purpose. Said defendants claim that they are authorized and protected in the conduct of said business and other acts aforesaid by virtue of a license issued by the board of commissioners of Marion county, Indiana, to said defendant Stehlin, which plaintiffs deny and say said claim is false; that plaintiffs have been damaged by defendants' aforesaid wrongs in the sum of \$2,000. Prayer for judgment for said sum and for a perpetual injunction against the longer maintenance of said saloon, etc."

Stehlin's answer set up the fact that he had a license duly granted by the board of commissioners of Marion county, Indiana, to carry on said saloon, and to sell therein intoxicating liquors by the drink, to be drunk on the premises under the liquor license law. One question presented by the record therefore is, whether the license alleged constitutes a valid defense to the supposed cause of action set up in the complaint; and the only other question is, Does the complaint state a valid cause of action against appellees? The sufficiency of the complaint is the

first question because if it is insufficient, there was no available error in overruling a demurrer to the answer of Stehlin, even though that answer was bad. *State v. Emmons*, 88 Ind. 279; *Vert v. Voss*, 74 Ind. 565; *Reeves v. Howes*, 104 Ind. 485; *Low v. Studabaker*, 110 Ind. 57; *Bowen v. Striker*, 100 Ind. 45; *Atina Ins. Co. v. Black*, 80 Ind. 518; *Atina Ins. Co. v. Kittles*, 81 Ind. 96; *Dorrell v. Hannah*, 80 Ind. 497; *Ice v. Ball*, 103 Ind. 42.

Much labor and learning is expended by appellants' counsel in a contention that the license alleged in Stehlin's answer was invalid because the Act approved March 17, 1875, requiring such a license to be taken out as a condition to sell intoxicants by the drink is unconstitutional. Why appellants' counsel so contend is a mystery to this court. If such contention were upheld, it is difficult to see how it could help the appellants. They are asking damages for, and an injunction against, an alleged nuisance created by the sale of intoxicants by the drink in close contact with their dwelling house. But for the liquor license law, every man in the ward, every man, woman, and child in the city could, if they chose, engage in the traffic without giving bond to keep an orderly house, without establishing their fitness to be entrusted with the sale of intoxicants and without any other of the many restrictions and burdens that that statute imposes upon the traffic. With that statute obliterated, the appellees could stand up and say, our business stands on the same legal basis as that of the dry goods merchant, the groceryman, the hardware merchant, or any other legitimate business or traffic. There is no mark of the public ban upon it, and our business stands the equal before the law of all other branches of traffic, and therefore we can no more be subjected to the charge of being the maintainers of a nuisance than the dry goods merchant. On the other hand, the license law treats the traffic as dangerous, as dangerous to public and private morals, dangerous to public peace and the good order of society, and therefore imposes heavy burdens upon it, among which is a heavy license fee to the county and city, and throws around it severe restrictions and liabilities upon those who engage in it, and of whom it requires proof of their fitness to be entrusted with the sale of the dangerous thing. With such a law in force, and springing as it does from such a public policy, as old as the state government, it is and must be easier to reach the conclusion that a licensed saloon might be kept in such a place as to make it a nuisance *per se*, than if the law and the policy upon which it is founded were obliterated as appellants' counsel would have us do. So it seems quite apparent to us, if appellants' contention that the license law is unconstitutional should prevail, it would weaken rather than strengthen their position. Such laws have been in existence from the earliest times and the courts everywhere have upheld their constitutionality, and appellants' counsel have been unable to cite a single decision where such laws have been held unconstitutional. The only case cited by appellants'

counsel upon the question as strongly affirms the constitutionality of such legislation as any of our own cases. Counsel has not only failed to cite authority in support of this contention, but he has not even suggested one single valid reason why such laws are in conflict with any provision of the constitution. His whole contention is founded on a total misconception of the object and effect of such laws. Counsel supposes the law was enacted for the protection of those engaged in the traffic, and to encourage and foster that traffic, and cites provisions of the constitution supposed to be inimical to such an object and policy; whereas, the object was to protect the people and society generally against the known evils and dangers which had arisen from the free and unlimited right of all people and all kinds of people to engage in the sale of intoxicating liquors which they would enjoy without any statute upon the subject. What provision of the constitution such a law would infringe has not been pointed out, and we know of none. The question is not, whether the statute provides the most effective remedy for the evils mentioned, nor whether some other kind of statute would not have better accomplished the object in view. That consideration belonged exclusively to the legislature.

The argument of appellant's counsel all the way through is precisely such argument as might be appropriate to address to the voters before an election whereat a legislature is to be elected. Indeed, appellant's briefs purport to be, and are, campaign documents printed in the best style of the art. There are very many arguments that can be addressed appropriately to the law-making power, and often effectively, that would be entirely out of place addressed to a court against the law after it is made. There are many books extant where this information can be found. These books will inform counsel that this court has no power to make, change, or modify laws. The following are a few of the cases where this court has affirmed the constitutionality of such statutes. *Thomason v. State*, 15 Ind. 449; *Harrison v. Lockhart*, 25 Ind. 112; *O'Dea v. State*, 57 Ind. 81; *Hedderich v. State*, 101 Ind. 564, 51 Am. Rep. 768; *Welsh v. State*, 126 Ind. 71, 9 L. R. A. 664.

The statute is clearly not unconstitutional. Does the complaint state facts sufficient? It shows that appellee Stehlin has established a drinking saloon in a portion of the city devoted to residences, churches, Sunday schools, orphan asylums, female college, public schools, and residences of people distinguished for morality and habitual attendance upon church services, and on account of these things property in that vicinity bore a high valuation both for sale and rent, and away from the business part of the city where no saloon had ever been established before. In the midst of all this, said appellee sits down and begins the work of selling intoxicating liquors by the drink, in a building on a lot adjoining that on which appellants, two women, have their residence, with all the incidents generally accompanying such a traffic, from which both the rental

and selling value of their home has been reduced nearly one half, and their home rendered odious and offensive to them.

In *Reichert v. Geers*, 98 Ind. 76, 49 Am. Rep. 786, this court said: "The necessity which will authorize the granting of the writ of injunction to restrain the carrying on of a business lawful within itself, must be a strong and imperious one. If it were otherwise, all mills and manufactories might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial." *Queen v. Phillips*, 78 Ind. 284, and authorities there cited.

And it must be conceded that the sale of intoxicants by the drink is a lawful business.

Wood on Nuisance, section 88, says: "A house which becomes a rendezvous or place of resort for thieves, drunkards, prostitutes, or other idle, vicious, and disorderly persons, who gather there to gratify their depraved appetites, or for any other purpose, for such persons are regarded as dangerous to the peace and welfare of the community, and their presence at any place in considerable numbers is always a just cause of alarm and apprehension; . . . and a place where liquor is sold in excessive quantities, whereby persons become intoxicated, and where frequent brawls result therefrom, is a disorderly house and indictable as a nuisance; for no person has a right to carry on, upon his own premises or elsewhere, for his own gain or amusement, any public business clearly calculated to injure and destroy public morals, or to disturb the public peace. And while a license to sell liquors will protect a person from prosecution for such sales, it will not protect him from a prosecution for an abuse of the authority given him whereby he creates a nuisance."

"No person can maintain a private action for a mere public or common nuisance, for the reason that the exercise of such a right would lead to a great multiplicity of suits, and endless interminable litigation." Wood, Nuisance, §§ 645, 646.

The complaint at bar makes the injury partake somewhat of a public or common nuisance, in that it shows injury probable to others in the neighborhood. But a nuisance may be both public and private. Wood, Nuisance, § 674; 16 Am. & Eng. Encyclop. Law, 980, and authorities cited.

But where the damage or injury to one is more than to the public, however slight, or where he sustains a special damage not common to all, he may maintain a private action. Wood, Nuisance, §§ 14-16, 672.

The facts stated in the complaint and admitted by the answer and demurrer to be true, show the injury to be greater to appellants than to the public. It is to be observed that the facts alleged in the complaint and admitted to be true by the demurrer and answer under consideration do not bring the case within the definition of that sort of a nuisance by Mr. Wood. But he was speaking about what it would take to make a drinking saloon a nuisance in any and every locality. In secti

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cality, the condition of property, and the habits and tastes of those residing there, dictated by dainty modes and habits of living, are the test to apply in a given case. In the very nature of things, there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings." And in section 10, he says: "The diminution of the market value of adjacent buildings by such use will not of itself make it a nuisance, but there is a limit to such a right. No man is at liberty to use his own property without reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up something of his absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use or enjoyment of their property. This is the fundamental principle of all regulated civil communities and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance."

In *Hackney v. State*, 8 Ind. 494, in a prosecution of a nuisance in keeping a ten-pin alley it is said: "Thus anything offensive to the sight, smell, or hearing erected or carried on in a public place, where people dwell or pass, or have a right to pass, to their annoyance, is a nuisance at common law."

In *Baumgartner v. Hasty*, 100 Ind. 576, 50 Am. Rep. 880, it is said: "A wooden building is not in itself a nuisance, . . . but when erected where it endangers the safety of adjoining property, it may become a nuisance."

It is no mere fanciful notion, dictated by dainty modes and habits of living that makes one who has located his home in a quiet, peaceful part of a city, in the immediate neighborhood of numerous churches, Sunday schools, common schools, female colleges and among neighbors who are attendants upon such places, and out of the reach of the busier haunts of the business part of the city to protest and object to the maintenance of a saloon on the adjoining lot, and within ten feet of such residence, where drinking people are invited to and do assemble to drink intoxicating liquors, with all the incidents usually attendant upon such a place, very few people indeed who would not object and protest and be seriously annoyed thereat. Even the man who frequents such a place to drink would, as a general thing, object to the traffic obtruding itself within ten feet of his threshold; especially where it is alleged and admitted, as here, that it has so injured the appellant's property both for selling and rental purposes.

We think, therefore, that the complaint stated facts sufficient as against Stehlin to constitute an actionable nuisance. Did it state a good cause of action against appellee Heidt? It states that he rented the property to appellee Stehlin for the purpose of being

used for a saloon, and received \$50 per month because of that fact, and that the property would not rent for more than \$25 per month for any other use. The landlord is liable where he rents his premises for the purpose of the establishment thereon of a nuisance. *Wood, Nuisance*, §§ 30, 31.

The court therefore erred in sustaining Heidt's demurrer to the complaint. Did the license set up in the answer of Stehlin constitute a justification? We are of opinion that it did not. It did not enlarge his rights, but restricted them within narrower limits than they were before and without any statute on the subject. It was a certificate only that he had been put under bond to keep the peace, and paid the license fees and was thereby permitted to sell. Notwithstanding his payment of the large sums of money for license fees both to the county and city, his license could be revoked without refunding his money. *State v. Bonnell*, 119 Ind. 494; *Monroe County Comrs. v. Kreuger*, 88 Ind. 231; *Moore v. Indianapolis*, 120 Ind. 483.

It is no contract; it is a mere permit given to sell in the exercise of the police power of the state, and may be withdrawn at any time. *Ibid.*; *McKinney v. Salem*, 77 Ind. 213.

The congress of the United States passed an act authorizing the Baltimore & Potomac Railroad Company to bring its tracks within the municipal limits of the city of Washington and to construct shops and engine houses there; and pursuant to said authority they built their engine house and shops close enough to the Fifth Baptist Church edifice in said city to so annoy the worshippers thereat as to make the same a nuisance, and in a suit very much like the present to recover damages, but asking no injunction, it was claimed that the license afforded by the act of congress was a complete protection against the charge of maintaining a nuisance, to which the Supreme Court of the United States said: "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the state; it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 332, 27 L. ed. 744.

In a similar action, the supreme court of New Jersey said: "It may be lawful for him and his assignees to execute this act, so far as the public interests, the rights of navigation, fishing, etc., are concerned, and he may plead, and successfully plead the act, to any indictment for a nuisance, or against any complaint for an infringement of a public right, but cannot plead it as a justification for a private injury, which may result from the execution of the statute." *Sinnickson v. Johnson*, 17 N. J. L. 151, 34 Am. Dec. 184.

In a nuisance case in the court of appeals in New York it is said: "But the statutory sanction which will justify an injury to pri-

vate property, must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. This is but an application of the reasonable rule that statutes in derogation of private rights, or which may result in imposing burdens upon private property, must be strictly construed. For it cannot be presumed, from a general grant of authority, that the legislature intended to authorize acts to the injury of third persons, where no compensation is provided, except upon condition of obtaining their consent." *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 21, 57 Am. Rep. 701.

We therefore hold that the complaint stated facts sufficient as against both appellees to entitle appellants to some relief, and that the answer of Stehlin stated no defense. We do not mean to be understood as holding that the complaint stated facts sufficient to warrant all the relief prayed for. It does not follow that because an act done, as here, under legislative authorization (the statute being constitutional), creating a nuisance and resulting damage to private property, that the extraordinary remedy of injunction may in all cases be invoked for the discontinuance of the acts complained of, as well as to recover damages for the injury. It is said in section 648, *Wood on Nuisance*, "The rule as existing at this time may be stated to be that where a person sustains special damage peculiar to himself, either to his person or property, direct or consequential, from a public nuisance, . . . he shall have his remedy therefor."

Baltimore & P. R. Co. v. Fifth Baptist Church, was a case where damages only were sought, and not injunctive relief. And the court there said: "It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted."

All the other cases above cited after the church case were cases of the same kind upholding the right of recovery for damages where the act done was done under legislative authorization, but no injunction was granted.

The complaint was sufficient to constitute a cause of action for damages.

The judgment is reversed, the cause remanded, with instructions to overrule the separate demurrer of Heidt to the complaint, and sustain the appellants' demurrer to appellee Stehlin's answer.

Howard, Ch. J., dissenting:

I regret that I am unable to agree in the result reached by the majority of the court in this case.

In the admirable opinion delivered on the first hearing of the case by Elliott, Ch. J., then a member of this court (Jan. 26, 1892), the validity of our statute regulating the liquor traffic was fully and clearly demonstrated, as it also is in the majority opinion of the court at the present hearing. Yet the able counsel for appellants has insisted and

still insists, that the question at issue is not the constitutionality of the statute in so far as it provides for regulating the sale of intoxicating liquors, but its constitutionality in respect to its provisions for licensing the sale of intoxicating liquors in saloons. "If the act of the legislature," says counsel, "contained no other provisions than such as assume control, regulation, and restriction upon the sale of intoxicating liquors, I should readily concede its validity. It is not the control over this subject and business to which I offer objections. My objections are made to the license, the authority and the sanction given by the act to the person, the place and the conduct of the saloon business." With all deference to the learned counsel, it would seem that he here attempts to make a distinction where there is no difference. If the control and regulation of the liquor traffic are in the hands of the legislature, that body must certainly be the judge as to the best means to secure such control and regulation; and it is consequently competent for the legislature to determine, as it has done, that the license system is the most just, efficient, and satisfactory means to attain the end in view. This policy is the one adopted. The legislature has, in effect, decided that the best policy for the regulation of the sale of intoxicating liquors is the license system; that by such system the traffic can best be controlled, regulated, and restricted. Counsel himself concedes, "that a statutory law providing a license system for saloons existed at the time when our present state constitution took effect, in 1851." There is no question that such system has been practically in operation ever since.

That the regulation of the liquor traffic, therefore, is entrusted to the legislature, and that the policy adopted by the legislature in the exercise of the power thus confided is the license system, seem to admit of no controversy.

Counsel, however, goes still further, and says that selling intoxicating liquors in a saloon is immoral; and that the act licensing such sale must for that reason be unconstitutional; inasmuch as the constitution provides for the promotion of morality. In answer to this, it would seem that if the regulation of the sale of intoxicating liquors is a trust confided to the legislative department of the government, then the sale itself cannot be immoral. And if the legislature, in the exercise of its sound discretion, is of opinion that the saloon license system is the best means of controlling and regulating such sale, it would also seem that the sale in a saloon, in the manner prescribed by law, cannot be immoral.

Because some saloons are not conducted in the mode which the law directs, it does not follow that a saloon which is properly conducted is also an immoral institution. Such a conclusion would amount to an admission that the legislature could not so regulate the sale of intoxicating liquors as to make such sale lawful, notwithstanding the admission already made that the legislature has the power to control such sale. It would seem to follow that the regulation and restriction

of the liquor traffic must be a question of policy, and not, properly speaking, a question of morals; and that, as such, it is confided to the good judgment of the legislature of the state. So far as the courts are concerned, to quote from the *Licenses Tax Cases*, 72 U. S. 5 Wall. 462, 18 L. ed. 497: "The court can know nothing of public policy, except from the constitution and the laws."

Counsel asks that the damage feature involved in this case to the appellants, caused by the establishment of a saloon beside their home be not overlooked by the court. This consideration, though but thus incidentally referred to, and not at all argued by counsel, I regard as the strongest that could be urged in appellant's favor. It has frequently been held that locality is often an important element in determining whether a business is or is not a nuisance. In *Owen v. Phillips*, 73 Ind. 284, the doctrine was approved in its fullest extent, "that in some localities, a business will be considered a nuisance, while it would not be so in others." The fact that the business conducted by appellees is a lawful one does not affect the question. No matter how good one's title to property, no matter how lawful the business in which he is engaged, he must so use his property and conduct his business as to cause no unnecessary injury to the property, rights, or interests of others. The reason for this rule, as well as the rule itself, are comprehensively stated by Judge Ray, formerly of this court, in his work on Negligence of Imposed Duties, p. 152: "It is the injury, annoyance, inconvenience, and discomfort thus occasioned that the law regards, not the particular business, trade, or occupation from which these result. And lawful as well as unlawful business may be carried on in a place, or in a manner so as to prove a nuisance."

The complaint shows the location of a saloon beside a home in a thickly settled residence part of the city, near also to schools and churches; and far from the business center. It also shows conspicuous advertising signs on the building, side and alley entrances, and that persons have been continuously going in there to buy and drink intoxicating liquors and are so seen going in and coming out by the public.

It avers a consequent diminution of the value of appellant's property and annoyance to appellants in the enjoyment of their home.

To this appellees answered by setting up their liquor license issued by the board of county commissioners, and the conduct of the business by authority of, and in pursuance of, such license.

Had appellants put their argument in support of their demurrer to this answer upon the ground that such license did not authorize the acts complained of, some case might perhaps have been made in favor of sustaining such demurrer. But, instead of this, appellant's contention is based upon the assumption that the answer is insufficient to constitute a defense for the reason that "the law pretending to authorize the same is unconstitutional and void." And the whole argument of counsel, instead of being addressed to the insufficiency of the answer as

a defense to the acts complained of, is directed against the license law itself. Counsel says expressly that, "the point at issue here is the validity of the act so far as its license features are concerned. If the law in that respect is valid, then the defense as set up in the respective answers of the appellees is complete."

I must disagree with counsel's reasoning in this. The license granted by the county commissioners gave no right to appellees to keep a disorderly place, where intoxicating liquors are sold, as prohibited by section 2097, Rev. Stat. 1881, and gave them no right to unnecessarily injure their neighbors' property, rights, and interests. For, while the business of selling intoxicating liquors, under a license duly issued, is lawful, yet, as we have seen, "a lawful as well as unlawful business may be carried on in a place, or in a manner so as to prove a nuisance."

Appellants, in basing their argument upon the alleged unconstitutionality of the law, instead of upon the insufficiency of the answer as a defense to the alleged unlawful acts of appellees, abandoned, as I think, their only reasonable grounds of action. Whether the acts complained of were in fact sufficient to constitute appellee's place of selling intoxicating liquors a disorderly house, or a nuisance, need not, as I think, be considered, since appellants in their argument chose to waive that question, and to rely wholly upon the alleged unconstitutionality of the license system. Having adopted a theory, they should be held to abide by it. It has often been decided that every case must proceed upon a definite theory. Parties cannot adopt one theory in the trial court, and a different theory in the appellate court.

I think that we must therefore assume, since the record shows nothing to the contrary, that appellant's contention in support of the demurrer to the answer was the same in the trial court as it is here, to wit, that the law licensing saloons is unconstitutional and void; and I think we must also assume that the trial court ruled upon the demurrer on that theory solely, holding against appellants that the law is constitutional; and further, that the court did not otherwise rule, nor intend to rule upon the question as to whether the answer constituted a sufficient defense to the acts complained of.

Courts are not called upon to decide questions not presented and argued by the parties, nor is it, as I think, equitable between the parties, nor just to the court trying the case, to reverse its decision upon a theory different from that on which the cause was tried and different likewise from that on which the case is presented on appeal.

This principle is very fully developed in chapter 24 of Elliott's Appellate Procedure; in section 489 of that work it is said that, "parties must stand by the positions assumed in the trial court, and upon which they asked and obtained rulings. The same rulings are to be reviewed, and not different ones." And in section 494: "If the parties put a definite construction upon the pleadings in the trial court, and induce the court to act upon that construction, they must adhere to it on ap-

peal. . . . Pleadings will be treated on appeal as the parties elected to treat them in the trial court."

If, then, the parties in this case, in arguing the demurrer to the answer, and the court in ruling upon that demurrer, proceeded upon the theory that appellants demurred for the reason that the answer was insufficient as being based upon an unconstitutional law, I do not think we should now pass upon that ruling of the court by assuming a different theory. Indeed, counsel does not ask this. He does not ask to have the demurrer sustained for any reason but because the license law is invalid, and says emphatically that "if the law in that respect is valid then the defense as set up in the respective answers of the appellees is complete." In addition to the express waiver so made, the failure of counsel to argue in his briefs any question in the case but the validity and constitutionality of the license law is, by the settled decisions of this court, a waiver of all other objections to the answer.

"It is essential," says Judge Elliott in his Appellate Procedure, section 444, "that all points be made in the brief and properly made; if not so made, they are waived. Many cases affirm this doctrine."

As nearly as the case of *Bates v. Bulla*, 6 Ind. 86, the court ruled that, "all points not made by brief may be treated as waived."

In the case of *Donovan v. Stewart*, 15 Ind. 498, it was said: "We are inclined to think that the points in the case, if any such exist, are not shown by the brief filed by the three attorneys whose names are signed thereto, and are consequently waived."

In *Burk v. Hill*, 55 Ind. 419, the court said: "The sufficiency of the second paragraph of complaint is questioned by an assignment of error, but the question is not discussed in the briefs of the parties,—indeed, it seems to be waived. We therefore dispose of it at once by holding the paragraph good."

In *Martin v. Martin*, 74 Ind. 207, it was said by Woods, J.: "That the rules of practice are a part of the laws of the land; that we have no right to disregard them; and that following these rules on appeal, 'we never go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out in the brief, but the appellee, without filing any brief at all, is entitled to the benefit of everything in the record which may prevent a reversal of the judgment upon the errors assigned.'"

In the *Western U. Teleg. Co. v. Ferris*, 103 Ind. 91, the statement is: "As this question was not suggested in the original brief and argument of appellant's counsel, nor until after the brief for appellee had been filed and the case taken up for consideration by the court, we think it might well be regarded as waived."

In the *Louisville, N. A. & C. R. Co. v. Grantham*, 104 Ind. 358, the court said: "In this court, the appellant has assigned a number of errors, but of these only one is noticed even by its learned counsel in his brief of this cause. . . . Of course, under the settled practice of this court, the other errors assigned by appellant, but not discussed by

its counsel, are regarded here as waived, and are not considered. *Goldberry v. State*, 69 Ind. 430; *Williams v. Potter*, 72 Ind. 354; *Coffin v. Asbury University Trustees*, 92 Ind. 337."

In *Carr v. State* (Ind.) 20 L. R. A. 863, decided at last term, objection was made in the court below to certain offered evidence. This court found the questions by which the evidence was sought to be introduced informal, but held that, as the objection to the evidence was sustained with express reference to the subject matter, and not to the form of the questions, and as no objection was made in this court to the form of the questions, the correctness of the ruling should be determined as if no such informality had existed. That was the theory upon which the court ruled below, and that was also the theory upon which argument was had in this court. See also, *Kimberlin v. Tow*, 183 Ind. 696, and *Funk v. Bentschler*, Feb. 18, 1893, both decided at last term, and *Thompson v. McCorkle*, Sept. 26, 1893, decided at this term. Also, *Works*, Pr. § 1099, and authorities there collected.

Whether, therefore, the demurrer in the case at bar should be sustained by reason of the insufficiency of the answer as a defense to the alleged acts complained of by appellants, and their demand for relief therefrom by injunction, or for any other reason than the alleged invalidity of the license law, is a question which has been waived by the failure of counsel to discuss the same, and, as I think, should not be considered.

The license law being valid, we must presume, until the contrary is shown, that appellee's business being lawful in itself, was conducted in a lawful manner; that they did only what they had a right to do with their own.

In *Barnard v. Shirley*, June 6, 1893, decided at last term, it was said: "No principle of law is better settled than that a man has a right to the lawful use and enjoyment of his own property, and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is a wrong for which there is no liability. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own."

It is true that there are certain well-known exceptions to this general rule, but until it is shown that some such exception applies, or that negligence or malice in the conduct of the business exists, or the law is otherwise violated, the owner will not be disturbed in the use and enjoyment of his property.

In the case before us, there is no unlawful act charged. According to the complaint, the appellee Stehlin established a saloon and engaged in the business of selling intoxicating liquors, to be drunk on the premises; he advertised his business by putting up printed signs, and provided different entrances to his building; persons have ever since been invited and received into said premises to buy from him and drink intoxicating liquors, and meet together there for that purpose, and are seen by the public going in and coming out. That is the sum and substance of what is 22 L. R. A.

charged against appellees; and it is acknowledged in the complaint that the appellees claim that they are authorized to do these things by virtue of a license duly issued by the board of county commissioners.

Appellees themselves answered this complaint by setting up their license and averring that the business has been conducted in pursuance of such license. The truth of this answer is not denied, but on the contrary, by the demurrer it is admitted to be true. No negligence or malice is charged, no violation of the liquor law, or of any other law of the state is alleged. We are brought, then to the conclusion, according to the opinion of the majority of the court, that a lawful business, carried on in a lawful manner, is yet a nuisance; that a man setting up on his own land a business made lawful by the statutes of the state, and conducting this business in a peaceful and quiet manner, without any wrong-doing on his part whatever, may yet be assessed damages because his neighbor's property is incidentally lessened in value. I do not think, this is the law. If a modest mechanic's shop, or a small and plain house, the best he can afford, is set up on a little lot of his beside a splendid mansion, in a fashionable part of a city, it will undoubtedly lessen the value of the fine property adjacent. Can the owner of the marble palace and the beautiful lawns and pleasure grounds therefore collect damages from the mechanic who has set himself down before the great man's door? Not in England, where every man's home is his castle; still more, not in free America, where all men are equal.

And if, as follows from the decision of the court in this case, a man may collect damages because the value of his property is lessened by the lawful business in which his neighbor engages, why may not a merchant bring suit against the man who sets up another lawful business next door, which may perchance lessen the popular favor which the merchant has heretofore enjoyed?

It is hardly necessary to further intimate the mischievous results which must, as I think, inevitably flow from thus practically, and that, too, without any legislative sanction, engraving so definite a feature of local option upon our license system. If the people desire local option, and the constitution and the laws are so framed as to sanction it, it seems to me it will then be time enough for the courts to do so.

If there were any improper conduct, any violation of the law, any boisterousness or noise, anything injurious to health or offensive to the senses charged against appellees, I could see some reason for declaring the place a nuisance; and I do not think that the authorities show that a business so conducted can be found a nuisance, simply because the presence of even a properly conducted saloon is offensive, and because adjacent property is incidentally lessened in value.

In *St. James Church v. Arrington*, 86 Ala. 546, 76 Am. Dec. 332, the court held that a private nuisance would be abated only when the matter complained of is a nuisance *per se* or when it has been declared a nuisance by

law; and hence, that the erection of a private stable near a church building would not be enjoined, a stable not being unavoidably and of itself a nuisance.

In *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790, it was held that an injunction to prevent the erection of a building for manufacturing purposes, on the ground of its being a nuisance to an adjoining dwelling house, would not be granted unless a very strong case should be made, and one which is marked by some very peculiar features. To the same effect was *Van Bergen v. Van Bergen*, 8 Johns. Ch. 282, 1 L. ed. 619, 8 Am. Dec. 511, decided by *Chancellor Kent*.

In *State v. Hall*, 52 N. J. L. 153, the supreme court of New Jersey held that a ten-pin alley, kept for public use in a village, even though kept in connection with a lager beer saloon, is not, *per se* a nuisance.

In *Pfingst v. Senn*, 15 Ky. L. Rep. 325, it was claimed by neighboring residents that certain premises were to be reopened which had before been used as a pleasure resort garden, with ten-pins, dancing and band music till early morning, where the noise would keep the neighbors awake to the detriment of their health and comfort, and where crowds of idle, disorderly persons were attracted and became a nuisance in the streets; that all this was not due to the management, but inherent in the business. The court of appeals of Kentucky held that a nuisance was not clearly made out. In the course of the opinion, the court said: "Nor are the things about to be done in themselves nuisances. There can be beer gardens and pleasure resorts, music, and dancing and yet no nuisance set up. Admittedly, the conduct of such exercises, or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less eligible as a place of residence for people who pay high rents, and are of 'dainty modes and habits of living' (Wood Nuisance, § 800), but nevertheless, these places and modes of amusement are not to be condemned or denounced as nuisances in themselves. . . . One living in a city, it was said (in *Louisville Coffin Co. v. Warren*, 78 Ky. 400), 'must necessarily submit to the annoyances which are incidental to city life.'"

In *Rhodes v. Dunbar*, 57 Pa. 274, 98 Am. Dec. 221, it was well said by the learned *Chief Justice*: "It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city."

These cases, and many others, go very much farther than it would be necessary to go in this case in order to hold that the business of appellees as conducted by them is not a nuisance, and that they are not liable for damages because the adjacent property had been rendered less valuable without any fault on their part.

I may say, besides, that were this an appeal from a judgment based upon an order of the board of county commissioners, renewing or refusing to renew a license to appellees in the locality where the acts complained of were done, the case, as I think, would be

a stronger one for appellants than is the case before us, which is, in some respects a collateral attack upon the order of the board granting the license.

I have no doubt, as already intimated, that the question of locality is one which the board of county commissioners, or the court on appeal, ought to take into consideration in determining the fitness or unfitness of an applicant for a license to conduct a saloon. The statute itself, section 5814, Rev. Stat. 1881, seems to imply as much.

In *Estlinger v. East*, 100 Ind. 494, objection was made to the introduction of certain evidence showing where the building in which license was applied for was situate, with reference to a public square and to a college and a graded school and how many school children usually passed the building in going to and returning from school. This court approved a ruling admitting the evidence. *Judge Mitchell*, speaking for the court, after alluding to the requirement of the statute, that the applicant for license should state in his notice "the precise location of the premises in which he desires to sell" said that while the inquiry must always be as to the fitness of the applicant to be entrusted with the sale of intoxicating liquor, yet "it may well have been supposed (by the legislature) that in determining the fitness of things, a court or jury might take into account whether, under all the evidence, an applicant in a particular case was a fit person to be entrusted with the sale of intoxicating liquors, if the place proposed was such that only a man possessed of an extraordinary degree of circumspection and caution could fitly conduct the business at that place, with a due regard to the situation and surroundings."

That, however, was an appeal from the action of the board of county commissioners as to granting a license in the first place. Here there is an attack on the authority of the license after it is duly granted.

Besides, in this case, there is no question of the fitness of the appellee to keep a saloon. His character and fitness are not even called in question. It is the saloon itself, as a saloon simply, and a properly conducted saloon, that is objected to. And here we return to the real question at issue. This saloon is objected to, not that it is in any way improperly carried on, but simply because it is a saloon, and because the law authorizing it is unconstitutional, and void. All other questions are waived by appellants in their argument, and by the rules of this court should not, as I think, be considered.

The waiver, too, is not an implied one simply, but is an express waiver. And counsel candidly gives us his reason for the waiver, saying: "If this were the only saloon in Indiana, located as it is, I dare say there would be little difficulty in suppressing it, but as it is a part of a great system, we are compelled to attack the system."

Appellants thus seek to uphold their demurrer to the answer setting up the license on the sole ground "that such license is no defense, because the law pretending to authorize the same is unconstitutional and void."

It does not seem to me that we are justified in ignoring the positions taken by the parties before the lower court, and in their appeal to this court. If there was error on the trial, that error should be presented here by the party appealing. We cannot reverse a judgment for a reason that the lower court had no opportunity to pass upon. Appellants' briefs show that the invalidity of the liquor law was the question presented to the lower court. The briefs also show that to be the question presented to this court. Shall we then do what Woods, J., in *Martin v. Martin*, *supra*, said the courts would never do,—"go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out in the brief?" I think we should not, and that the appellees are themselves "entitled to the benefit of everything in the record which may prevent a reversal of the judgment." By the decision of the majority of the court, it would seem as if this rule was to be changed, and that hereafter the burden would be upon the appellee to show that the record was without

error, rather than upon the appellant to point out the error, if any there should be. To me, however, the long established rule seems the fair one to be applied in this case, fair to the parties and fair to the court below, which could only pass upon the questions presented to it for consideration and decision. The theory of appellants' complaint and of appellees' answer, the theory recognized in the trial court and urged in the briefs in this court, bears wholly upon the constitutionality of the liquor license law. I am therefore of opinion, without even considering the fact that this saloon is properly conducted according to law, and is not a nuisance in itself, that the demurrer was properly overruled, and that the judgment ought consequently to be affirmed.

Hackney, J.: I concur in the dissenting opinion of **Howard, Ch. J.**

Petition for second rehearing denied March 14, 1894.

MISSOURI SUPREME COURT (Div. 2).

Floyd CRANDALL, *Resp't.*,

v.

Robert ALLEN, *App't.*

(.....Mo.....)

1. **Accretions formed in front of the land of several owners** belong to them all and cannot be claimed by one, with whose land the first point of contact was made.
2. **Accretions which begin to form upon land which was originally not riparian** but became such by the washing away of a portion of an intermediate tract, and which continue to form until they reach the latter tract and then fill out in front of it, replacing some of its washed-out portion, do not all belong to the land on which they begin to form, but that portion of them which forms beyond its original boundary line and along the washed-out portion of the adjoining land belongs to the latter.

(December 7, 1893.)

A PPEAL by defendant from a judgment of the Circuit Court for Cole County in favor of plaintiffs in an action brought to recover possession of certain land which had been formed by accretion along the shore of the Missouri River. *Affirmed.*

The facts are stated in the opinion.

Messrs. Silver & Brown, for appellant: That land formed by accretion belongs to the owner of the contiguous tract to which the accretion is made, is a fundamental principle.

Land not originally riparian becomes so when the river has reached it by gradually washing away all the intervening land.

NOTE.—For extensive treatment of the question of the division of alluvion flats or water front, see note to Northern Pine-Land Co. v. Bigelow (Wis.) 21 L. R. A. 776. The present case adds to the subject a novel decision on peculiar facts.

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Naylor v. Coz, 114 Mo. 232; *Welles v. Bailey*, 55 Conn. 292. See also *Rees v. McDaniel*, 115 Mo. 145.

And where the lot originally not riparian becomes so by such change of the river-bed, there attach to it all the incidents of riparian land.

Welles v. Bailey, supra.

Among these incidents is that of the right of appropriating to itself gradual accretions from the river where, by a change in the movement of the bed, it begins to recede, and leave soil upon its front.

Ibid.

And this right of appropriation does not cease when the original limits have been restored.

Ibid.

Messrs. Pope, Edwards & Davison for respondent.

Gantt, P. J., delivered the opinion of the court:

This is an action of ejectment for 8.18 acres of land, described by metes and bounds. Plaintiffs assert title to it as a part of the S. E. fractional $\frac{1}{4}$ of section 21, township 45, range 12, and defendant claims it as an accretion to lands he owns in section 28, in the same township and range, to wit, the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section 28. On the trial, and in his answer, defendant admitted he was in possession of all the lands described in the petition, but disclaimed all title or right to "so much of said land as lies north of the line between sections 28 and 21, in township 45, range 12, and west of a line beginning at a point on said line between said sections 28 and 21, 16 chains east of the northwest corner of the northeast quarter of said section 28, and extending north by a straight line to the slough of the Missouri river," and denied

plaintiffs' right to the remainder of the land. It was admitted that plaintiffs, as the heirs-at-law of Floyd Crandall, their father, the original plaintiff in this cause, now deceased, were the owners of the S. E. fractional quarter of section 21, under meane conveyances from the original patentee to said land from the United States, and that defendant was likewise the owner of the N. W. $\frac{1}{4}$ and W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 28. It was shown that the Missouri river borders on, and constitutes the eastern boundary line of, said S. E. fractional $\frac{1}{4}$ of section 21; that the direction of the river along the eastern side of this land is from the northwest to the southeast; that since it was originally surveyed, and patented by the government of the United States, six or seven acres of it has washed away, but has since been restored, by accretion, to the eastern boundary. Defendant's evidence tended to show (1) that so much of the land sued for as lies north of the line between sections 28 and 21 (township 45, range 12), and east of a line beginning at a point on said line between sections 28 and 21, 16 chains east from the N. W. corner of the N. E. $\frac{1}{4}$ of said section 28, and extending north by a straight line to the Missouri river, had been washed away by the Missouri river; (2) that said washing and cutting in extended in on defendant's land lying south of the line between sections 21 and 28, leaving defendant's land south of said line bordering on the Missouri river; (3) that afterwards land began to re-form to defendant's land so bordering on the Missouri river, and that said land so formed by degrees—that is, by accretion,—and gradually extended over the line between sections 21 and 28; that the land so formed, and north of said section line between sections 21 and 28, is that part of the land in suit, which defendant claims; that said land is east of plaintiffs' land in section 21, and north of defendant's land in section 28; that the river runs from the northwest to southeast. Defendant also introduced evidence tending to show that he had known the land since 1857; that he had bought it in 1880, and claimed possession of it since then, and fenced it in about four years before suit was brought.

Thereupon the court instructed the jury, on behalf of the plaintiffs, as follows: "(1) If the jury believes and finds from the evidence that the land described in plaintiff's petition was in the possession of the defendant at the commencement of this suit, and that plaintiff was the owner of the same, or that the same was formed by accretion made to the mainland, of which the plaintiff was the owner, then they will find for the plaintiff, and also find for him for damages whatever the reasonable rental value of the land is worth from the 2d day of February, 1888, until the present time, and also the value of timber taken by defendant, and will also assess the monthly rents and profits of whatever they may believe from the evidence that such is worth, not to exceed \$5 per month. (2) In an instrument made either by the government or by an individual, if a boundary such as a river is called for, the

tract must have that boundary. (3) The call for a natural object in a deed or grant, as a river, will control both course and distance; and if the plaintiff's deeds called for the Missouri river, and that defendant had and still holds the possession thereof wrongfully from plaintiff, they will find for the plaintiff." "(4) Although the jury may believe that the portion of lands contained in the deeds to plaintiff at any time washed entirely away, or in part, after the same was surveyed and patented by the United States government, yet if they further find that the land in controversy is a re-formation of said lands on the bed of the river where said lands formerly existed, then plaintiffs are entitled to recover in this action, if it be shown that the defendant unlawfully detained the same. (5) If the jury finds that the plaintiffs, and those under whom they claim, were in possession and the owners of the land in controversy, then the fact that the lands had washed away, and other land formed on the bed thereof by accretions, does not change or deprive plaintiffs of title to same." The court gave all the foregoing instructions asked by plaintiffs, and defendant objected and excepted.

The court, then, at request of defendant, gave the following instructions: "(8) The court instructs the jury that the term 'accretion,' as used in these instructions, means portions of soil added to that already in possession of the owner by gradual deposit caused by the washing of the river. (4) The court instructs the jury that, if they find for plaintiff for only a part of the land claimed by him in this suit, they will express in the verdict the part of said land plaintiff is so entitled to recover. (5) The court instructs the jury that an accretion partakes of the character of the land by the conveyance of the latter, and it makes no difference in this case whether the alleged accretion was formed to defendant's land before or since he became the owner thereof, provided the jury find it actually did so form by way of accretion. (6) The court instructs the jury that if they shall find and believe from the evidence that, for ten years next before the bringing of this action, the defendant was in the public, open, and adverse possession of the land in dispute, claiming the ownership thereof, then such possession and claim of ownership constitutes a good defense for defendant, and the jury will find for him,"—and refused the following, also prayed by defendant: "(1) The court instructs the jury that if they believe from the evidence that the defendant is the owner of the northwest quarter of the northeast quarter and the west half of the northeast quarter of the northeast quarter of section 28, township 45, range 12, in Cole county, Mo., which at the time of the government survey of the same was cut off from the Missouri river by intervening land, but that said intervening land was washed away by change of the river bed until a portion of defendant's land bordered on the river, and that afterwards additions were made to defendant's land so fronting on the river by gradual and imperceptible accretions or additions thereto by the sediment or deposit of

the river, then defendant is entitled to all such accretions to his front, to the present margin of the river, and the jury will so find. (2) The court instructs the jury that although a tract of land may not originally have bordered on a river, being cut off therefrom by an intervening tract, yet if such intervening tract is washed away until the remoter tract borders on the river, the latter then becomes riparian, and is entitled to the riparian right of accretions,"—and defendant duly excepted. There was a verdict and judgment for plaintiffs.

The appellant, upon the foregoing facts, submits that the main question involved in his appeal is this: "Although a tract of land may not originally have bordered on a river, being separated therefrom by an intervening tract, yet, if such intervening tract is washed away until the remote tract borders on the river, the latter then becomes riparian, and is entitled to the riparian rights of accretion, even though such accretion extends beyond the original line dividing the two tracts." *Naylor v. Cox*, 114 Mo. 282, is cited as authority for this position, but it is misapprehension of that case to apply it to the undisputed facts of this case. In *Naylor v. Cox* the accretion began to the island, between which and the Howard county shore the Missouri river ran. The accretion gradually pushed the river north, until it cut away a large portion of the bank on the north, or Howard county side; the river thus changing its bed, but still preserving, as long as it ran, a water front to each tract of land. We held that the river was a natural boundary on defendant's land, and, as it had cut away and destroyed a part of his land, his boundary receded as the river encroached upon him, and although the accretions to the island on the opposite side increased until they passed the line of survey, which once defined defendant's southern boundary, they belonged to the owner of the island. With that decision we are still satisfied, but we think this record presents a very different proposition. In the case at bar, both proprietors own their lands on the west bank of the Missouri river; the plaintiffs' land lying immediately north of, and adjoining, defendant's on the south. The proposition of defendant, that if the river cut away and destroyed all the land that originally intervened between his land in section 28 and the river, until the river formed in fact his eastern or northern boundary, he thereby became a riparian owner, is true enough, in one sense; but it is not true, either in reason or upon authority, that it would enable him, by means of the accretion to his own shore, to appropriate all the alluvion or accretions that formed in front of his neighbor's shore on the same side of the river or water front. We find nothing in the record that questions that this accretion in front of plaintiffs' land formed to their shore; but it is assumed by defendant that if it began to form on the north of his land, as the river then ran, until it extended up in front of plaintiffs' boundary on the same river, it then became defendant's by reason of the alluvion having first made its appearance on his northern

boundary. The inevitable consequence of this claim would be, if carried to its logical conclusion, that defendant would thus become possessor of the river front, not only in front of plaintiffs, but of all other riparian owners, wherever the accretion extended east of a line drawn north from a point on the line between sections 21 and 28, 16 chains east of the N. W. corner of the N. E. $\frac{1}{4}$ of said section No. 28, if it was continuous. In a word, the contention is simply this: that if, in the forming of accretions along a river front, it can be shown that the point of contact was first made to lands of one of the riparian owners, he is entitled thereby to the whole accretion subsequently made to the lands of other riparian owners on either side of him, and although this would thus cut off their water boundaries and privileges. As before said, there is no warrant for this claim in *Naylor v. Cox*, or any other case within our knowledge. On the contrary, the authorities are numerous and well considered which scrupulously preserve to each adjoining riparian owner his water boundaries and privileges. In *Lamprey v. Metcalf*, 52 Minn.—, 18 L. R. A. 670, the supreme court of Minnesota, in discussing the reason for the law giving accretions and relictions to the riparian owner, says: "The reasons usually given for the rule are either that it falls within the maxim '*de minimis lex non curat*,' or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz. to preserve the fundamental riparian right—on which all others depend, and which constitutes the principal value of the land—of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to water, and another owner sandwiched in between him and it, whenever the water line has been changed by accretions or relictions, are self evident, and have been frequently animadverted on by the court."

When the witnesses were asked in front of whose land the river now ran, they answered, "As much in front of plaintiffs' as defendant's," or "About as much of one as the other," and defendant said that after the accretion formed "it was east of plaintiffs' land, and north of mine." The apportionment of alluvion is by no means new in the judicial history of this country, and many rules have been suggested and adopted to secure to each riparian owner his just proportion of the accretions. Thus, in *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276, Chief Justice Shaw quoted and adopted a rule of the civil law found in Denisart's Collection of New Cases, in France (1783), and says of it: "The rule suggested in this work is founded upon the obvious consideration already alluded to, that in many cases lands which border upon navigable rivers derive a great part of their actual value from that circumstance, and from the benefit of the public easement thereby annexed to such lands, and

that being wholly deprived of the benefit of that situation would operate as a great hardship, and do real injustice to a riparian proprietor, although he should obtain his full proportion of the land, measured by the surface. This injustice will be avoided by the proposed rule, in conformity with which each proprietor will keep a larger or smaller proportion of the alluvial formation, and of the newly formed river or shore line, according to the extent of his original line on the shore of the river." After giving the rule, he says further: "This mode of distribution secures to each riparian proprietor the benefit of continuing to hold to the river shore, whatever changes may take place in the condition of the river by accretion, and the rule is obviously founded in that principle of equity upon which the distribution is to be made." See also Gould, *Waters*, §§ 162-164, and cases cited; *Gray v. Deluce*, 5 Cush. 9; *Thornton v. Grant*, 10 R. I. 487, 14 Am. Rep. 701; *Kehr v. Snyder*, 114 Ill. 818, 55 Am. Rep. 866.

In this case the court, in effect, instructed the jury that, if this was accretion to plaintiffs' land on their river front, they were entitled to it, and declined to instruct that if the accretions began on defendant's land, and

extended north in front of plaintiffs' lands on the river, defendant was entitled to it, though its effect might be to cut off plaintiffs from their water boundary and rights. We think the circuit court was correct, under the facts of the case. Plaintiffs were the exclusive riparian proprietors, as to these accretions that formed on the east of their land, on the Missouri river, and were most clearly entitled to recover them. As was said in *Manchester v. Point Street Iron Works*, 13 R. I. 355, and approved in *Kehr v. Snyder*, 114 Ill. 818, 55 Am. Rep. 866, "one common principle, which pervades all modes of division [of accretion or alluvion], is that no regard is to be paid to the direction of the side lines between contiguous proprietors." "In all cases when practicable, every proprietor is entitled to a frontage of the same width on the new shore as on the old shore, and at low-water mark as well as at high-water mark, without regard to the side lines of the upland." Gould, *Waters*, § 162. Giving plaintiffs their original river front would necessarily secure them the land in suit.

We have examined the other assignments but find no substantial error, and the judgment is affirmed.

All concur.

PENNSYLVANIA SUPREME COURT.

RE Rachel A. BRAMBERRY'S ESTATE.

(October 2, 1893.)

APPEAL OF H. James BRAMBERRY.

(156 Pa. 628.)

1. A conveyance of land to a husband and wife in consummation of their joint purchase of it during coverture vests in them an estate by entireties.
2. A mortgage taken in the joint names of husband and wife on the sale of land held as tenants by the entirety is presumed to be held by the same estate.

APPEAL by H. James Bramberry, administrator of the estate of Rachel A. Bramberry, deceased, from a decree of the Orphans Court for Chester County dismissing exceptions to the report of an auditor surcharging him, in the settlement of his accounts as administrator, with one-half of the amount of a certain mortgage given jointly to himself and his wife, which he claimed as his individual property. *Reversed*.

The material portion of the auditor's report was as follows:

NOTE.—Tenancy by the entireties, in personal property.

The decision in the above case, that a mortgage taken in the joint names of husband and wife on the sale of land held as tenants by the entireties is presumed to be held by the same estate, is a very important one, considering the number of decisions which hold that this kind of tenancy is not abolished by the married women's statute. This is, we believe, substantially, if not entirely a pioneer decision. Although the opinion in the case states that a tenancy by the entireties may exist in personal as well as real property, this can be true only in a modified sense, in the absence of statutes abolishing the common-law disabilities of married women. The power of the husband at common law to reduce to his possession all choses in action of the wife, and, in the case of securities taken in their joint names, to dispose of them and appropriate the proceeds, clearly prevented the existence at common law of a tenancy by the entireties in its true sense in personal property.

The case of *Gillan v. Dixon*, 65 Pa. 306, cited in the main case as authority for the doctrine that a tenancy by entireties may exist in personal prop-

erty, is one of a class of cases holding that choses in action owned by husband and wife jointly would survive to the wife on the husband's death, in case they were not reduced to his possession during his lifetime. But these cases do not restrict his right to cut off the wife's interest entirely by reducing the choses in action to his possession. Therefore, the joint interest of husband and wife is not, in the strict sense, a tenancy by the entireties.

In *Gillan v. Dixon*, *supra*, choses in action belonging to a daughter, which on her death passed to the father and mother jointly, were held to survive to the wife, where the husband died before administration and distribution of the daughter's estate, as in that case it was impossible for him to reduce them to possession during his life.

To the same effect it is held in *Frankenfield v. Gruver*, 7 Pa. 448, that personal estate passing to father and mother of an intestate survives to the mother, if not reduced to possession by the father during his life.

The same is true of a bequest to a husband and wife. *Hamm v. Melsenheiter*, 9 Watts, 349.

And a recognition in an orphans' court for the wife's share of land taken in the name of both husband and wife, survives to her, if not reduced into

"The exceptions to the account are merely formal, and state that the accountant has not charged himself with all the money that has come, or should have come, into his hands, but the chief contention is in relation to the supposed interest of the decedent in a certain bond and mortgage in the possession of the accountant, and the facts relating to them are as follows, viz.: Lewis Seal and Susan W., his wife, by deed dated March 28, A. D. 1865, conveyed certain premises therein mentioned to Henry James Bramberry and Rachel A., his wife, which said premises they conveyed to Dr. Benjamin Thompson by deed dated March 11, A. D. 1890, and recorded in the recorder's office of Chester county in Deed Book T 10, vol. 241, page 18, and secured on the said premises the sum of fifteen hundred dollars, by the bond and mortgage of the said Dr. Benjamin Thompson for that amount, dated March 28, A. D. 1890, drawn to H. James Bramberry and Rachel A., his wife, payable in five years at five per cent interest, payable half-yearly, the mortgage being found on record in the recorder's office aforesaid in Mortgage Book M 4, vol. 86, page 91, and was given to secure a part of the purchase money of the said premises. This mortgage is not yet due, and

a part only of it, with accrued interest, has been paid, and no part of either principal or interest is found in the administrator's account. The claim made by the party excepting is that one half of this sum, viz. seven hundred and fifty dollars, with one half of the interest thereof, belongs to the estate of the said decedent, and should be accounted for by her administrator. The position taken by the accountant is that as the land sold by Lewis Seal and wife was conveyed to the said Henry James Bramberry and Rachel A., his wife, they, under the provisions of the common law, fortified by a long line of decisions of our own courts, took an estate by entirety, and not by moieties, and that, in the event of the death of either of them in the lifetime of the other, the whole estate would immediately vest in the survivor; and when they sold this land to Dr. Thompson, and took a purchase-money mortgage to both of them as husband and wife, the same principle would follow the mortgage, and, when Rachel A. Bramberry died, her interest in the mortgage immediately vested in her surviving husband. If this position is the true one, then the accountant is right in not taking into his account one half of said bond and mortgage debt and its interest. But is

the husband's possession or disposed of by him. Lodge v. Hamilton, 2 Serg. & R. 498.

So notes taken in the name of both husband and wife go the survivor on the death of either. Shields v. Stillman, 48 Mo. 86; Abshire v. State, 53 Ind. 64.

In *Re Albrecht*, *infra*, it is said: "We are aware that there are many authorities holding that where the husband purchases a security, or makes a deposit, or subscribes for stock in the joint name of himself and wife, and pays therefor with his own funds, upon his death the entire security belongs to the wife, if she survives him. But the decision in all these cases is put upon the ground that it is apparent from the character of the transaction that the husband intended to give the property to his wife in the event of her survivorship, and hence the transfer possesses all the essential qualities of a gift *causa mortis* which he may revoke in his lifetime, and which does not take effect until his death, if not previously recalled." These cases evidently have no real bearing on the question of a tenancy by the entirety in such personal property.

In this class of cases also are *Sanford v. Sanford*, 45 N. Y. 723; *Craig v. Craig*, 3 Barb. Ch. 104, 5 L. ed. 835; *Johnson v. Lusk*, 6 Coldw. 113, 38 Am. Dec. 445; *Borst v. Spelman*, 4 N. Y. 288; *Roman Catholic Orphan Asylum v. Strain*, 2 Bradf. 84; *Re Brooks*, 5 Dem. 226; *Platt v. Grubb*, 1 N. Y. S. R. 484; *Draper v. Jackson*, 16 Mass. 498.

It is expressly stated in *Abshire v. State*, *supra*, that personal property is not subject to a tenancy by the entirety, and this statement as we have seen, must be regarded as correct, where the wife's common-law disabilities and the husband's control over her whole property exist. But under the modern statutes existing in most states, allowing a married woman to hold separate property, and in some states freeing her from all restrictions, a tenancy by the entirety might be possible. So that the decision in the main case may be more important than it would appear to be at first thought. It is conceivable that under these modern statutes the doctrine of tenancy by the entirety might be applied to personal as well as real property, but the few decisions really touching the question have not fully settled the law on the question.

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Surplus moneys arising out of a foreclosure sale of premises held as tenants by the entirety are regarded as real estate, subject to the same tenancy. *Germania Sav. Bank v. Jung*, 28 Abb. N. C. 81. But this decision is based expressly on the theory that such surplus proceeds are not to be regarded as personality.

In *Patton v. Rankin*, 66 Ind. 245, 34 Am. Rep. 254, a crop raised on land held by an estate in entirety is regarded the same as the land, so as not to be subject to a levy against the husband alone. But in these cases as well as in *Re Bramberry*, the main case the property held by this estate is connected with, and in some sense derived from, land thus held and there seems to be no case in which personal property, under modern statutes, has been held to be the subject of a tenancy by the entirety, where it did not in some way grow out of, or represent, real property held by that estate.

Tenancy by the entirety does not exist in a bond and mortgage executed to husband and wife for moneys, of which each individually contributed a part, but upon the death of either his or her share vests in his or her personal representatives. *Re Albrecht*, 18 L. R. A. 329, 136 N. Y. 91.

Under a statute providing that a wife shall have her separate property to the "same extent as before marriage," an investment by husband and wife in securities to which they contribute equal shares of the funds, taking their securities in their joint names, is held to belong to them equally and not to be subject to survivorship. *Wait v. Bovee*, 35 Mich. 425.

So, under the statute giving a wife her separate estate, an annuity charged on land in favor of husband and wife for their joint lives and to the survivor for life, does not give the husband the entire interest during the joint lives, but they take by moieties, and the husband, if he receives the whole annuity during his wife's lifetime, is a trustee of her portion. *Sloan v. Frothingham*, 72 Ala. 589.

Husband and wife may also be tenants in common of personal property. *Chambovet v. Cagney*, 3 Jones & S. 474; *Kaufman v. Schoffel*, 46 Hun, 571.

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this position the true one? and will the common-law doctrine governing estates by entireties of husband and wife apply to the case now on hand? There can be no doubt about the common-law principle relating to cases where land is conveyed to husband and wife, which declares that they take by entireties, *'per tout et non per my.'* See 2 Chitty, Bl. 147, 148. This principle, while repeatedly affirmed and reaffirmed by our supreme court, is very clearly stated in the late case of *Fleek v. Zillhaver*, 117 Pa. 213, and it is unnecessary to spend further time in the investigation of a principle so thoroughly established in our law. This principle, then, while it may be now, as it was before the passage of the Married Persons' Property Act of June 8, A. D. 1887 (Pub. Laws, 1887, p. 883), held to be indisputable, of which your auditor has serious doubts, still the principle or doctrine cannot, in the opinion of your auditor, be made to apply to the case in point. In this case the real estate held by husband and wife by entireties was by their joint and mutual action sold, and the realty was thereby converted into personalty, and after this conversion they invest \$1,600 of the proceeds of the sale in the same land, and secure their investment by bond and mortgage. By doing this they obtain a lien upon the land, but no interest in it. In *Craft v. Webster*, 4 Rawle, 255, the supreme court says: 'A mortgage in Pennsylvania is literally and legally now understood to be but a bare security for the payment of the money, or the performance of other acts therein mentioned;' and a number of cases are cited by the court in support of this doctrine. It is clear, then, that at this stage of the case the property is personalty, and not realty. Now, if the property is personal estate at this stage of the case, whose personal estate is it? Does it belong to the husband, to the wife, or to both together? The testimony of E. B. Speakman, who, being an interested witness, was called only to testify of matters occurring since the death of the decedent, said 'he [H. J. Bramberry] told me that it [the mortgage] was one half hers and one half his, and Mr. Bramberry stated that his opinion before he consulted counsel was that one half of the mortgage would go to his wife's estate.' Your auditor is convinced that one half of the money secured by the Dr. Thompson bond and mortgage was and is the separate personal property of the decedent.

"This fact being established, the next point to be considered is this: If husband and wife, each owning respective sums of money in their own right, place them together in one loan, and secure the same by bond and mortgage drawn to both of them, in which they are designated as husband and wife, will the adoption of this form of security carry with it the common-law principle of an estate by entireties in the whole sum invested, with the incident of survivorship, so that, in the event of the death of either before the mortgage is collected, the survivor will take the whole amount? The counsel for the accountant argues affirmatively, and cites in support of his position the case of *Donnelly's Estate*, 7 Pa. Co. Ct. Rep. 196; but

in that case there is no evidence of who was the owner of the money, and, in addition to that, the case was clogged with a special agreement which controlled it, and upon which it could not but be decided. That case, then, gives us no light, and your auditor is of the opinion that the investment in manner aforesaid would not deprive the estate of one half of the amount invested. This is not the case of a conveyance of land to husband and wife, nor the case of a devise of land to husband and wife, nor where personal estate is bequeathed to husband and wife, nor where realty or personalty falls to husband and wife under the provisions of the intestate laws of the state; but it is the case where a married woman possessing separate personal estate invests it upon real-estate security, and takes a bond and mortgage, drawn to her and her husband, who has invested a similar sum, and which is secured by the same mortgage. Why, in the event of her death before the mortgage matures, should her estate be swept away from her children, and the whole of it given to her surviving husband? If H. J. Bramberry and Rachel A. Bramberry had been brother and sister, then no one would for a moment suppose that the estate of either would lose anything in the event of the death of either before the collection of the debt. Then, if a different state of affairs exists in this case, it must be because they are husband and wife. Now, the Married Persons' Property Act of 1887 expressly says that hereafter marriage shall not be held to impose any disability on or incapacity in a married woman as to the acquisition, ownership, possession, control, use, or disposition of property of any kind, in any trade or business in which she may engage, or for necessities, and for the use, enjoyment, and improvement of her separate estate, real and personal, etc. This law, in the opinion of your auditor, controls the present case; and one half of the Dr. Thompson bond and mortgage being the separate personal estate of the said Rachel A. Bramberry, and the investment having been made since the passage of the Married Persons' Property Act of 1887, the money belongs to the estate of the said decedent, and must be accounted for by her administrator."

Mr. George B. Johnson, for appellant:

Husband and wife both hold real and personal estate which is in their joint names by entireties and not by moieties; and therefore, by right of survivorship, upon the death of either, the survivor takes the whole.

2 Bl. Com. 182; 2 Kent, Com. 182; *Stuckry v. Keefe*, 26 Pa. 401; *Gillan v. Dixon*, 65 Pa. 395; *Slaymaker v. Bank of Gettysburg*, 10 Pa. 373; *Donnelly's Estate*, 7 Pa. Co. Ct. Rep. 198.

The principle of tenancy by entireties in real estate and the right of survivorship between persons jointly possessed of any chattel interest, created by the common law (2 Bl. Com. pp. 182-183, 399), has always been recognized and applied, as an established rule of construction, to all grants of real estate or personal property, or titles to choses in action, vested in a husband or wife during coverture, in Pennsyl-

vania. No distinction seems to be made in this respect between personality and realty.

Lodge v. Hamilton, 2 Serg. & R. 493; *Slaymaker v. Bank of Gettysburg*, *supra*; *Frankenfield v. Gruver*, 7 Pa. 448; *Robb v. Beaver*, 8 Watts & S. 107; *French v. Mehan*, 56 Pa. 286; *Hamm v. Meisenhelter*, 9 Watts, 849; *Wintercast v. Smith*, 4 Rawle, 177; *Fink v. Hake*, 6 Watts, 132; *Fleck v. Zillhaber*, 117 Pa. 218.

A bond or judgment to husband or wife, or any other chose in action survives to husband and wife.

Gibson v. Todd, 1 Rawle, 452; *Carey's Estate*, 1 Chester (Pa.) 99; *Gillan v. Dixon*, *supra*; *Diver v. Diver*, 56 Pa. 107; *Holcomb v. People's Sav. Bank*, 92 Pa. 388; *Doe v. Parratt*, 5 T. R. 652; *McCurdy v. Canning*, 64 Pa. 40.

The doctrine of the right of survivorship as to personality has been recognized since the Act of June 3, 1887.

Homerger v. Whitley, 1 Pa. Dist. Rep. 809. Statutes similar to ours of June 3, 1887, have received the same construction in Arkansas.

Robinson v. Eagle, 29 Ark. 202.

In Mississippi.

McDuff v. Beauchamp, 50 Miss. 581; *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586, 97 Am. Dec. 425.

In Missouri.

Garner v. Jones, 52 Mo. 68; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

In Indiana.

Abshire v. State, 53 Ind. 64; *Anderson v. Tannehill*, 42 Ind. 141; *Hulet v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210.

In New Jersey.

Buttler v. Rosenblath, 42 N. J. Eq. 651, 59 Am. Rep. 52.

And in New York.

Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361.

The seisin of the entirety by each and the right of survivorship of the husband, could not be divested by a subsequent statute, as those rights vested by virtue of the grant, and not of the mere succession.

Zornitlein v. Bram, 100 N. Y. 12; *Harrer v. Wallner*, 80 Ill 197; *Stuckey v. Keefe*, 26 Pa. 397; *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; *Lefever v. Witmer*, 10 Pa. 506; *Mann's App.* 50 Pa. 875; *Stehman v. Huber*, 21 Pa. 260; *Bachman v. Ohristman*, 23 Pa. 162; *Peck v. Ward*, 18 Pa. 506.

There is nothing in the statute which seems intended to do away with any rules of construction applicable as such to common-law conveyances of realty or personality.

Slaymaker v. Bank of Gettysburg, 10 Pa. 873; *Re Hecht's Estate*, 43 Phila. Leg. Int. 187; *Weir's Estate*, 13 W. N. C. 518; *MacConnell v. Lindsay*, 131 Pa. 476; *Rank v. Rank*, 120 Pa. 191; *Trimble v. Reis*, 37 Pa. 448.

Messrs. Thomas W. Pierce and E. D. Bingham, for appellees:

The purpose of the mortgage was to secure the conversion of the wife's land into money, and it was no part of the transaction that the wife should give any of her property to her husband. That would require a distinct transaction, of which there is no evidence.

Trimble v. Reis, 37 Pa. 448; *McKinney v. Hamilton*, 51 Pa. 63; *Dexter v. Billings*, 110 22 L. R. A.

Pa. 135; *Holcomb v. People's Sav. Bank*, 92 Pa. 388.

McCullum, J., delivered the opinion of the court:

Assuming that the auditor's findings or deductions of facts were warranted by the evidence before him, we have a purchase by and a conveyance to husband and wife of seventeen acres of land, a payment by the wife from her separate estate of one half the purchase money, and a payment by the husband of the other half of it. The grantees held the land so purchased and conveyed twenty-five years, when they sold it, and took from their vendee his bond and mortgage to secure to them a portion of the purchase money. Ten days after this sale was consummated by a conveyance the wife died, and the question now presented for our determination is whether one half the sum so secured belongs to her estate, or her husband, as survivor, is the owner of the whole of it. The learned auditor's view, approved by the learned court below, was that, inasmuch as the wife's money was blended with the husband's in the purchase of the land, one half the proceeds arising from the sale of it belonged to her estate, although the obligation for such proceeds, like the conveyance of the land, was made to the husband and wife. It was also thought by the learned auditor that tenancy by entireties was abolished by the Act of June 3, 1887, relating to the property of married women and their control of it. A tenancy by entireties arises whenever an estate vests in two persons, they being, when it so vests, husband and wife. It may exist in personal as well as real property; in a chose in action as well as in a chose in possession. *Freem. Coten*, §§ 68, 69; *Gillan v. Dixon*, 65 Pa. 395. The common-law rule is that the words which, in a conveyance to unmarried persons, constitute a joint tenancy, will create, if the grantees are husband and wife, a tenancy by entireties. The tenancy established by a conveyance to husband and wife is not destroyed or affected by the Act of March 31, 1812, which abolished survivorship among joint tenants nor does the rule referred to yield to an express provision in the deed that the grantees shall hold the estate granted as tenants in common. *Stuckey v. Keefe*, 26 Pa. 397. It has been contended, and in some jurisdictions held, that the legislation which secures to the wife the enjoyment of her separate estate is destructive of the legal unity of husband and wife on which tenancies by entireties depend, but the better view is that such tenancies are not destroyed or impaired by it. 9 Am. & Eng. Encyclop. Law, p. 851, and cases cited. In *Diver v. Diver*, 56 Pa. 106, it was expressly decided that the Act of April 11, 1848, did not in any manner affect the creation and enjoyment of estates by entireties; and *Strong, J.*, in delivering the opinion of the court, said: "To hold it as operating upon the deed conveying land to a wife, making such deed assure a different estate from what it would have assured without the act, is to lose sight of the legislative purpose. Were we to do so it would become in many cases a means

of divesting her of her property, instead of an instrument of protection. In the present case, if it has converted the estate granted to Diver and his wife into a tenancy in common, it has taken from her her ownership and enjoyment of the entirety during her husband's life, and her right of survivorship to the whole. We hold, then, that no such effect is to be given to the Act of 1848, or any of its cognate acts. The legal unity of husband and wife still remains, and consequently Mrs. Diver, on the death of her husband, succeeded to the whole estate granted by the deed." We think this language in reference to the Act of 1848 and tenancy by entirety is applicable to the Act of June 8, 1887, and the case under consideration. The Act of 1887, like the Act of 1848, was "intended to protect the property of the wife from the dominion or control of the husband, but not to change the nature of her estate, or to destroy the legal unity of person which characterizes their relations to each other." *Gillan v. Dixon, supra*. Prima facie the conveyance of the land in 1865 to H. James Bramberry and Rachel A. Bramberry, they being at the time husband and wife, vested in them an estate by entirety; and when, on the sale of the land in 1890, they accepted from their vendee his bond and mortgage to secure to them a portion of the purchase money, they held the sum so secured, not as joint tenants or tenants in common, but as tenants by the entirety. Freem. Coten. § 68, and cases cited. If either had died before the land was sold, the survivor would have held it against any claim of the heirs or creditors of the decedent and no valid reason appears for applying a different rule to the chose in action taken by them in their joint names for a portion of the purchase money. There is certainly nothing on the record to indicate that the parties intended a division of the sum between them, or to repel the presumption arising from the form of the obligation given to secure it. These obligations

conform to the ownership established by the conveyance, and we may fairly conclude from them, in the absence of evidence to the contrary, that it was the purpose of the vendors to hold the purchase money as they held the land.

We cannot say that the auditor erred in finding that the husband and wife were joint purchasers of the land, and that the wife paid from her separate estate one half the sum or price they gave for it. This finding was based on the declarations of the surviving husband, and, in a contest between him and the heirs of the wife, he ought not to complain that what he said about the purchase was accepted by the auditor as true. The facts so found did not change the character or qualities of the estate granted; they merely showed that the husband and wife were jointly entitled to the land which was conveyed to them. If, as in *Trimble v. Reis*, 37 Pa. 448, and *Dexter v. Billings*, 110 Pa. 135, the wife alone was entitled to the land, or, as in *McKinney v. Hamilton*, 51 Pa. 63, the mortgage was for purchase money due on a sale by the wife of land she inherited from her father, a different question would be presented. But a conveyance of land to husband and wife in consummation of their joint purchase of it during coverture vests in them an estate by entirety; and when, on a sale of the land so held, they take in their joint names an obligation for the purchase money, the presumption is that they intend to hold the latter as they did the former. It follows from these views that the appellant, as survivor, is the owner of the fund secured by the bond and mortgage, and that it was error to surcharge him as administrator with one half thereof, and to award the same to the heirs of the decedent.

Decree reversed, at the cost of the appellees; and it is ordered that the record be remitted to the court below, with instructions to enter a decree in accordance with this opinion.

NORTH CAROLINA SUPREME COURT

Jesse R. STARNES

v.

J. R. HILL, *Appt.*

(112 N. C. 1.)

*1. A limitation to M. J. P. for and during the term of her natural life, and in the event that R. O. P. shall outlive her, then to him for and during the term of his natural life, and, after the termination of the said life estates, then to the heirs of R. O. P. *Held*,

*Headnotes by SHEPHERD, Ch. J.

that R. O. P. takes a contingent remainder, and that until the happening of the contingency the rule in *Shelley's Case* cannot operate so as to vest in him an indefeasible fee.

2. That, should R. O. P. fail to survive M. J. P., his heirs will take as purchasers,—no estate having vested in their ancestor; the word "heirs" being *descriptio personarum*.

3. The rule in *Shelley's Case* has not been abolished by section 5, chap. 43, of the Revised Code, and section 1329 of the present Code.

(March 7, 1893.)

NOTE.—As to the rule in *Shelley's Case*, which is discussed with so much learning in the above case, see also *Fowler v. Black* (Ill.) 11 L. R. A. 670, and note; *Vanollender v. Carpenter* (Ill.) 2 L. R. A. 455, and note; also *Re Browning's Petition* (R. L.) 8 L. R. A. 809.

As to what remainders are vested, see *Myers v. Adler* (D. C.) 1 L. R. A. 432, and note; *Culbreth v.* 22 L. R. A.

Smith (Md.) 1 L. R. A. 538, and note; *Bunting v. Speaks* (Kan.) 8 L. R. A. 680, and note; *Kansas City Land Co. v. Hill* (Tenn.) 5 L. R. A. 45; *Hills v. Barnard* (Mass.) 9 L. R. A. 211, and note; *Ebby v. Adams* (Ill.) 10 L. R. A. 163; *Schuyler v. Hanna* (Neb.) 11 L. R. A. 321; *Gindrat v. Western Railway of Alabama* (Ala.) 19 L. R. A. 839; *Saxton v. Webber* (Wia.) 20 L. R. A. 509.

APPEAL by defendant from a judgment of the Superior Court for Buncombe County in favor of plaintiff in an action brought to compel specific performance of a contract to purchase real estate. *Reversed.*

The action was presented to the court upon an agreed case in which it was stated: that "the question intended to be presented by this case agreed is whether C. A. Moore, trustee, and Robert C. Patterson and wife, Madara J. Patterson, had the power, under the deed of William A. Holland and wife, Mira McD. Holland, of date the 2d day of April, 1875, to pass the fee simple in the land in question as they undertook to do by their deed of the 21st day of March, 1878. If they were able to pass the fee simple, and did pass it, by their said deed, or if the same passed by operation of law, then the plaintiff shall recover, and the defendant shall accept the plaintiff's deed, and pay the purchase money agreeably to said contract; otherwise, the defendant shall recover his costs, and be discharged from his obligation to purchase the land in question."

It was further agreed that the facts set forth in the pleadings were true. That C. A. Moore, Robert C. Patterson and his wife were all living, and that the Pattersons had several living children. That the fee simple to the land in question was in William A. Holland and wife at the date of their deed. That the R. O. Patterson mentioned in the deed was identical with Robert C. Patterson who contracted to sell the land in this case; and that Robert C. Patterson paid the purchase money to the Hollands in consideration of which their deed was made to C. A. Moore, trustee, *et al.*

The deed from William A. Holland and wife, the construction of which is the subject of this controversy, is as follows:

"This indenture, made this 2nd day of April, A. D., 1875, between Wm. A. Holland and wife, Mira McD. Holland, of the county of Buncombe, and state of North Carolina, of the first part, and C. A. Moore, trustee, of the second part, witnesseth, that whereas, on the — day of July, 1874, the said Wm. A. Holland and wife, Mira McD. Holland, bargained and sold to R. O. Patterson, for and in consideration of one thousand dollars (\$1,000) to them in hand paid on said last-named day, the lot hereinafter described, and, by writing under their hands and seals, agreed to convey to the said R. O. Patterson, by good and sufficient deed, the same; and whereas, the purchase money has been paid in full, and the said R. O. Patterson has directed that the deed be made to C. A. Moore, the party of the second part, for said lot, for the use and trusts and purposes hereinafter mentioned: Now, therefore, in consideration of the premises, and the further consideration of the sum of one dollar to said parties of the first part in hand paid by the said party of the second part, the said parties of the second part do hereby give, grant, bargain, sell, and convey, and by these presents have bargained, sold, and conveyed, unto the said party of the second part, and his heirs, forever, a certain lot in the town of Asheville, county of Buncombe,

and state of North Carolina, on the north side of Patton avenue, leading from the public square towards Smith's bridge, across the French Broad river; said lot containing about three and one third acres, and being the lot lately conveyed to the said Mira McD. Holland by C. M. McLoud,—beginning at a stake on said Patton avenue, within the limits of the town corporation, being the southwest corner of lot No. 1, and runs south, 73 west, 32 poles, to a stake; thence north, 17 west, 16 poles, to a stake; then north, 73 east, 34 poles, to a stake; then south, 17 east, to the beginning, 18 poles. To have and to hold to the said party of the second part and his heirs forever, in special trust and confidence, however, that the said C. A. Moore and his heirs will hold the same to the use of Madara J. Patterson for and during the time of her natural life, and, in the event that the said R. O. Patterson shall outlive his said wife, Madara J., that the said C. A. Moore and his heirs will then hold the same to the use of said R. O. Patterson for and during the term of his natural life, and, after the termination of the said life estates, that the said C. A. Moore and his heirs will then hold the same to the use of the heirs of the said R. O. Patterson, and them and their heirs forever. And the said William A. Holland and wife, Mira McD. Holland, for themselves and their heirs, do hereby covenant to and with the said C. A. Moore and his heirs that they are seised in fee simple of the said premises, and that they have right and full power to convey the same, and that the same is free from all incumbrances; and they do further covenant, for themselves and for their heirs, to and with the said C. A. Moore and his heirs, that they will warrant and defend the title to the said premises against the lawful claims of all persons whatsoever. In witness whereof, the said parties of the first part, and C. A. Moore, trustee, as aforesaid, have hereunto set their hands and seals this day and date above written.

"Wm. A. Holland. [Seal.]

"Mira McD. Holland. [Seal.]

"C. A. Moore. [Seal.]"

On the 21st of March, 1878, the above-described land was conveyed, for a valuable consideration, by C. A. Moore, trustee, and said Robert O. Patterson and wife, Madara J., to one F. E. A. Roberts, in fee; the deed containing the following covenant: "And the said Robert O. Patterson, for himself and his heirs, covenants to and with the said F. E. A. Roberts and his heirs that he and the said Madara J., his wife, and the said C. A. Moore, trustee, as aforesaid, are seised in fee of said lands, and have the right to convey the same; and the said Robert O. Patterson, for himself and his heirs, for the consideration aforesaid, unto the said F. E. A. Roberts, his heirs, will forever warrant and defend the title to the said lands against the claims and demands of all other persons whatsoever." It further appears that the plaintiff thereafter purchased the said land of the said Roberts, and on the 16th of October, 1891, entered into a contract with the defendant whereby the defendant contracted to purchase the same of the plaintiff for the sum

of \$20,000, executing his note to plaintiff for said sum, payable on the 18th of November, 1891. This action is brought by the plaintiff to compel specific performance of the contract, and the defendant resists the same on the ground that the plaintiff is unable to execute to him a title in fee to the premises, alleging in his answer "that the title to the land acquired by the plaintiff, and offered by the plaintiff to this defendant, is materially defective and imperfect, and that the plaintiff, on account of said defects, has no valid title whatsoever to said land, and cannot specifically perform his agreement to convey to this defendant said lot of land, by a good, perfect, and valid title, and that, therefore, the defendant ought not, in equity and good conscience be compelled to specifically perform his contract to purchase the land, and to pay said note for twenty thousand dollars, executed for the purchase money thereof."

Messrs. Gudger & Martin for appellant.
Mr. W. W. Jones for appellee.

Shepherd, Ch. J., delivered the opinion of the court:

It is well settled that "in limitations of a trust, either of a real or personal estate, . . . the construction of limitations ought to be made according to the construction of limitations of a legal estate, unless the intent of the testator or author of the trust plainly appears to the contrary." *Fearne, Remainders*, p. 125. As there is nothing in the deed from W. A. Holland and wife to C. A. Moore, trustee, from which we are at liberty to infer an intention that the terms therein employed were to be understood in any other than their technical sense, it must follow, in accordance with the foregoing principle, that the limitations under consideration must be determined by the rules of the common law applicable to limitations of a strictly legal character. Under the provisions of the deed, the said C. A. Moore was seised in fee to the use of Madara J. Patterson, during her natural life, and, in the event that R. O. Patterson should outlive the said Madara, his wife, then to the said R. O. Patterson, for and during the term of his natural life, and, after the determination of the said life estates, then "to the use of the heirs of said R. O. Patterson, and them and their heirs forever." The deed under which the plaintiff claims purports to convey a fee simple, and was executed by the said trustee and Madara J. and R. O. Patterson, all of whom, together with several children of the said Patterson and wife, are now living. We are called upon to define the interests of the various parties under the said limitations, and more especially to determine whether the parties to the deed just mentioned could convey an indefeasible fee in the premises. It is insisted by the plaintiff that R. O. Patterson took a vested remainder for life, and that, as the limitation over was to his heirs, he was, under the rule in *Shelley's Case*, seised of an absolute estate in fee simple. On the other hand, it is argued by the defendant that the life estate of the said Patterson was

contingent upon the event of his surviving his wife, and that until the happening of such event no interest vested in him which, under the said rule of law, could unite with the inheritance so as to destroy the remainder limited to his heirs, who would otherwise take as purchasers, if he failed to survive his said wife.

In support of the plaintiff's contention, we are referred to the principle laid down by *Mr. Fearne, supra* (page 217), in a passage which has often been quoted in text-books and judicial opinions, but seldom accompanied with the explanation of the learned author in its immediate connection. *Id.* pp. 216, 217. The language is as follows: "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." It is urged that inasmuch as the death of Madara J. is an event which must happen, and, as R. O. Patterson is a person *in esse*, the latter would have the capacity of taking the possession, should the preceding estate of the said Madara J. be presently determined by her death, and therefore, under the foregoing rule, his estate would be a vested remainder. Conceding what does not seem altogether free from doubt, that the rule is applicable to a limitation like the present, the fallacy of the argument may be found in the failure to observe that at common law the particular estate may be determined during the lifetime of its tenant, as by forfeiture or surrender (*Fearne, supra*, p. 217; *Tiedeman, Real Prop.* 401; 4 *Kent, Com.* 254), in which case it is entirely clear that the remainder to R. O. Patterson would be defeated, because the event upon the happening of which his interest was to vest, to wit, the survival of his wife, would not have transpired during the continuance of the particular estate (*Fearne, Remainders*, p. 217; 2 *Minor, Inst.* 170, 171); and it is common learning that the contingency must happen during the continuance of the particular estate, or *eo instante* it determines (2 *Bl. Com.* 168). If it be granted, for the purposes of this argument, that no merger or surrender can have the effect of destroying the particular estate in this instance, and if it be said that, under the modern system of tenures, such estate may no longer be forfeited, as in feudal times, the answer is that the rule which distinguishes a vested from a contingent remainder has for centuries been a rule of property of the common law, and "to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretense that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great landmarks of property, but would introduce a latitude of construction boundless in its range, and pernicious in its consequences." 4 *Kent, Com.* 231. "We have many laws," says *Mr. Fearne*, "the origin of which cannot at this distant period be traced at all, yet justly should we laugh at the man urg-

ing that as an argument against the present validity of such laws; and surely a law for which no reason at all now appears has no more original ground, in the present state of things, than a law whose origin may be traced up to a circumstance which does not now exist." Fearn, *supra*, p. 87. In *Perrin v. Blake*, 1 W. Bl. 672, and *note* i, 4 Burr. 2579, Judge Blackstone remarked: "There is hardly an ancient rule of property but what had in it more or less of feudal tincture." And, after instancing several, he observes "that, whatever their parentage was, they are now adopted by the common law of England, incorporated into its body, and so interwoven into its policy that no court of justice in this kingdom had either the power or [he trusted] the inclination to disturb them." In view of the fact that, except where changed by statute, the rule of the common law which we have been discussing is generally recognized and acted upon in all its rigor, regardless of the fact that some of its reasons no longer exist, there can be no serious doubt of the entire applicability of the language of the distinguished jurists from whom we have quoted.

We return to the rule as laid down by Fearn. This may be illustrated by a limitation to A. for life, and then to B. for life. Now, here B. may die before A., in which event he would never actually enjoy the possession; but during his life he has "a fixed right of future enjoyment" (4 Kent, Com. 203), which, upon the determination of A's estate, whether by death or otherwise, entitles him to the immediate possession, irrespective of the concurrence of any collateral contingency, and his remainder is therefore vested. In other words, the term "vested remainder" imports, *ex vi termini*, "a present title" in the remainderman. So that, if the limitation in the above illustration had been to B. and his heirs, the latter would have taken, although B. had died before A. In Gray, on Perpetuities, 68, the learned author thus distinguishes a vested from a contingent remainder: "A remainder is vested in A. when, throughout its continuance, A or A. and his heirs have the right to the immediate possession whenever and however the preceding estates determine; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estates; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estates." Fearn, *Remainders*, p. 217; 1 Cruise, Dig. 211; Tiedeman, *Real Prop.* 401; 2 Washb. *Real Prop.* 595. In accordance with these principles, Blackstone (vol. 2, p. 171) puts a case "on all fours" with the one before us, and declares the limitation to be a contingent remainder. "A remainder," he remarks, "may also be contingent where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain as where land is given to A. for life and, in case B. survives him, then with the remainder to B. in fee. Here B. is a certain person, but the remainder to him is a con-

tingent remainder, depending upon a dubious event,—the uncertainty of his surviving A. During the joint lives of A. and B., it is contingent; and if B. dies first it can never vest in his heirs, but is forever gone. But if A. dies first the remainder to B. becomes vested." 1 Cruise, *supra*, p. 205; Boone, *Real Prop.* 174; *Bamforth v. Bamforth*, 123 Mass. 282. It is true that the law favors the vesting of estates, and in many instances the courts have construed limitations to be conditions subsequent instead of conditions precedent. Thus, "on a devise to A. for life, remainder to his children, but, if any child dies in the lifetime of A., his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent." Gray, *supra*, p. 108. The distinction, says the same author, is that, "if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is contingent; but if, after the words giving a vested interest, a clause is added, divesting it, the remainder is vested." Several of the authorities cited by counsel fall within the latter branch of the proposition, and clearly have no bearing upon this case, as no ingenuity is equal to the task of construing the present limitation as one vesting a present interest subject to be divested upon a condition subsequent. It is plain that, if it vests at all, it must remain vested.

The cases cited from our Reports do not in the least impinge upon the principle we have stated. In *McNeely v. McNeely*, 82 N. C. 188, a testator, "after devising to his wife for life, gave all the lands that I have to my son Billy at the death of his mother, by him seeing to her." The court held that the words, "by him seeing to her," were not operative as a condition precedent, but were the mere expression of a wish that he should take care of his mother. It was therefore properly held to be a vested remainder. In *Brinson v. Wharton*, 45 N. C. 80, the decision was influenced entirely by the construction of the will. It was declared that the testator intended to give the property to his wife during her life, and then to his children, to be equally divided between them, with a proviso that, if his wife should marry, her particular estate in the whole should determine, and she would be entitled to a child's part. Under this construction it was, of course, held that the children took a present interest, to be enjoyed in the future,—that is, after the determination of the estate given to the wife,—subject only to the contingency of letting in the wife, as to one share, if the particular estate determined by her marriage. "This contingency," says the court, "not having happened, is out of the case; and it is the ordinary one of a gift to a widow for life, and then to the children, to be equally divided." We are unable to see how this case is authority for the position that a remainder limited upon a precedent condition can be vested until such a condition is fulfilled. In *Rives v. Whizzle*, 48 N. C. 237, the court simply decided that the words "after"

or "upon" the death of a person "do not make a contingency, but merely denote the commencement of a remainder in point of enjoyment." There could hardly be found in the language words which more aptly express a contingency than those used in the present case. In *Ellwood v. Plummer*, 78 N. C. 392, the land was devised in trust for "two of the testator's daughters during their natural lifetime, to be equally divided, and, after the death of either, in trust, in part, for her three grandchildren until the death of the other daughter, at which time said plantation is to be equally divided between said three grandchildren, of whom R. A. Plummer was one." The court said that "both the object of the gift, and the event of its full enjoyment, are certain, which makes a vested remainder." Here there was no condition precedent to the vesting of the remainder, and there was a present capacity to take effect upon the determination, in whatever manner, of the life estates. We cannot see how any of these decisions are in point. Neither do we find anything in the other cases to which we have been referred that can be regarded as authority against so well settled a principle of the common law as that which we have stated. In *Den v. Sherrerd*, 72 U. S. 5 Wall. 288, 18 L. ed. 580, cited for plaintiff it was said that "where an estate is granted to one for life, and to such of his children as should be living after his death, a present right to future possession vests at once in such as are living, subject to open and let in after-born children, and to be divested as to those who shall die without issue." Similar decisions were made by the supreme courts of Alabama and Illinois, and all of them have been severely criticised by eminent authority. Mr. Gray, *supra* (page 107, note 2), suggests that in these cases "an expression of opinion upon the point in question was not really necessary to a decision upon the merits. At any rate," he remarks, "it would seem that these decisions as well as those in Indiana and New York present an exceptional view of the common-law conception of a remainder in other jurisdictions." While the cases are not directly in point it may be well to add that their reasoning seems to be identical with the New York decisions based upon statutory definitions and in reliance upon *Chancellor Kent's* statement that the statutory definition expressed the common-law notion of a vested remainder. Mr. Gray (*supra*) further remarks that it is doubtful whether such legislation was intended to change the common law; but he says "the courts have decided, and it would seem correctly, that it has done so." This latter view seems to be the correct one (*Moore v. Little*, 41 N. Y. 66), and therefore destroys the force of decisions based upon or influenced by such statutory definitions and practically leaves nothing which seriously conflicts with the common-law principles which we have enunciated.

We are therefore of the opinion that R. O. Patterson took but a contingent remainder, and that until the happening of the contingency the rule in *Shelley's Case* could not operate so as to defeat the contingent re-

mainders of his heirs as purchasers. Granting, however, that the limitation could possibly be construed to vest in him a present interest, so as to put in operation the rule in *Shelley's Case*, still he would take but a defeasible estate as, under all of the authorities, his failure to survive his wife would operate (if we can venture to use such an expression in reference to such a limitation) as a condition subsequent, by which his estate would be divested in favor of the said heirs. So, treating the limitation either way, the plaintiff has not acquired such an absolute estate in fee as is necessary to enable him to comply with the terms of the contract which he seeks to enforce against the defendant. It may further be observed that the position that the warranty in the deed of the life tenant can defeat the remainder of the said heirs, by way of rebutter, is wholly untenable. Code, § 1334; *Moore v. Parker*, 34 N. C. 123.

We will now endeavor to ascertain the interests of the parties in the event that R. O. Patterson should survive his wife; and while, under the view we have taken, we might abstain from doing so, yet, as the answer denies that the plaintiff has any "valid title whatever to the land," and the parties may be left somewhat at sea in respect to their rights under the limitations in the deed, and a construction at this time may avoid future litigation, we have concluded to proceed further in the discussion, and pass upon the remaining questions presented in the record. We are all the more inclined to pursue this course because it involves the consideration of a question which was thoroughly argued by counsel, and the determination of which is of very great importance to the profession. The question is whether the rule in *Shelley's Case* still obtains in North Carolina. It is insisted that this ancient rule of law was abolished in 1854 by section 5, chap. 43, of the Revised Code, which provision was brought forward, and now constitutes section 1329 of the present Code. As the existence of the rule has for many years been unquestionably recognized in North Carolina as one of the "ligaments of property" (the only doubt upon the subject having been suggested by *dicta* of comparatively recent date), and under it many titles have vested, and been transferred, the question now presented is one of very great importance, and demands the most serious consideration of the court. Before attempting a construction of the provision referred to, it may be well to make some general observations upon the probable origin and policy of the rule, in order to ascertain, if we can, whether it be in accord with the general drift of enlightened jurisprudence in modern times, and more especially with the policy of our own laws. It is believed that such an inquiry may lend us valuable aid in our efforts to discharge the delicate and responsible duty of interpreting the legislative will.

The rule under consideration takes its name from an early case decided in the reign of Queen Elizabeth (*Shelley's Case*, 1 Coke, 94), though it was at that time considered as an ancient dogma of common law, and has been traced by *Justice Blackstone* to a case decided

in the reign of Edward II. The earliest intelligible decision upon the subject, however, is to be found in the *Case of the Provost of Beverly*, in the time of Edward III., and reported in the Year Books, in which the rule is substantially declared as in *Shelley's Case*. Various theories have been suggested as furnishing a reason for the rule in the first instance; some authors, with much plausibility, tracing it to the same principle which applied originally to "heirs" when used in a conveyance. "It was at first understood that in case of such a limitation the estate was in fact to go to the heirs of the grantee named; that, though he had a right to enjoy it during life, he had no right to cut off the descent by alienation; and that when, therefore the word 'heirs,' in the progress of estates, came to be regarded as a mere term of limitation, giving the grantee a complete ownership, with an unrestricted right of alienation, it was not easy to distinguish between a case where the limitation was to one and his heirs, and that where it was to him for life, and after his death to his heirs: the effect at common law being the same in both forms of limitation." 2 Washb. Real Prop. 647; Wms. Real Prop. 254. Nor does it seem that this result worked any particular hardship to the heir, as in those days ready money was extremely scarce, and the alienation of lands assumed the form of perpetual leases, granted in consideration of certain services or rents reserved to the grantor and his heirs: and, as such services or rents descended to the heir, it was not so great a disadvantage to him as at first might be supposed. Wms. Real Prop. 89. It is not to be doubted that this construction was aided and greatly strengthened by other considerations, such as the prevention of frauds upon the feudal lord and specialty creditors (2 Fearn, Remainders, chap. 12, § 8), the prevention of the inheritance from being, as was supposed, in abeyance (*Justice Blackstone's* argument in *Perrin v. Blake*, in Exchequer Chamber, 4 Burr, 2579); and to preserve the marked distinction between title by descent and purchase (*Hargrave, Law Tracts*). "But, whatever may have been the grounds of the rule in its origin, another reason subsequently existed as an inducement to the preservation of the rule from legislative abolition and judicial discouragement after the feudal reason had ceased with the feudal system itself; and that subsequent reason is the desire to facilitate alienation, by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease." 2 Fearn, Remainders, § 421. In *Perrin v. Blake*, *supra*, *Justice Blackstone* said: "Another foundation of the rule, probably, was laid in a principle diametrically opposite to the genius of feudal institutions, namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by vesting the inheritance in the ancestor." See also *Kawle's note*, Wms. Real Prop. 258. In *Polk v. Paris*, 80 Am. Dec. 400, *Reese, J.*, in a very able opinion in vindication of the rule, uses this language: "It is a rule or canon of property, which so far from being at war with the

genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing perhaps to this circumstance that the rule, a Gothic column found among the remains of feudality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system." In *Hileman v. Bouslaugh*, 53 Am. Dec. 474, the distinguished *Chief Justice Gibson* says: "Though of feudal origin, it is not a relic of barbarism, or a part of the rubbish of the dark ages," etc. It has other than feudal objects, to wit, the unfettering of estates, by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it otherwise would be.

That this result accords most thoroughly with the general tendency of juridical evolution is apparent from the progress of the law, and the gradual falling away of entails, and other restraints on alienation, from the times of Henry I. to the present. It seems clear that in a highly complex state of society, with greatly diversified industries, and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property; and that such has been the spirit of the legislation in this state is manifest from a perusal of the various statutes enacted upon the subject. We are not unaware of the fact that in some of the states the rule has been partially, if not wholly, abolished. Such legislation was probably influenced by the presumed lack of conformity with the supposed intention of the grantor or testator. But to this it has been answered that "when a case arises, fulfilling the requirements for the application of the rule, it is not against the intention of the testator. It is only applicable when the intention of the testator has been discovered by the ordinary canons of descent." 2 Fearn, Remainders, § 434. "The rule is not a means to discover the intention of the grantor or testator, but, supposing the intention ascertained, the rule controls it, so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than the more particular and prescribed, intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other, to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular, and apparently less important, design, of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose, of transmitting the inheritance in the manner indicated." 2 Minor, Inst. 395, cited with approval in *Leathers v. Gray*, 96 N. C. 548.

As the courts are astute in discovering the intention from the context of the conveyance, and readily give effect to every word from which such intention can reasonably and le-

gitimately be inferred, it does not often occur that the application of the rule has the effect of subverting the real intention of the grantor or testator. But, granting that it does, it is urged with great force that particular instances of hardship can better be endured than the uncertainty and confusion of titles resulting from sudden and radical changes in well-settled rules of property. In reference to this very question, *Chancellor Kent* remarks that "it is a question for experience to decide, whether the attainable advantages suggested by a change in the law will overbalance the inconvenience of increasing fetters upon alienation, and shaking confidence in law, by such an entire and complete renunciation of a settled rule of property, memorable for its antiquity, and for patient cultivation and discipline which it has received." 4 Kent, Com. 283. "Certain established maxims as to the legal import and effect of technical expressions will render the decisions of titles to property as little dependent as the nature of things will admit upon the occasional opinion, humor, ingenuity, or caprice of the judge, and are therefore the most proper and sure grounds for titles to rest and depend upon. Titles so founded may be easily and clearly ascertained and under them a permanent, peaceful enjoyment may be expected." 1 Fearn, Remainders, p. 171. It may be further observed that the rule in *Shelley's Case* is by no means the only principle of law which may thwart the intention of the grantor or testator in the interest of public policy, as, for instance, the intention cannot change the rule against perpetuities, nor impose a general restraint upon alienation. If the views of the eminent jurists and authors from whom we have so liberally quoted be sound, there is certainly no reason for looking upon the rule with disfavor; but, on the contrary, it is highly useful, and should be jealously guarded and preserved.

But, whatever may be the better policy (and this it is not our province to determine), its great antiquity and general prevalence, as well as its earnest indorsement by so many great lawyers of the present as of past centuries, should alone be sufficient to entitle it to a fair and patient hearing, when the question of its abolition arises upon the construction of a statute which, for the particular purpose for which it is now invoked, must be regarded as obscurely worded, and sufficiently ambiguous to admit of an entirely different application. This "ancient land-mark of the law" was, we believe, on a celebrated occasion, shown but slight respect by so great a judge as *Lord Mansfield*, but the controversy which immediately sprang up between his lordship and Mr. Fearn did not, it is said, result to the advantage of the former, and the rule was more firmly settled than ever in the jurisprudence of England. See *Campbell's Life of Mansfield*.

We will now attempt a construction of the act in question: "Any limitation by deed, will, or other writing, to the heirs of a living person shall be construed to be the children of such person, unless a contrary intention

appears by the deed or the will." Rev. Code, chap. 43, § 6; Code, § 1329. The word "limitation" has two well-known and distinct meanings. In the one, the primary meaning, it signifies a marking out the bounds or limits of the estate created; in the other, it signifies simply the creation of an estate (2 Fearn, Remainders, § 24), and it is evidently used in the secondary sense in the above act. It will appear hereafter that its framers had a very definite purpose in view; and it seems that, in effectuating this purpose, they endeavored to avoid any interference with the rule in *Shelley's Case*. This must be apparent, because the rule has nothing whatever to do with limitations to the heirs of a person unless there is a precedent limitation of a freehold estate to that person, and yet the act does not make the slightest reference to this essential element of the said rule. It is impossible to suppose that the gentlemen who prepared the Revised Code, and incorporated this section, should have been inattentive to this defect, if it had been their purpose to abrogate the rule. Their abilities and learning need no eulogy from us. They are a part of the heritage of the legal profession of this state, and of which it may be justly proud. And this is a point which may be very strongly insisted upon,—that, if these commissioners had intended to abolish the rule, they could have done it, and would have done it, in such a manner as to leave no doubt upon the subject. That there is a doubt is the most powerful reason for sustaining the rule. Acts abridging the common law must be strictly construed (1 Kent, Com. 464), "for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for, if the parliament had had that design, it is naturally said, they would have expressed it." *Potter's Dwar. Stat.* 185; *Brown v. Barry*, 8 U. S. 8 Dall. 865, 1 L. ed. 638; *Shaw v. Merchants Nat. Bank of St. Louis*, 101 U. S. 557, 25 L. ed. 892. The very important omission to which we have adverted is rendered still more significant when it is considered that in all of the statutes abolishing the rule, which we have been able to examine, there is an express reference to the precedent life estate given in the same conveyance in which there is a limitation to the heirs of the life tenant. This will strikingly appear from an examination of the statutes, of which we give the following as illustrations: The Virginia Code (1850) enacts that "when any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs, or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs, or the heirs of his body." In New York it is provided that "when a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who on the termination of the life

estate shall be the heirs of the body, or heirs of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them." 4 Kent, Com. 232. In Maine, New Hampshire, and several other states in which the rule has been abolished, the statutes, while differing in phraseology, all contain provisions substantially similar to those we have reproduced.

Another argument against the construction contended for is that in a large number of cases arising under the rule,—perhaps the majority,—the words of the act can have no operation. As an illustration of our meaning, take the case of a limitation to A. for life, and after his death to his heirs. A. never has any children, and consequently there are no heirs (of that sort) to be construed into children. It is plain that the case must be left as at common law; that is, A. will take a fee. In other words, the rule in *Shelley's Case* is applicable to every case where an estate is limited to one for life, with a remainder to the heirs of the first taker, whether the tenant for life has children or not; but the act, by its very terms, can only extend to those cases, if to any, in which the first taker has children. The alleged abrogation, therefore, is by no means coextensive with the rule as is the effect of the statutes to which we have referred. These statutes are framed so as to prevent any enlargement of the life estate, even if there be no children, and to confer a remainder upon such persons as shall, in any sense, be the heirs of the life tenant. Can it be inferred that such profound lawyers as our code commissioners would attempt to abolish such a well-known and firmly established principle of the common law by an act, the words of which they knew could reach only a few of the great number of cases under the rule, and especially when the words can find a much more direct and natural interpretation, as we will presently attempt to show? The inapplicability, however, of the words of the act to the rule under consideration, seems to us to be placed beyond question by the fact that they are equally applicable to ordinary limitations in fee simple; and we do not suppose that any one will seriously contend that the act abolished fee-simple estates generally. If an estate to A. for life, remainder to the heirs of A., he having living children, is converted into an estate for life in A., with a vested remainder in his children, by the words of an act, which says that, "in every limitation to the heirs of a living person the word 'heirs' shall be construed to mean, 'children,'" why, may it be asked, does not the same act convert an estate to A. and his heirs, he having living children, into an estate in common in A. and his children? Certainly a limitation to A. and his children, he having living children, will create a tenancy in common in A. and his children, and surely the commissioners did not intend any such startling result. Courts will restrain the literal meaning of a statute if its words would extend to cases not intended by the legislature. "*Scire leges, non hoc est verba eorum tenere sed vim ac potestatem*," and the reason and intention of the lawgiver will con-

trol the strict letter of the law, when the latter would lead to a palpable injustice, contradiction, and absurdity." 1 Kent, Com. 463; Potter, Dwarr. Stat. 209, note; *Brewer v. Blougher*, 39 U. S. 14 Pet. 178, 10 L. ed. 408; Lieber, Hermeneutics, 45. And here it may not be inappropriate to say that it seems to be the opinion of many of the ablest law-writers that the act does not necessarily abolish the rule. Thus, Mr. Washburn, in the fourth edition of his work on Real Property (vol. 2, p. 607), undertakes to give a list of the states with reference to the acts which have abolished the rule; and he does not include North Carolina, although he was familiar with our act as is shown by a reference to section 8, chap. 43, of the Revised Code. The same observation applies to Mr. Rawle, the learned editor of Williams on Real Property. He also gives a list of the states which have abolished the rule, without including North Carolina. The same may be said of Mr. Freeman, the very able and discriminating editor of the American Decisions, in a note to 30 Am. Dec. 415, and also of the editors of Jarman on Wills and Lawson's Rights and Remedies.

We will now attempt to give our construction of the act. It seems to us that its main object (and its phraseology nicely adapts it to the purpose) was to convert a contingent into a vested remainder, under certain circumstances. For instance, an estate to A. for life, remainder to the heirs of B.; B. living, and having children. Now, at common law, this created a contingent remainder in the heirs of B., for *nemo est heres viventis*; and, if A. died before B., the heirs or children of B. took nothing. Under the act in question the children of B. would take a vested remainder, and upon the death of A. would get the estate, whether B. was living or not. And it is singular that the only case which we have been able to find in our Reports, in which the court has adjudged the act to be applicable, was similar to this. In *Smith v. Brisson*, 90 N. C. 284, the limitation was as follows: "To Rowland Mercer, and the heirs of his body; and, if the said Rowland Mercer should have no heirs, the said land shall go to the heirs of my son James A. Mercer." Rowland Mercer died without ever having had children. James A. Mercer was living at the date of the deed, and had children at that time; and the court held that the Act (Code, § 1329) applied, and construed the deed as if the limitation over had read, "the said land shall go to the children of my son James A. Mercer." It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance, at common law, would have been void, unless there was something in the deed which indicated "that by 'the heirs' was meant the children of the person named." 8 Washb. Real Prop. 282. The act in question provides that in such a case the word "heirs" shall be construed to mean "children," and the limitation, therefore, would be good.

Our construction that the act does not affect the rule in *Shelley's Case* finds strong support

from its position in the Revised Code, which we are at liberty to consider under the maxim *noscitur a sociis*. Indeed, the whole structure of chapter 43 seems to have for its prime object the greater alienability of estates than existed at common law. Section 1 converts fee tails into fee-simple estates, and uses no ambiguous terms. Section 2 converts joint tenancy into tenancy in common. Section 3 makes certain contingent limitations vest much sooner than at common law; and then comes section 5, the provisions of which we have under consideration. This object was further advanced by the Act of 1879 (Code, § 1280), providing that "all conveyances shall be construed to be in fee simple, unless otherwise plainly expressed," showing plainly the legislative policy. The construction insisted upon by the defendant would, it seems, run counter to the general trend of our policy, which favors the early vesting of estates (*Hilliard v. Kearney*, 45 N. C. 221); and it would also place the act entirely out of harmony with its environment.

We do not regard it as serving any useful purpose to refer to the queries thrown out in various cases extending from *King v. Utley*, 85 N. C. 59, to the present time, because the point did not arise, and the question is expressly reserved, in all of them. It is often remarked that great legislative changes in the law are usually preceded by some decision of the courts, of a novel or striking character, calculated to arrest public attention; and we have made such investigation as we could with a view of discovering such a case as would probably cause the passage of the act. In this we have not been particularly successful. Certainly, we find nothing which indicates that courts, lawyers, or laymen were dissatisfied with *Shelley's Case*, or that the question was particularly interesting at that time. We do find a case or two in which the court applied the rule, but there is nothing unusual to distinguish them from the thousands of similar cases decided within the last four or five hundred years. It is possible, however, that the act grew out of the discussion arising upon the much-litigated case of *Ward v. Stow*, 17 N. C. 509, 27 Am. Dec. 288, which came several times before the court, and which seems to have established the proposition that in a legacy to the "heirs" of a person, which person the will itself recognizes as living, the word "heirs" is to be construed "children." While supported by authority, it seems rather arbitrary that the construction of the word

"heirs" in a will should depend upon whether the will recognizes the ancestor as living, and not upon the fact of his being alive. It is not unreasonable to suppose that the discussion in this case may have influenced the action of the commissioners; but, however this may be, we are entirely satisfied, from the language used, that it was not their purpose to work so great a change in the law governing the limitations of property. The importance of the question, involving, as it probably does, the validity of the titles to a large amount of real estate, has induced us to discuss the subject at a somewhat unusual length, and we are glad that our conception of the law is in harmony with the views so long entertained and acted upon by the profession.

The rule in *Shelley's Case* being still in force in North Carolina, its application to the present case will be as follows: If R. O. Patterson should survive his wife, he will take a vested, equitable freehold estate; and as the limitations apply to interests of the same quality, and the trusts are not executory (*Fearne, Remainders*, pp. 51, 55, 90; 2 Co. Litt. 145), the inheritance will, under the said rule, unite with the said estate, and he will then be seised of an indefeasible, equitable estate in fee simple. This estate will inure to the benefit of the plaintiff, by way of feeding the estoppel worked by the covenants of warranty in the deed of the said R. O. Patterson. *Bell v. Adams*, 81 N. C. 118; *Southerland v. Stout*, 68 N. C. 446; *Fortencus v. Satterthwaite*, 28 N. C. 566; 7 Am. & Eng. Encyclop. Law, 9, 10, notes. Until the contingency happens, the "heirs" of R. O. Patterson have a contingent remainder in fee, expectant upon the determination of the life estate of Madara J., she surviving her said husband. In this event they will take, not under the said Patterson, but as purchasers; the word "heirs" being *descriptio personarum* only. We think his honor was correct in holding that the rule in *Shelley's Case* had not been abolished; but for the reasons given, we think he erred in holding that the defendant was compelled to accept the title offered by the plaintiff.

Error. Reversed.

Note. It may not be improper to say that since the preparation of this opinion the writer has been assured by *Ex-Justice* Rodman, the distinguished survivor of those connected with the supervision and publication of the Revised Code, that it was not the purpose of the commission to abolish the rule in *Shelley's Case*.

PENNSYLVANIA SUPREME COURT.

Michael O'TOOLE, *Appt.*,

PITTSBURGH & LAKE ERIE R. CO.

(158 Pa. 90.)

1. Negligence is the absence of care according to the circumstances.

2. A passenger upon a street-car approaching a railroad crossing which has stopped 75 feet away from the crossing and again started, is under no duty to be on the lookout to learn if the railroad track can be safely crossed and to jump off, if he discovers an approaching locomotive, especially where he is crippled.

(October 30, 1898.)

NOTE.—The above decision seems to be as novel as it is just. To hold a passenger liable for negligence in remaining on a public conveyance under 22 L. R. A.

the control of the carrier's servants or agents trusting to their management would surely require a strong case.

APPPEAL by plaintiff from a judgment of the Court of Common Pleas for Lawrence County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The material parts of the charge of the trial court were as follows:

Did Michael O'Toole contribute in any way to the injury that he received that morning? Being upon the car of the street railway company he would not be required to exercise the care that the law lays down as the rule with a person going along a highway coming to a railroad crossing,—he must stop and look and listen. There could be no reason for that rule under the circumstances in this particular case. A person in a street railway car going along the highway cannot know where a railroad crosses the line of the street railway. And if they did know where the railroad and the railway cross it would be impossible for them to stop and look and listen to comply with the rule that binds all other persons in going along public highways. They have no control of the carriage in which they are riding; they cannot control its movements; they cannot stop and look and listen unless at the will of the carrier company. So that that rule becomes meaningless when you apply it to passengers in a railway car, and it should not be applied to the plaintiff in this case.

If Michael O'Toole upon that street-car could have seen the engine, and did not undertake to see it, or did not exercise reasonable care for the purpose of ascertaining whether they could proceed across the street railway track in safety, then he would be guilty of contributory negligence. And that, I say to you, would be the rule applicable to him, for the reason that it is in evidence that he knew well the point at which this railway crosses the Pittsburgh & Lake Erie Railroad. And he has testified that he had gone backward and forward quite frequently as a passenger on the line of the street railway company, and that he knew the point at which they crossed the line of the Lake Erie Railroad. He tells you further he was looking at the safety gates that morning, that he was watching them. If he was looking at the safety gates that morning he knew where the railroad was. If he knew the point at which the safety gates were erected, he knew the purpose for which they were erected. If he looked at those safety gates for the purpose of ascertaining whether they could proceed safely across the line of the Pittsburgh & Lake Erie Railroad, then he could at the same time and with the same effort have looked up the track of the railroad to see whether or not an engine was approaching. And if at the time the car in which he was traveling stopped, it stopped at such a place that he could have looked up the railroad, and if by looking up the railroad at that time he could have learned whether this engine was or was not approaching, and could at that time have gotten off the car if he discovered an engine approaching, and did not do that, then he would be guilty of contributory negligence and could

not recover in this case. Whether he could have done that or could not have done that is a question for you. And the point where the street-car stopped is a question for you to determine from the evidence. If in considering this case, under all the testimony that has been offered, you conclude that Michael O'Toole in any way contributed to the accident—if his conduct in any way contributed to the receiving of the injury which he did receive, then he is guilty of contributory negligence. And a person who is guilty of contributory negligence in any degree cannot recover in a proceeding of this kind. If you conclude that he was guilty of contributing in any way to this accident, then you must find a verdict for the defendant.

These safety gates are erected for the protection of the traveling public. But the fact that the safety gates are erected does not affect in any way the responsibility or the liability of the railroad company in the operation of its railroad or in the management of its trains. These safety gates are erected, and it is customary to have them lowered when a train is passing in order that the public may have notice that a train is about to pass, and when the train has passed the gates are raised. Persons going along a public street or along a public road where there are safety gates have still incumbent upon them the duty imposed by law to stop and look and listen—to exercise ordinary care for their own safety and to ascertain by stopping, and looking and listening whether a train be approaching.

Even if the safety gates are not lowered, that does not relieve the person passing along the road from the obligation imposed upon him by the law to stop and look and listen for a train. He still has that obligation upon him; it is the duty, where there is an ordinance requiring safety gates, and safety gates have been erected, for the company to lower these gates at the approach of a train. If they fail to lower these gates they become liable to the penalty imposed by the ordinance, if there be such a penalty imposed. The failure to lower the safety gates does not of itself make the company negligent, so far as this case is concerned. The question of whether they were or were not lowered before this train came to the crossing is a question of fact for you. There is considerable testimony offered on that point and the testimony is conflicting, and it is for you to reconcile, if you can, and if you cannot reconcile it, then it is a question for you from the evidence in the case to conclude whether the safety gates were or were not lowered; and you come then to the credibility of the witnesses on that point. It is a question for you to say whom you will believe and whom you will not believe. But if you conclude that the gates were not lowered, that fact, of itself, is not sufficient to warrant you in finding a verdict for the plaintiff. Had the plaintiff been walking along the street, the fact that the gates were not lowered would not be an invitation to him to cross the railroad in violation of the rule of law, that he shall stop and look and listen when approach-

ing a railroad crossing. And that rule is not taken away because the plaintiff happened to be in a street-car at the time.

Mr. Oscar L. Jackson, for appellant:

When an individual is injured by the concurrent and contributory negligence of two parties, one of whom at the time is the common carrier of his person, both tortfeasors are liable to him jointly and severally, and the negligence of his common carrier cannot be imputed to him.

Dean v. Pennsylvania R. Co. 6 L. R. A. 143, 129 Pa. 514; *Bunting v. Hogsett*, 12 L. R. A. 268, 139 Pa. 363.

Messrs. L. T. Kurtz and D. B. Kurtz, for appellee:

Where the danger is known to the passenger of a common carrier and he can avoid it and does not, though not subject to imputed negligence of the carrier, he is guilty of personal or individual negligence in not avoiding the danger.

Dean v. Pennsylvania R. Co. 6 L. R. A. 143, 129 Pa. 514; *Crescent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367.

Where particular instructions on a given point are not asked for, the case will be reviewed upon the general effect of the charge and not upon sentences or paragraphs selected from it. If as a whole the charge was calculated to mislead, there is error in the record; if not, there is none.

Lahigh Valley R. Co. v. Brandtmaier, 118 Pa. 610; *Pennsylvania R. Co. v. Coon*, 111 Pa. 430; *Com. v. Zappe*, 153 Pa. 498; *Reese v. Reese*, 90 Pa. 89, 35 Am. Rep. 634; *Smith v. Meldren*, 107 Pa. 348; *Horton v. Chevington & B. Coal Co.* 2 Pennyp. 26.

Dean, J., delivered the opinion of the court:

The defendant operates a steam railroad running through the borough of New Castle. Its road crosses at grade South Mill street, diagonally. The New Castle Electric Street Railway has its rails longitudinally on the same street. Hence, the two tracks cross each other at grade on this street. There are guard gates at the crossing, under the control of the defendant, to be raised or lowered on the approach of a locomotive to the crossing. On the 14th of March, 1891, the plaintiff, a shoemaker by trade,—a cripple from birth, in both feet,—took a seat in the street-car to go north through the town. When the car came to a point about 75 feet from the crossing, a locomotive approached, going south-west; the watchman lowered the gates; the street-car stopped; the locomotive crossed; the watchman raised the gates; the car started, and, as it reached the railroad track, was struck by another locomotive, following the one that had passed. There is some conflict in the testimony as to whether the gate was wholly or partly closed at the moment of collision. A house obstructs the view of the track in the direction from which the locomotive came, except when quite near the point of crossing. The plaintiff, in the collision, was thrown out, and seriously injured. Under the instructions of the court, the verdict was for the defendant. There was some evidence on the part of defendant

that the collision was wholly the result of the negligence of the street-car company; that those in charge of the car disregarded the warning of the watchman and the lowering of the gate for the second locomotive to pass. But that the collision was the result of the negligence of one or other company, or of the concurring negligence of both, could not have been doubted, on the evidence. The learned judge of the court below, on the evidence, properly instructed the jury (1) that, if the collision was the result of negligence of both parties, each was answerable to plaintiff, and he could maintain his suit against either; (2) if the collision was the result, wholly, of the negligence of the street-car company, the defendant was not answerable. But the plaintiff, in his several assignments of error, complains of the instructions with reference to his duty as a passenger, under the circumstances here developed. The fifth and sixth assignments, in substance, embrace this alleged error. The court instructed the jury: "If Michael O'Toole, upon that street-car, could have seen the engine, and did not undertake to see it, or did not exercise reasonable care for the purpose of ascertaining whether they could proceed across the railway track in safety, then he would be guilty of contributory negligence; and if, by looking up the railroad at that time, he could have learned whether an engine was or was not approaching, and could at that time have gotten off the car if he discovered an engine approaching, and did not do that, then he would be guilty of contributory negligence, and could not recover." Then, further on, is this instruction: "But the fact that safety gates are erected does not in any way affect the responsibility or the liability of the railroad company in the operation of its railroad, or in the management of its trains. But, if you conclude that the gates were not lowered, that fact, of itself, is not sufficient to warrant you in finding a verdict for the plaintiff. Had the plaintiff been walking along the street, the fact that the gates were not lowered would not be an invitation to him to cross the railroad, in violation of the rule of law that he shall stop, look, and listen, when approaching a railroad crossing; and that rule is not taken away because the plaintiff happened to be in a street-car at the time."

Defendant's counsel argues that these are mere excerpts from the charge, and, standing alone, do not fairly present the instruction really given to the jury; that this can only be properly understood when read in connection with what preceded and followed. Certainly, the charge must be taken as a whole, to arrive at the correct meaning. We have carefully read it, in the light of the evidence, and are forced to the conclusion the tendency was to mislead the jury. We find no evidence which warranted such instruction. Negligence is the absence of care according to the circumstances. There was evidence here from which the jury might have found there was no negligence on part of defendant, and that the street-car company was negligent. They might have found the

defendant was negligent, and the street-car company was not. They might have found both were negligent. But a careful search for any evidence of negligence, under the circumstances, on part of plaintiff, has been fruitless. He was a passenger of the street-car company, which had contracted to carry him safely. He had a right to presume they would exercise the care required in this undertaking. When the car approached the crossing, it stopped. He was in no danger then, and had no reason to apprehend any. When it started, he had a right to believe it did so because the crossing was clear. Running a distance of about 75 feet, the collision occurred. In the very few seconds which were necessary to accomplish this distance, the court, in substance, instructs the jury that it was plaintiff's duty to be on the lookout to learn if the railroad track could be safely crossed, and if, by so doing, he could have seen the approaching locomotive, ordinary care required him to jump off. To impose such a duty upon a passenger, under these circumstances, is going much further than any court has yet gone. All experience has demonstrated that to get off a moving car is highly dangerous. Therefore, it is held that such an act is negligence *per se*, and the passenger, if thereby injured, except in very rare cases, is guilty of contributory negligence, and cannot recover. Hence, here, if the plaintiff had been on the lookout, and had seen the approaching locomotive, ordinary care did not require he should make a dangerous jump to escape a problematical collision. Admit he had some reason to apprehend danger if he remained in the car. At the worst, this was only, to him, a possible danger. A careful man, ignorant of the power of control of the engineer over the locomotive, or of the motorman over the electric car, and knowing nothing of the rules governing them in approaching the crossing, might very well think one or the other would stop before reaching it. He had no right or power to control or direct those in charge of either. He was warranted in assuming that they knew their business better than a shoemaker, and would, by proper care, avert the possible collision. Therefore, holding him rigidly to the rule of ordinary care, at best, he had a choice of perils: a choice to be exercised on the instant by a man crippled in both feet, and consequently a not very agile jumper. He had been put in this position by no act of his own, but by the negligence of one or other, or both, of the railroad companies. We fail to see any evidence of ab-

sence of ordinary care here, under these circumstances. The instruction, in substance that ordinary care required plaintiff to perform the duties of conductor and motorman; that, practically, he was to exercise the same care as if he had been driving his own horse,—"stop, look, and listen,"—was erroneous, and calculated to mislead the jury. It would have been but a step further, and a short step at that, to have directed the jury to inquire whether plaintiff had not been guilty of contributory negligence in taking passage on a street-car, which he knew, in its route, would cross a steam railroad at grade. The law imposes no such duty upon the traveler by public conveyances laid down in this charge. The cases of *Crescent Twp. v. Anderson*, 114 Pa. 648, 60 Am. Rep. 867, and *Dean v. Pennsylvania R. Co.*, 129 Pa. 514, 6 L. R. A. 148, cited and relied on by appellee as sustaining the instruction complained of, really recognized the opposite doctrine. Both are cases where the plaintiffs, when injured, were riding in private vehicles driven by another, and both were injured by the contributory negligence of the driver and a third party, the defendant. In both the decision was put on the ground that the negligence of the driver of the horse was apparent, and he was, to some extent, under the direction or control of the party injured. There was no attempt, by remonstrance or otherwise, by the party injured, to restrain the negligent driver. The negligence of the driver was not, in either case, imputed to an innocent plaintiff, but the latter was held to have participated in the negligence which caused the accident. *Carlisle v. Brisbane*, 118 Pa. 544, 57 Am. Rep. 488, is to the same effect; and the decision is expressly put on the ground that, although the conveyance was a private one, the injured party did not, to any degree, participate in the alleged negligence of the driver. The plaintiff here was a passenger in a public conveyance. He conformed to the rules of the company; kept his seat, relying on the vigilance and care of those in charge of the car, as his contract gave him the right to do. There was upon him no duty of moving the car with caution at dangerous crossings; no duty of watching for possible collisions, and jumping off in apprehension of them. Consequently the learned court below erred in its instructions embraced in plaintiff's fifth and sixth assignments of error.

The judgment is reversed, and venire facias de novo awarded.

WISCONSIN SUPREME COURT.

George KLEIN, *Reapt.*,
v.

N. P. VALERIUS *et al.*, *Appls.*

(.....Wis.....)

The jurisdiction of the supreme court

of Wisconsin under the constitution being appellate only, except in specified cases, a statute attempting to make it the duty of that court to examine and review the evidence preserved by bill of exceptions and give judgment according to the right of the case regardless of the decisions by the court below upon ques-

NOTE.—We believe the above decision to be the first on the question of the power of the legislature 22 L. R. A.

to authorize a review of the facts by the court of last resort, although the decision is analogous to

tions of fact as well as of law, is unconstitutional.

(January 30, 1894.)

APPEAL by defendants from a judgment of the Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover money loaned, and the price of chattels sold and delivered by plaintiff to defendants. *Affirmed.*

Statement by **Cassoday, J.:**

This action was commenced November 18, 1889. The complaint alleges, in effect, that the defendants have been partners since June 1, 1886, doing business at Watertown; that between June 17, 1886, and December 6, 1888, the defendants, at sundry and divers times, borrowed money of the plaintiff, and purchased horses and hay of him, which money was delivered by the plaintiff to the defendants, and which horses and hay were sold and delivered by the plaintiff to the defendants at their request, to the amount of \$2,377.03, and demands judgment for the same with costs; that a bill of particulars is annexed to said complaint, covering the time between the dates named, amounting to \$4,277.30, including \$2,000 cash loaned to the defendants June 17, 1886, \$300 cash loaned to the defendants June 28, 1886, and \$800 cash loaned to the defendants September 10, 1886. The defendants, answering the complaint, admitted the partnership of the defendants, and allege, in effect, that between September 20, 1886, and April 1, 1889, they borrowed of the plaintiff \$80, and bought of him one horse at the agreed price of \$125, and also bought of him 16,325 pounds of hay at the agreed price of \$8 per ton; but that long before the commencement of this action they repaid to the plaintiff the \$80 so borrowed, and also paid him in full for said horse and said hay; and otherwise deny each and every allegation contained in the complaint. The answer also alleged, by way of counterclaim, in effect, that between November 1, 1886, and April 1, 1889, the defendants, as such partners, sold and delivered to the plaintiff, at his request, several pieces of property mentioned, and paid to him, or for his benefit, and at his request, several items of cash, amounting in the aggregate to \$1,849.55. That no part thereof had been paid, except \$271.28, and prayed judgment for the balance of \$1,578.27, with a bill of particulars annexed to said answer. That thereupon the cause was referred to George Grimm, as sole referee, to hear, try, and determine this action, and of the issues therein. That said Grimm thereupon took the requisite oath, and, after hearing the witnesses, evidence, and proofs of the respective parties, and the arguments of their respective attorneys, pursuant to notice given, on June 11, 1892, the said referee made and filed his report, wherein he found as matters of fact, in effect: (1) That from May 1, 1885, to the

commencement of this action, the defendants were partners, doing business at Watertown. (2) That the moneys described and charged in the plaintiff's bill of particulars, to wit, June 17, 1886, cash loaned to defendants, \$2,000; June 28, 1886, cash loaned to defendants, \$300; and September 10, 1886, cash loaned to defendants, \$800,—were loaned by the plaintiff to the defendants, and were borrowed by the defendants of the plaintiff, with the mutual understanding that said sums should be repaid at the expiration of eight months. That the plaintiff so loaned to the defendants said money for the purpose of using the same in one certain exportation and importation of horses to be made by the defendants in the summer of 1886, with the mutual understanding that the same should be repaid at the end of the time necessary to complete such exportation and importation, which was fixed at eight months, and, in case said trip should be successful,—that is to say, profitable to the defendants,—then the plaintiff should receive a horse for the use of his money, and, if not successful, then he should receive nothing for its use. (3) That said trip was not successful, within the meaning placed upon that word by the parties, and that the defendants sustained a heavy loss, the amount of which the referee does not determine, as he deemed it immaterial. (4) That defendants were indebted to the plaintiff in the other sums set out in the plaintiff's bill of particulars, with the exception of the item under date of December 6, 1886, cash \$300, which he finds was paid by the defendants with the Farlow note of \$400, and the balance of \$100 charged by defendants against plaintiff; and with the exception of the last item on the plaintiff's bill of particulars, under date of December 6, 1886, one stallion, \$300, which he finds should be \$275, and which he further finds was paid by the defendants with the Wassow note of \$575, and the balance of \$300 charged to the plaintiff by the defendants, making the aggregate sum owing the plaintiff by the defendants \$3,677.30. (5) That the plaintiff is indebted to the defendants upon their counterclaim in the sum set out in their bill of particulars, to wit, the sum of \$1,849.55, and that the final balance due the plaintiff from the defendants upon said accounts is \$1,827.75. And as conclusions of law the referee found that the plaintiff is entitled to judgment against the defendants for the sum of \$1,827.75, with interest thereon from May 10, 1887, at the rate of 7 per cent per annum. That September 5, 1892, the plaintiff moved the court to confirm said report, and for judgment in favor of the plaintiff and against the defendants, in accordance with the findings therein; that at the same time the defendants moved the court to alter and modify said findings of fact and conclusions of law; and, after hearing of said motions respectively, and the arguments of counsel for the respective parties therein, and after duly considering the same, the court, on March 27, 1893, ordered,

those cited in the opinion in respect to trial by jury and the relation of law to equity jurisdiction, as well as to similar decisions of federal courts on those questions. The statute involved in the 22 L. R. A.

above case is noticeable in contrast with the legislation in other jurisdictions for the relief of overburdened courts of last resort.

adjudged, and decreed that said report of the referee be, and the same is, in all respects confirmed, and judgment for the plaintiff and against the defendants is thereby ordered in accordance with said report and findings, with proper costs and disbursements; and thereupon, and on the same day, judgment was entered in favor of the plaintiff and against the defendants for the sum of \$3,774.30, damages and costs. From that judgment the defendants bring this appeal.

Mr. Harlow Pease, for appellants:

In this state it is quite immaterial how the referee rules upon objections to testimony, or that he fails to rule thereon, so long as he takes the testimony.

Kinney v. Archer, 80 Wis. 201.

In disposing of the case, this court considers all proper testimony, and rejects that which is improper, and decides the case without reference to the rulings of the referee or court, or their omissions to rule, on objections to testimony.

Ibid.

Mr. L. B. Caswell, with **Mr. W. H. Rogers**, for respondent:

The transaction was a loan of money.

Shoemaker v. Hinz, 53 Wis. 116.

The transaction, as claimed by the defendants, was not a partnership. The plaintiff was to receive a fixed compensation for the use of his money, if anything.

2 Greenl. Ev. §§ 481, 482; *Pleasants v. Fant*, 89 U. S. 22 Wall. 116, 22 L. ed. 780; *Loomis v. Marshall*, 12 Conn. 79, 80 Am. Dec. 596; *LaFlez v. Burns*, 77 Wis. 588; *Rideburg v. Schmitt*, 71 Wis. 644; *Nicholaus v. Thielges*, 50 Wis. 491.

Cassoday, J., delivered the opinion of the court:

The plaintiff married the mother of the defendants in 1868, when the defendants were quite young. The boys both left home before they were sixteen years of age, and went to work for themselves. After they had accumulated a little money, and as early as 1884, the defendants, or one of them, went to Europe, bought some horses, shipped them to this country, and sold them. In the spring of 1885 they located at Watertown, and went into the business of buying and selling both imported and American horses, mostly for breeding purposes, but also on commission. The business of buying horses in Europe and shipping them to this country and selling them, by the defendants, appears to have been continued during the years 1886, 1887, and 1888. It is undisputed that the plaintiff from time to time let the defendants have money, to be used in such business. It would seem that some of the moneys so put in by the plaintiff were by way of a joint venture for a particular trip, whereby he was to have a certain share of the profits of the venture. It is conceded that the plaintiff let the defendants have, in June and September, 1886, the three items of cash mentioned in the findings, aggregating \$3,100, to be used by the defendants in buying horses in Europe, and shipping to this country and selling the same. The defendants contend

that the plaintiff so paid in the amount named in pursuance of an agreement or understanding that the defendants should put about \$6,000 in for the same trip; and that, if the trip should turn out to be successful, then the plaintiff should have his money back, and one horse as his share of the profits; but, in case the trip should turn out to be unsuccessful, and a loss should occur, then the plaintiff was to stand his share of the loss in proportion to the respective amounts of money invested in such venture, and that the same should be deducted from the amount so advanced, and the plaintiff only to be paid the balance. On the other hand, the plaintiff claims that the amount of money named was loaned by the plaintiff to the defendants; that, if the trip was successful, he was to receive one of the horses for the use of his money, but that the amount thereof was to be returned to him within eight months in any event, as found by the referee. The question for determination is, which of these two theories is correct? The evidence is voluminous and conflicting. The determination of the question presented necessarily depended upon the credibility of the respective witnesses. The plaintiff appears to be a German, who speaks the English language very imperfectly, if at all. It appears also to be conceded that the referee was a lawyer of ability, thoroughly conversant with both the German and English languages, and personally acquainted with the parties and their witnesses. He possessed opportunities for determining the credibility of the witnesses, and the proper weight to be given to their testimony, which, from the very nature of things, this court cannot have. After full and apparently very deliberate consideration, the referee's report was wholly confirmed by the trial court. A detailed discussion of the evidence would only incumber the reports without being of any benefit to any one. It is enough to say that after a very careful examination and consideration of the whole record we have all come to the conclusion that the findings of the referee are sustained by the evidence. Certainly we cannot say that there is such a clear preponderance of the evidence against the findings as would justify a reversal. It is suggested, however, that the recent amendment to section 9070, Rev. Stat., by section 3, chap. 242, Laws 1893, makes it the "duty" of this court to review "all questions of law or fact presented by the record upon such appeal or writ of error," and "to examine and review the evidence when the same is preserved by a bill of exceptions, and give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below, according to law and equity." This court has always sought to review "all questions of law or fact" properly presented for review by the record upon appeal or writ of error. It has, moreover, always sought "to examine and review the evidence when the same is preserved by a bill of exceptions," in a manner authorizing and calling for such examination and review, according to the established rules of "law and equity." Accordingly, this court has

never felt bound by the findings of the trial court regardless of the weight of evidence, in an equitable action, or an action tried by the court without a jury, or even the verdict of a jury in an equitable action upon a feigned issue, whenever the record has properly presented the question of such weight of evidence, "according to law and equity." It has been suggested that the portion of the statute quoted was intended to impose upon this court the duty of examining and reviewing all questions of law or fact presented by the record upon such appeal or writ of error, and giving judgment as a court of original jurisdiction, according to the right of the cause, regardless of the decision of the trial court upon questions of fact or law. Undoubtedly, within certain limits, the legislature have power to regulate the practice of this court; but it must be remembered that this court, as well as the legislature, gets its judicial power and jurisdiction directly from the constitution. That instrument declares that "the judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace." Section 2, art. 7. It, moreover, declares that "the supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed." Section 3, art. 7. The case at bar is not one of those otherwise provided for in the constitution, and hence is not within the exception mentioned. In fact, there are but very few cases which do come within that exception. The duties of this court are confined almost wholly to an exercise of its appellate jurisdiction. The constitution provides that "the right of trial by jury shall remain inviolate; and shall extend to all cases at law." Section 5, art. 1. This court has uniformly held that this language imports that such right must remain as it existed when the constitution was adopted. *Norval v. Rice*, 2 Wis. 22; *Gaston v. Babcock*, 6 Wis. 503; *Mead v. Walker*, 17 Wis. 190; *Connecticut Mut. L. Ins. Co. v. Cross*, 18 Wis. 109; *Orocker v. State*, 60 Wis. 555.

In *State v. Cameron*, 2 Pinney, 499, Stow, Ch. J., said: "The trial by jury, as it existed of old, is the trial by jury secured by our national and state constitutions. It is not granted by these instruments; it is more,—it is secured. It is no American invention. Our fathers brought it with them to this country more than two centuries ago, and by making it a part of the constitution they intended to perpetuate it for their posterity, and neither legislatures nor courts have any power to infringe even the least of its privileges." That language was quoted approvingly by Ryan, Ch. J., in *Re Eldred*, 46 Wis. 553, and it was again quoted in *Jackson v. State*, 81 Wis. 131. The writ of error mentioned in the act is to review the record properly made upon such a trial, and the constitution provides that in actions at law "writs of error shall never be prohibited by law." Section 21, art. 1. *State v. Ryan*, 70 Wis. 683.

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It has been held that the legislature cannot authorize appeals to this court in certain cases from orders of circuit judges at chambers. *Hubbell v. McCourt*, 44 Wis. 584. To the same effect, *State v. Brownell*, 80 Wis. 568.

In *Oatman v. Bond*, 15 Wis. 20, the writer of this opinion attempted to sustain the validity of a legislative enactment which authorized, in a certain class of equity cases, a compulsory reference to take testimony, and gave a jury trial as a matter of right, and in some respects changed the established rule of procedure, the effect of evidence and judgment in such cases, and provided that certain matters not incorporated in the bill of exceptions should be considered by this court the same as though they were so incorporated; but the court properly held the enactment to be a nullity. So a statute requiring every issue of fact in an action to foreclose a mortgage executed to a corporation to be submitted to a jury on demand of either party was held to be invalid. *Truman v. McCollum*, 20 Wis. 360.

In *Callanan v. Judd*, 23 Wis. 343, counsel sought to maintain the validity of a legislative enactment requiring foreclosure cases, unless otherwise stipulated by the parties, to be tried by a jury, and giving the verdict the same force and effect as in actions at common law, but the act was held to be invalid, for the reason that the determination of questions of fact in such cases must remain as at the time of the adoption of the constitution.

In *Deery v. McClintock*, 81 Wis. 195, it was held that under the provisions of our state constitution, cited, the legislature cannot take anything from the original or primary jurisdiction of equity, and give it to the law, or the reverse.

It may be added that much less can the legislature take anything from the original jurisdiction of the circuit courts and give the same to this court in cases in which it has only appellate jurisdiction. We must hold that, in so far as section 2, chapter 242, Laws 1893, has attempted to give this court original jurisdiction in cases in which, under the constitution, it only has appellate jurisdiction, the same is null and void. This leaves the statute on that subject essentially the same as it was in Rev. Stat., § 3070. Counsel contends that upon the findings of fact the referee and trial court improperly allowed interest upon the balance due the plaintiff upon the accounts between the parties. But the referee found, in effect, that the \$3,100 was loaned to the defendants with the mutual understanding between the parties, had in June, 1886, that the moneys so loaned "should be repaid at the expiration of eight months." It therefore became due at the end of the eight months, and would draw interest thereafter without any agreement. Besides, it appears from the defendants' bill of particulars that the amount was not very materially reduced by payments until long after the expiration of the eight months. We find no error in the record.

The judgment of the Circuit Court is affirmed.

WASHINGTON SUPREME COURT

A. H. PORTER, *Appt.*,

v.

F. M. TULL, *Reapt.*

(6 Wash. 408.)

A tenant of a portion of a building may recover back rent paid in advance in accordance with the lease upon the total destruction of the building by fire.

(May 24, 1888.)

APPEAL by plaintiff from a judgment of the Superior Court for Spokane County in favor of defendant in an action brought to recover back the unearned portion of an advanced payment for rent of buildings which were destroyed by fire. *Reversed.*

The facts are stated in the opinion.

Messrs. Nash & Nash, for appellant:

A lease of land with buildings thereon, made in the country, holds the tenant to the payment of rent notwithstanding destruction of the premises during the term, because the land is the principal and the buildings the mere incidents and not the main thing upon which the parties predicated their agreement for a lease. But a different construction must be placed upon leases made in the country from those made in the city.

Doe v. Burt, 1 T. R. 708; *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220.

In cities the building becomes the principal and the land the incident.

A destruction of the building reaches to the subject-matter of the lease, or the thing that

NOTE.—Rights and liabilities of tenant on destruction of leased building.

Right of possession of rooms.

A tenant of rooms in a building destroyed by fire has no right of possession in a building erected by the lessor on the same property, unless under some covenant in the lease. *Stockwell v. Hunter*, 11 Met. 448, 45 Am. Dec. 220; *Kerr v. Merchants Exchange Co.* 3 Edw. Ch. 315, 6 L. ed. 672.

And he cannot retain possession by roofing basement walls. *Winton v. Cornish*, 5 Ohio, 477.

Nor by moving another building on the lot. *Harrington v. Watson*, 11 Or. 143, 50 Am. Rep. 465.

And where the question was one of repair, it was held that the tenant of a room had no right to have a building replaced by the landlord in the absence of contract. *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47.

So a lease of a "message tenement and premises known as house No. 468 on —, in city of —," is construed not to include the ground, and the tenant has no interest in one rebuilt by lessor, especially where the lease required the tenant to rebuild in case of fire. *Schmidt v. Petit*, 1 McArthur. 179.

Possession of building.

A tenant of houses cannot recover in ejectment when such houses burned down and the landlord rebuilt but was under no obligation to rebuild. *Ainsley v. Rutter*, 1 T. R. 812, *note*.

But a lease of a building is not avoided by the destruction of the same under N. Y. Laws 1860, chap. 245, providing for a surrender, where no surrender is made and on rebuilding the tenant may retain possession. *Smith v. Kerr*, 108 N. Y. 31.

Continuance of rent for apartments and rooms.

The main case seems to be one of first impression as to the right of a tenant to recover back rent paid in advance for apartments, but somewhat similar decisions as to buildings were made in *Cross v. Sutton* and *Smith v. Farnworth*, *infra*, and in numerous cases it has been held that a lessee of apartments is not liable for rent after destruction of the building, without fault on his part. *Parker v. Gibbins*, 1 Q. B. 421, 1 Gale & D. 10, 5 Jur. 1088; *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 654; *Graves v. Berdan*, 29 Barb. 109, 25 N. Y. 498; *Shawmut Nat. Bank v. Boeton*, 118 Mass. 125; *Womack v. McQuarry*, 38 Ind. 103, 32 Am. Dec. 303; *Austin v. Field*, 7 Abb. Pr. N. S. 29; *Ainsworth v. Ritt*, 38 Cal. 89.

In *Chamberlain v. Godfrey*, 50 Ala. 530, and *Buerger v. Bond*, *infra*, it was held that the destruction of a building dissolves a tenancy as to a lease of a room, but this was not involved in the case.

Where the destruction was not irreparable, the

lease was not terminated. *Connecticut Mut. L. Ins. Co. v. United States*, 21 Ct. Cl. 196; *Smith v. McLean*, 123 Ill. 210.

And the tenant of first floor and basement is not released from rent by the destruction of the rest of a four-story building above his floor except the walls, where the landlord used diligence in restoring. *Nonotuck Silk Co. v. Shay*, 37 Ill. App. 542.

And a tenant of an apartment was not released where the landlord rebuilt in seven months under 11 Geo. II. chap. 12, authorizing landlord to recover satisfaction for lands held or occupied, as this means power to occupy as far as the landlord is concerned. *Ison v. Gorton*, 5 Bing. N. C. 501, 3 Arn. 39, 7 Scott. 537, 8 Jur. 653.

The lessee of one room has no interest in the building after its destruction by fire, and it is no eviction to re-enter by the landlord to rebuild. *Alexander v. Dorsey*, 12 Ga. 12, 56 Am. Dec. 448.

This action was on a note for rent. The defense was eviction, and judgment was for lessor. The court does not discuss the question of abatement, failure of consideration, which seems not to have been raised but simply puts the decision on the above ground, and no authority is cited except on the ground of right to re-enter.

The tenant of a room was held liable for rent under Ga. Rev. Code, § 2207, providing that the destruction of rented premises by fire shall not abate the rent. *Pope v. Garrard*, 39 Ga. 471.

And *Helburn v. Mofford*, 7 Bush, 169, holds that a tenant of an apartment was liable on his covenant to pay rent after destruction of the premises. The court does not discuss the distinction generally made as to rooms, but bases the decision on a dictum of *Redding v. Hall*, *infra*.

So *Marshall v. Schofield*, 47 L. T. N. S. 406, 81 Week. Rep. 134, holds that a lessee of a room with steam power is liable for rent although the building was burned. The tenant did not file a counterclaim against the plaintiff for failure to furnish power and the court did not discuss the question as to rooms.

A lessee of three rooms and a piece of land must surrender all on destruction of building by fire, else he will be liable on his covenant to pay rent "so long as I shall be permitted to occupy the premises." *Willard v. Tillman*, 19 Wend. 358.

Continuance of rent for building.

At common law a lessee of premises is liable on his covenant to pay rent notwithstanding the destruction of the leased building without fault of lessee, in the absence of stipulation exonerating him. *Philips v. Epp*, 9 Lanc. L. Rev. 197, 6 Kulp, 406; *Lanpner v. Glenn*, 37 Minn. 4; *Hallett v. Wylie*, 3 Johns. 44, 3 Am. Dec. 457; *Linn v. Ross*, 10 Ohio,

must be regarded as the consideration of the agreement to pay rent.

Coogan v. Parker, 22 S. C. N. S. 255, 16 Am. Rep. 674.

At common law it is held that if the leased property be destroyed by the act of God, so as to be incapable of any beneficial use or enjoyment to the tenant, the rent should be apportioned.

Rolle, Abr. 236; *Graves v. Berdan*, 26 N. Y. 498; *Whitaker v. Hawley*, 25 Kan. 675, 37 Am. Rep. 277; *Ainsworth v. Ritt*, 38 Cal. 89; *Womack v. McQuarry*, 28 Ind. 103, 92 Am. Dec. 306; *McMillan v. Solomon*, 42 Ala. 362, 94 Am. Dec. 654.

Where after destruction of buildings by fire the tenant of the property has endeavored to exert his title and dominion over the burned district, and has sought to keep the landlord off the premises, the leading case in *Winton v.*

Cornish, 5 Ohio, 477, holds that after the fire the tenant no longer has any legal interest in the soil.

See also *Kerr v. Merchants Exchange Co.* 8 Edw. Ch. 315, 6 L. ed. 672; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125; *Stockwell v. Hunter*, 11 Met. 456, 45 Am. Dec. 220.

When the use of the premises is entirely lost to the tenant and destroyed, it is reasonable that the rent should be abated, because the title to the rent is founded upon the presumption that the tenant can enjoy the demised premises during the term.

Comyn, Land. & T. 218; *Gilbert, Rents*, 182.

The doctrine that the tenant shall pay rent although the premises be destroyed during the term has no foundation in natural justice, and the reasons for its existence, if it ever had any, have disappeared with the changed conditions of society.

412, 36 Am. Dec. 96; *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552; *Stafford v. Staunton*, 38 Ga. 298; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Cowell v. Lumley*, 39 Cal. 151, 2 Am. Rep. 490; *Fowler v. Bott*, 6 Mass. 63; *Belfour v. Weston*, 1 T. B. 310; *Monk v. Cooper*, 1d. Raym. 1477, 2 Strange. 768; *Gibson v. Perry*, 29 Mo. 245; *Fowler v. Payne*, 49 Miss. 32; *Jemison v. McDaniel*, 25 Miss. 83; *Wagner v. White*, 4 Harr. & J. 565; *White v. Molyneux*, 2 Ga. 124; *Buerger v. Bond*, 26 Ark. 441; *Davis v. Smith*, 15 Mo. 464.

And the same was held in *Bigelow v. Callamore*, 5 Cush. 231; *Cook v. Anderson*, 35 Ala. 99; *Coogan v. Parker*, 28 S. C. N. S. 271, 16 Am. Rep. 659; *Diamond v. Harris*, 38 Tex. 684; *Fisher v. Milliken*, 8 Pa. 111, 49 Am. Dec. 497; *Redding v. Hall*, 1 Bibb, 598; *Proctor v. Keith*, 12 B. Mon. 253; *Harrison v. Murrell*, 5 T. B. Mon. 359; *Stow v. Russell*, 35 Ill. 18; and *Paradine v. Jones*, *Aleyn*, 27,—but was not the question involved in those cases.

And a tenant is liable on his covenant to pay rent where the building is destroyed by fire, although the lessor has obtained insurance money on the building. *Leeds v. Cheetham*, 18 Sim. 145; *Bussman v. Ganster*, 72 Pa. 285; *Lofft v. Dennis*, 1 El. & El. 474, 28 L. J. Q. B. 168, 5 Jur. N. S. 737; *Magaw v. Lambert*, 3 Pa. 444.

And a guarantor of lessee of lot with buildings is not released from payment of rent where the buildings are destroyed by fire, nor for past rent by surrender by lessee of lease in consideration of release by lessor of future rent, nor by lessor's obtaining full insurance and not rebuilding. *Kingsbury v. Westfall*, 61 N. Y. 356.

But *Brown v. Quilter*, 2 Ambl. 619, 2 Eden, 219, holds that the liability ceases in case the lessor obtains the insurance money; but in this case the landlord took possession.

The same doctrine was announced in *Magaw v. Lambert*, *supra*, to the effect if the landlord obtained insurance and took possession the lease would be at an end.

So where the lease required the landlord to rebuild or give the insurance to the lessee and the landlord retained the insurance and possession of the premises, the liability of the tenant ceased on the destruction of the building. *Boyer v. Dickson*, 7 Phila. 190.

And a tenant of building and contents is not liable for rent after the destruction of the building where he was required to insure for the benefit of the lessor, as this provision of the contract provides for the possibility of fire. *Whitaker v. Hawley*, 26 Kan. 675, 37 Am. Rep. 277.

And under N. J. Rev., 576, § 23, providing rent shall cease where building on leased premises is 22 L. R. A.

destroyed by fire without fault of lessee, and landlord fails to rebuild, a tenant is liable for rent where a barn was burned through his fault. *Dorr v. Harkness*, 49 N. J. L. 571, 60 Am. Rep. 654. See also *Ely v. Ely*, *infra*.

And a tenant is liable on his covenant to pay rent, on the destruction of the building by fire, although the lease may provide that he is not to repair in case of fire. *Hare v. Groves*, 3 Anstr. 687; *Holtzappel v. Baker*, 18 Ves. Jr. 118; *Beach v. Farish*, 4 Cal. 389.

Rent ceasing by terms of lease.

A tenant is not liable for rent after the destruction of the premises, where such a provision is made in the lease. *Patterson v. Ackerson*, 1 Edw. Ch. 93, 6 L. ed. 73; *Rich v. Smith*, 121 Mass. 323; *Buschman v. Wilson*, 29 Md. 553.

Or where such a clause is omitted from the lease by mistake. *Wood v. Hubbell*, 10 N. Y. 479; *Gates v. Green*, 4 Paige, 355, 3 L. ed. 468, 27 Am. Dec. 68.

And where some of the buildings burned, the tenant may have the rent apportioned, where such a provision was in the lease. *Allen v. Culver*, 3 Denio, 204; *Bennett v. Ireland*, El. Bl. & El. 323, 28 L. J. Q. B. 49, 4 Jur. N. S. 1104.

This may also be done under Louisiana Civ. Code, § 2067; *Penn v. Kearny*, 21 La. Ann. 21.

A lessee who gave a note for the privilege of surrendering a lease which provided for an abatement of the rent if the premises should be burned, is not entitled to an abatement for burning after the surrender, and before the note matured. *Brooks v. Cutter*, 119 Mass. 132.

A lease providing for a deduction in the rent in case of destruction by fire, is not a covenant to refund rent paid in advance. *Cross v. Button*, 4 Wis. 468.

So a tenant paying rent after the building has burned cannot recover it back where it is a voluntary payment and there is no claim of mistake. *Regan v. Baldwin*, 126 Mass. 435.

If the building is destroyed by fire before the term commences, the tenant is not liable for rent. *Wood v. Hubbell*, 5 Barb. 601.

And a landlord is liable to the tenant for repairs made by the tenant in advance on a contract to credit such repairs on the rent, where the premises are burned before the term. *Smith v. Farnworth*, 6 Hun, 598.

A lessee of warehouse with privilege of purchase cannot be compelled to take the property, where the building is destroyed before the expiration of the time for completion of the contract. *Powell v. Dayton*, 8 & G. R. Co. 12 Or. 438.

Rent ceasing by lease. *Philadelphia Trust, S. D. & Ins. Co. v. Furves*, *infra*.

Gates v. Green, 4 Paige, 355, 3 L. ed. 468, 27 Am. Dec. 68; *Sayward v. Carlson*, 1 Wash. 29.

Any estate less than a freehold is called by writers on real property a chattel interest in lands, and the tenant the quasi bailee of the remainderman or reversioner.

His interest has more of the characteristics of bailments than of a freehold estate in real property.

Tiedeman, Real Prop. § 171; Washb. Real Prop. § 435; 1 Cruise, Dig. 224.

Messrs. Jones, Belt & Quinn, for respondent:

The only case which we have been able to find in which a suit had been brought to recover back rent paid in advance, is the case of *Ward v. Bull*, 1 Fla. 271. In that case the rent was payable yearly in advance. The tenant paid the rent when due. Subsequently

the buildings were destroyed by fire. The landlord rebuilt them, and on the completion leased them to a third party, and refused to let the original lessees into possession. He sued to recover back a proportionate amount of the rent for so much of the term as run subsequent to the time when the landlord made the lease to the third party; and the court held that he was entitled to recover, not because the landlord had contracted to re-pay him anything, but because the landlord had been guilty of a wrong. But the court in that case would not listen to any claim for repayment of any part of the rent that accrued prior to the wrongful act of the landlord.

Dunbar, Ch. J., delivered the opinion of the court:

This is an action for the recovery of lease money paid in advance, according to the

Abatement of rent by surrender of premises.

A tenant not surrendering possession of the premises where the buildings are destroyed during the term, is liable on his covenant to pay rent. *Baker v. Holtzappel*, 4 Taunt. 45.

And is so liable under a parol lease. *Voluntine v. Godfrey*, 9 Vt. 186.

And a tenant is liable for reasonable rent for retaining possession some time after the fire, where the lease provided "rent shall cease on destruction by fire." *Wallace v. Coe*, 13 N. Y. S. R. 546.

And the liability for rent on an appeal bond pending suit for possession still continues, notwithstanding the destruction of the building by fire. *Davis v. Alden*, 2 Gray, 309.

And the tenant cannot recover back rent paid in advance where he does not surrender, although lessor covenants in case of fire to refund so much for the unexpired term. *Chamberlain v. Godfrey*, 50 Ala. 590.

Under Minn. Laws 1883, § 1, chap. 100, authorizing an abatement of rent, where buildings are destroyed, a surrender must be made. *Roach v. Peterson*, 47 Minn. 291.

So under Ohio Rev. Stat., § 4113, which is a similar statute. *Gay v. Davey*, 47 Ohio St. 396, 24 Ohio L. J. 819.

The same was held in *Boston Block Co. v. Buffington*, 39 Minn. 386, but was not the point involved in the case.

And this was held under The New York Act of 1890 authorizing a surrender but was not the question involved. *Danziger v. Falkenberg*, 46 N. Y. S. R. 341; *Pearson v. Gillotte*, 15 N. Y. S. R. 395.

And under this act the tenant should have a reasonable time to remove. *Zimmer v. Black*, 37 N. Y. S. R. 312; *Bassett v. Dean*, 84 Hun, 250.

And he is discharged from further rent on such surrender. *New York Real Estate & Bldg. Imp. Co. v. Motley*, 3 Misc. 232.

But keeping the goods for sale on the premises, under a new contract with the lessor, will not defeat a surrender made under this statute. *Kelly v. Partridge*, 4 Misc. 205.

And lessee is not liable for further rent even if he did not surrender, where the lessor fails to replace the leased building and the lease provides, "lessee may at his option terminate this lease and shall no longer be liable for rent thereunder," if lessor fails to rebuild the premises destroyed. *Philadelphia Trust, S. D. & Ins. Co. v. Purves (Pa.)* May 7, 1888.

And lessee holding over is not liable for rent after the building is destroyed, where the new case was void because not signed as required by 22 L. R. A.

law. Cheesebrough v. Pingree, 1 L. R. A. 529, 73 Mich. 438.

The liability of the tenant for rent ceases where landlord re-enters, rebuilds and leases to others, and the former tenant may recover back rent paid in advance. *Ward v. Bull*, 1 Fla. 311.

So if the landlord pulls down a party wall rendering the leased premises untenable, the lease will be avoided under La. Code, § 2367. *Coleman v. Haight*, 14 La. Ann. 570.

And re-entry by landlord, will suspend rent. *Hoever v. Fleming*, 91 Pa. 322.

But not if tenant retains possession with some goods during the time of rebuilding by landlord. *Townsend v. Hendrickson*, 5 W. N. C. 422.

Surrender. See *Williard v. Tillman*, 19 Wend. 356; *Smith v. Kerr*, 106 N. Y. 31. See also Statutes, *infra*.

Liability of tenant to rebuild.

A tenant is not liable to rebuild structures destroyed during the term without his fault, where the lease provides merely for a surrender of the said premises but makes no provision for repair. *Warner v. Hitchins*, 5 Barb. 666; *Maggort v. Hansbarger*, 8 Leigh, 536.

Or to deliver in the same condition wear and tear excepted. *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Miller v. Morris*, 56 Tex. 412, 40 Am. Rep. 814; *Levey v. Dycas*, 51 Miss. 501.

So under a similar lease having a clause "unavoidable casualty excepted." *Kelly v. Duffy (Pa.)* Oct. 31, 1887; *Howeth v. Anderson*, 25 Tex. 557, 78 Am. Dec. 538.

And the same is true even where there is a covenant to keep in repair and yield up the same in like condition but with an exception as to damages by the "elements" and the buildings are burned. *Van Wormer v. Crane*, 51 Mich. 393, 47 Am. Rep. 582.

And even where under a similar covenant the exception was only for "natural wear and tear and fire," and the building fell down from its own defective construction the tenant was not required to rebuild. *Hess v. Newcomer*, 7 Md. 325.

So it was held that a tenant will not have to rebuild on a covenant to repair and maintain, where the house had to be pulled down because it is condemned as dangerous in consequence of its inherent defects caused by rotting of foundations. *Lister v. Lane, C. A.* [1893] 2 Q. B. 212.

This is based on the doctrine that the age and condition of a house when the tenancy begins is to be considered in construing such covenants.

But the general rule is that a covenant to repair requires a lessee to rebuild in case the premises leased are destroyed or burned. *Bullock v. Dommett*, 6 T. R. 650; *Hoy v. Holt*, 91 Pa. 88, 36 Am. Rep.

terms of the lease. The respondent, F. M. Tull, the owner and lessor of the leased premises, rented and leased to A. H. Porter and C. F. Jackson certain rooms and portions of the building known as the "Tull Block" in the city of Spokane. The lessees paid the stipulated rent, according to the terms of the

lease, monthly, in advance, including the month of August, 1889. On the 4th day of August, 1889, the building was destroyed by fire, and Porter, for himself, and as the assignee of Jackson, brings this action to recover from Tull the money paid in advance for the remainder of the month of August, 1889. It

659; *David v. Ryan*, 47 Iowa, 642; *Compton v. Allen*, Styles, 182; *Poole v. Archer*, 2 Show. 401; *Earl of Chesterfield v. Duke of Bolton*, 3 Comyns Rep. 627.

And the same was held under a covenant "to repair and deliver up." *Nave v. Berry*, 23 Ala. 383.

And the same was held under a similar covenant where the house burned down, after the term, but before the tenant had surrendered. *Digby v. Atkinson*, 4 Campb. 275.

A lessee's covenant "to keep the buildings and fences in good repair, except natural wear and tear" binds him to rebuild in case of accidental destruction by fire or otherwise. *McIntosh v. Lown*, 49 Barb. 550.

So in a covenant to keep premises in repair and at the termination of the lease to return the said house in as good condition and repair "as it was in when the lease was made," even if the tenant is a corporation. *Abby v. Billups*, 35 Miss. 630, 73 Am. Dec. 143.

And the same was held under a similar covenant containing also the words "reasonable wear and tear excepted." *Phillips v. Stevens*, 16 Mass. 238.

So where the covenant was to keep a bridge in repair and it was destroyed by a flood or cyclone. *Brecknock & A. Canal Navigation v. Pritchard*, 6 T. R. 750; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 31 Fed. Rep. 440.

So where the lease required a tenant to rebuild and the lessee insured and collected the money when the building burned but failed to replace it. *Hayes v. Ferguson*, 15 Lea, 1, 54 Am. Rep. 393.

And under a covenant to "keep the premises in good and tenantable repair," and keep as long as he should think proper, the tenant must replace the premises if they are burned, and cannot escape liability by declining to keep. *Gregg v. Coates*, 23 Beav. 33, 2 Jur. N. S. 964; *Bohannon v. Lewis*, 3 T. B. Mon. 376; *Meyers v. Myrrell*, 57 Ga. 516.

And *Singleton v. Carroll*, 6 J. J. Marsh. 523, 23 Am. Dec. 95; *Pym v. Blackburn*, 3 Ves. Jr. 34, and *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369, state that a tenant is bound to rebuild under a covenant to repair, but this was not the point involved in these cases.

Where the covenant required the tenant to repair and he was sued for not replacing a house that was burned, a plea that the house was rebuilt was bad as it did not show that it was rebuilt by the tenant. *Walton v. Waterhouse*, 2 Saund. 420; *Walton v. Johnson*, 2 Keb. 535.

And *Rook v. Warth*, 1 Ves. Jr. 462, holds that a tenant for years subject to the law in regard to waste must rebuild in case the premises are destroyed unless by lightning or by act of God, but this was not the question involved.

But a tenant is not liable to the landlord in the absence of any covenant, where the building burned without any fault on the part of the tenant. *Wainscott v. Silvers*, 13 Ind. 497.

Liability of landlord on destruction of building.

Landlord is liable to the tenant for failure to rebuild burned premises on express covenant to rebuild. *Hadia v. Ott*, 2 Wash. Terr. 165.

And his executor is also liable. *Chamberlain v. Dunlop*, 126 N. Y. 45, affirming 8 N. Y. Supp. 123.

But under such a covenant he cannot be compelled to replace additions to the leased premises that the tenant built. *Loader v. Kemp*, 2 Car. & P. 575.

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And the lessor is liable for refusal to rebuild where a carriage house fell down from weight of snow thereon, and the lessor covenanted to make all necessary repair on the outside of the building. *Leavitt v. Fletcher*, 10 Allen, 112; *Crocker v. Hill*, 61 N. H. 345, 60 Am. Rep. 322.

And the lessor is liable to the tenant for damages caused by the destruction of the building caused by negligence of the lessor in an attempt to repair. *Butler v. Cushing*, 46 Hun, 521.

And after a lease was surrendered under New York Act 1860, the lessor requesting the lessee to remove the debris of the burned building is liable to him for the cost. *Fleischman v. Toplitz*, 134 N. Y. 349.

And under the Pennsylvania Act of April 11, 1854, §4, providing that dangerous walls shall be removed by the owner, a landlord is liable to contribute to the tenant for removing such a wall after the premises burned. *French v. Richards*, 6 Phila. 547.

But the lessor is not liable for not rebuilding where the tenant had covenanted to rebuild and repair. *Hartford & N. Y. S. B. Co. v. New York*, 12 Hun, 550.

Even if the lessor obtains insurance. *Ely v. Ely*, 80 Ill. 532.

And a lessor acquiescing in the destruction of his buildings by the city is not liable to the tenant as in case of an eviction. *Hitchcock v. Acon*, 118 Pa. 272.

And under La. Code, art. 2609, providing for an annulment of the lease in case the thing ceases to be fit for the purpose for which it is leased, the lessee is not entitled to indemnity for injury to his plantation amounting to destruction of crops by flood. *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. ed. 776.

Liability of landlord. See *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47.

Statutes.

In some states the statutes provide that a tenant may surrender the premises where the same has been destroyed without fault on his part, and the rent shall abate unless there is an express covenant to the contrary. *Cal. Civ. Code*, § 1942; *Conn. Stat.* 1888, § 2609; *Minn. Gen. Stat.* chap. 75, § 38c; *Miss. Code*, §§ 2497, 2498; *Mo. Rev. Stat.* 1899, § 2303; *N. C. Batt. Rev.* 1872, p. 554; *La. Civ. Code*, § 2676; *N. Y. Rev. Stat. Birdseye*, vol. 1, p. 326; *Laws* 1860, chap. 345, § 1; *Ohio Rev. Stat.* § 4113.

And some states provide that a destruction of leased premises by fire without fault of lessee abates the rent. *N. J. Rev.* 1877; *Va. Code* 1867, § 2455.

And some states also provide by statute that a tenant will not have to rebuild premises destroyed by fire without fault on his part, unless he has expressly covenanted to rebuild. *Cal. Civ. Code*, § 1941; *Dak. Code*, § 1114; *Ga. Code*, § 2284; *Ky. Gen. Stat.* 1888, chap. 63, § 23; *W. Va. Code* 1891, chap. 72, § 22; *Va. Code* 1867, § 2454.

And some provide that mills are to be rebuilt and cost apportioned by judicial proceedings. *Me. Rev. Stat.* 1883, chap. 57; *Mass. Rev. Stat.* 1867, p. 1096.

And in North Carolina a tenant cannot be compelled to contribute more than one half the cost of rebuilding. *N. C. Batt. Rev.* 1872, p. 554.

As to rights of tenant where property is taken in condemnation proceedings, see note to *Corrigan v. Chicago* (Ill.) 21 L. R. A. 213. L. T.

is contended by the appellant that the authorities in this country fully sustain the proposition that, when there is a total destruction of the subject-matter of the lease, the rent shall be apportioned, and the tenant is no longer liable on his covenant. This proposition is conceded by the respondent so far as it applies to rent that is due for periods subsequent to the term for which the rent is paid in advance, but he insists that a distinction must be made here, and that, inasmuch as the parties have contracted that the money must be paid in advance, it follows that they have apportioned the risk, or settled it between them; that the tenant assumes the risk of losing the rent for the time for which he has paid in advance, and the landlord assumes the risk of losing subsequent payment, besides the loss of his building. We are unable to discover any real foundation in logic, law, or justice for this distinction. The consideration for which the lessee pays a monthly rent in advance is not that he may be put in possession of the building for a day or two days or a week, but the real consideration is the use and possession of the building for a month. That is the valuable thing for which he contracts, and for which he parts with his money; and there is an implied contract on the part of the lessor to furnish him the use of the building for the time for which he pays for it. It cannot be presumed that, because a lessee pays in advance, he has in contemplation the fixing of a different degree of liability in case of the destruction of the leased premises by fire; neither is it so intended by the lessor. It is simply a prudential requirement on his part to secure the rent, and to protect himself against the chances of losing

it, and the inconvenience and trouble of collecting it. Conceding that the lessee is not liable for the destruction of the leased building for the remainder of the period for which the building was leased, there must be something more to warrant the presumption that the parties intended to establish a different degree of liability than the mere fact that the money was paid in advance. What difference can there be in principle, so far as fixing liability is concerned, whether the contract is to pay the rent monthly in advance or monthly at the end of the month? Great stress is placed by respondent on the idea that the parties have made a positive contract, and that they are bound by its terms. The contract in one instance is as positive and binding as in the other, and the liability to pay at the end of the month is as much fixed by such contract as the liability to pay in advance is fixed by the contract; and the same reasoning that would prevent the recovery of the money paid in advance would compel the payment of the money under the other contract at the end of the month after the destruction of the building. We are not cited to any adjudicated cases on this point. The reason probably is that no one has ever questioned the right of the lessee to recover money paid for that which he never received. We think the complaint states a good cause of action, and that the court erred in sustaining the demurrer.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer, and to proceed in accordance with this opinion.

Hoyt, Anders, and Scott, JJ., concur.

MINNESOTA SUPREME COURT.

Manford HORN, *Resp't.*,

v.

Theodore HANSEN, *App't.*

(.....Minn.....)

*1. **A unilateral promise or agreement, in writing, to pay for specified personal property, is binding if upon sufficient consideration; and, in a case not within the statute of frauds, the consideration may be shown by parol. But the writing may not be contradicted by oral evidence, though an issue may be raised in respect to the consideration, or the writing may, for other valid reason, be shown to be inoperative.**

2. **Where either of the parties to a suit is a stranger to the written agreement in controversy, and does not claim under one who is a party to it, the rule forbidding parol evidence to vary or contradict its terms does not apply. Otherwise when the question arises between those claiming under the original parties to it.**

*Headnotes by VANDERBURGH, J.

NOTE.—The effect of a wheat ticket like the one involved in the above case in respect to contradiction by oral evidence presents an interesting question, especially in view of the fact learned from counsel that this is a test case to decide the rights 22 L. R. A.

3. **A note or other instrument containing an express promise to pay money, without any time specified, is in law payable immediately, and interest runs from its date, while a promise to pay upon demand requires at least a judicial demand to set interest running.**

(December 20, 1893.)

APPEAL by defendant from a judgment of the District Court for Swift County in favor of plaintiff in an action brought to recover the amount alleged to be due upon a wheat ticket. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. T. F. Young and Foland & McCune, for appellant:

The rule of law that when parties reduce their contracts to writing their terms cannot be varied by parol only applies when the action is between the parties to the contract or their privies.

The plaintiff in this case is a stranger to the contract and is not even an assignee, but

of the parties in a large number of tickets. For the general rule as to contradicting a writing which states part of a contract only, see *note to Ferguson v. Rafferty* (Pa.) 6 L. R. A. 44.

obtained his title thereto by forcible process of law. The reason for the rule does not apply to strangers except perhaps in the case of negotiable instruments.

Abbott, Trial Ev. p. 7, § 16; Rice, Ev. p. 295, § 181; *Burns v. Thompson*, 91 Ind. 146; *Lovell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591; *Masteron v. Boyce*, 29 Hun, 456; *Husmann v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 Cal. 58; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222, 14 Am. Rep. 239; *Brown v. Thurber*, 77 N. Y. 618, 58 How. Pr. 95; *Van Eman v. Stanchfield*, 10 Minn. 255 (Gil. 197); *Sanborn v. Sturtevant*, 17 Minn. 200 (Gil. 174); *Barry v. Ransom*, 12 N. Y. 464; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388.

Volume 6, Gen. Dig. p. 772, § 1291, states the rule as follows: "The rule that parol evidence is inadmissible to contradict or vary a writing does not apply to controversies between persons not parties or privy to the writing or between parties to it and third persons.

Citing *Robinson v. Moseley*, 98 Ala. 70; *Bruce v. John L. Roper Lumber Co.* 87 Va. 381. See also Bishop, Cont. § 1824.

The wheat was delivered to Hansen by Sylte for storage. This ticket was issued and delivered to Sylte in pursuance of this parol agreement for the purpose of indicating the number of bushels of wheat so held by Hansen and does not contain all of the conditions of the actual agreement of the parties and is upon its face manifestly incomplete, and upon such an instrument the defendant had a right to introduce parol proof of the oral agreement even between the parties to it.

See *Healy v. Young*, 21 Minn. 389; *Alexander v. Thompson*, 42 Minn. 498; *Boynston Furnace Co. v. Clark*, Id. 385.

This instrument is incomplete for the further reasons: The court cannot say from an examination of the instrument that it is an agreement to pay currency for that wheat; no price is stated and no amount of money is mentioned though in the form used there is a blank space for each of these items, when that is agreed upon. Besides under this instrument it may be shown that currency was not meant at all.

Donley v. Tindall, 32 Tex. 43, 5 Am. Rep. 234.

Parties entering into an oral contract may employ written memoranda in aid of it; in which case, and in others wherein there are writings evidently not meant to be complete, the contract is oral, and as such is not prevented from being good by what is written.

Bishop, Cont. enlarged ed. § 168.

Mr. E. T. Young, for respondent:

This action is, "between the parties to the contract or their privies." Plaintiff has legally succeeded to Sylte's rights, occupies the position of an assignee, and is in privity to the party to whose rights he succeeds.

The rule appellant attempts to invoke, applies only where a contract comes in question, to which at least one of the parties to the action is neither a party nor a privy.

Clerihew v. West Side Bank, 50 Minn. 538.

The only thing lacking in this written con-

tract, to make it absolutely complete, is the omission of the price to be paid.

It is not claimed by either party that a price was expressly agreed upon. In such cases the law implies an understanding that the buyer shall pay what the article purchased is reasonably worth.

Benjamin, Sales, § 85; *Accebal v. Levy*, 10 Bing. 876; *Lovejoy v. Michels*, 18 L. R. A. 770, 88 Mich. 15; *Hillestad v. Hostetter*, 46 Minn. 894.

Where a contract is silent as to the time of performance the law conclusively presumes that it is to be performed within a reasonable time. And it is even held that oral evidence is not admissible to contradict this necessary legal inference, if the contract is in writing.

Liljengren Furniture & L. Co. v. Mead, 42 Minn. 420.

Any evidence to be admissible at all to add to or vary this contract would have to be consistent with the contract, and tend to aid and uphold it, and not evidence which if admitted would flatly contradict it.

Wemple v. Knopf, 15 Minn. 440 (Gil. 355), 2 Am. Rep. 147. See also *Kessler v. Smith*, 42 Minn. 494; *Thompson v. Libby*, 34 Minn. 374.

If this ticket is evidence of anything it is that the transaction was a sale.

Tarbell v. Farmers Mut. Elev. Co. 44 Minn. 471.

Vanderburgh, J., delivered the opinion of the court:

The controversy in this case arises over a so-called "wheat ticket" issued by defendant, and now owned by plaintiff. The plaintiff alleges that one Sylte, under whom he claims, sold and delivered to defendant 45 20-60 bushels of wheat, of the quality and amount designated on the ticket, on the day of the date thereof, and that he thereupon issued to Sylte the ticket, which is as follows: "Ex. A. No. 9,617. Date. Oct. 7, 1891. Theo. Hansen will pay to J. K. Sylte for forty-five 20-60 bushels, grade one N. wheat. Ole Saterbakken, Buyer." It is also alleged that the wheat, on that day, was worth 81 cents per bushel. Judgment is accordingly asked for the value of the wheat. The defendant, in his answer, admits issuing the ticket, and the delivery of the wheat described therein, at that date, but alleges that he did not purchase the wheat, but received the same to hold for plaintiff as a bailment. The defendant does not deny that the "ticket" was issued for that number of bushels of wheat left with him, or that it was connected with that transaction, or that it was the evidence of his liability therefor. Indeed, defendant admits and insists, in his argument, that it was given in part performance of the actual agreement. But he says that the writing does not contain all the agreement, and he claims the right, not only to supplement it by parol evidence of so much of the entire agreement as is not expressed in writing, but to contradict the terms of the writing, because it is informal, and not a complete agreement, and for that reason he is not bound by it. But we think the writing, on its face, is a valid unilateral promise or

agreement, if supported by a consideration, which may, of course, be shown by parol, since the agreement is not within the statute of frauds. The common-law rule permits this, and permits a contract to rest partly in writing and partly in parol, so that it may accordingly be proved by the writing and by parol. *Wright v. Weeks*, 25 N. Y. 158; *Cummings v. Dennett*, 26 Me. 397; *Arms v. Ashley*, 4 Pick. 74.

In this case the writing is silent as to the fact or time of the delivery of the wheat; and it might, therefore, be shown that the wheat therein referred to was actually delivered when the written promise was made, as admitted here, or at a subsequent day. In the latter case the writing would be construed as an offer or proposition good while it remained open; and if acted on, and the wheat delivered and accepted before it was withdrawn, the promise would thereupon become binding. 1 Story, Cont. § 572. But the written proposal or promise could not be contradicted by parol, though it might be shown that it was or was not accepted, or that the stipulated quantity of wheat was or was not in fact appropriated to the agreement. The general rule is that the omitted portions of a contract which does not appear to be complete may be proved by parol, but so much of the contract as is in writing must be proved by the writing. *Thomas v. Scutt*, 127 N. Y. 138. See Smith, Cont. *78; 1 Greenl. Ev. § 804.

It is true that in some instances an instrument purporting to be a contract, and actually signed by parties, may be shown not to be operative, for various reasons, or it may be controlled by an independent agreement not in writing. A conspicuous instance is the case of *Domestic Sewing Mach. Co. v. Anderson*, 23 Minn. 57. No reason appears in this case why the writing in question should not be operative according to its terms. It is not claimed to have been issued through fraud, mistake, or inadvertence. For aught that appears, it is the conclusion of the parties in respect to so much of the agreement as is in writing, viz. that part of it which defines the defendant's relation to the contract as that of purchaser, and not simply that of bailee.

The defendant's principal assignment of error relates to the ruling of the court rejecting his offer to show that, upon the date named in Exhibit A, said ticket was issued to the parties thereto for a portion of a larger quantity of wheat delivered, "and for the purpose of indicating that the said wheat was held by the said Hansen subject to the order of Sylte." So much of the offer was objected to as tending to contradict the writing, and the objection was sustained. The ruling extended no further. For reasons already stated, we think the court ruled correctly. It did not, however, preclude the defendant from introducing evidence in respect to other matters embraced in his general offer, or permissible under the rule above stated. The defendant, however, introduced no other evidence.

22 L. R. A.

The defendant raises no question as to the plaintiff's title to the wheat ticket, or the indebtedness represented thereby. And, there being no special agreement as to the price, the law will imply that the price to be paid was the fair market value of the wheat on the day of the delivery, being the date of the writing. He does not deny that plaintiff claims under, and has succeeded to the rights of, the original payee, Sylte. He stands in the shoes of the latter; and the rule therefore applies, that as between parties to a written agreement, or their privies, parol evidence cannot be received to contradict or vary its terms. Strangers to a contract are, of course, not bound by it, and the rule excluding extrinsic evidence in the construction of writings is inapplicable in such cases; and it is relaxed where either one of the parties between whom the question arises is a stranger to the written agreement, and does not claim under or through one who is a party to it. In such case the rule is binding upon neither. But it is manifestly inapplicable in this case. It was admitted at the trial that the market value of the wheat on the day of its delivery—the date of the writing—was 80 cents per bushel.

We think the court properly allowed interest from the date of the writing, the wheat having been already delivered. No date of payment is fixed in the writing. No credit is contemplated and it was due presently. Had there been simply a cash sale and delivery of the wheat, the amount due would have borne interest from the day of the delivery, and there is nothing in the writing qualifying such rule of liability. It is distinguished from a promise to pay upon demand, which requires a demand, at least a judicial demand, to set the interest running. This distinction is recognized by the authorities. The rule, summarily stated, is that a note or other instrument containing an express promise to pay money, without any time specified, is in law payable immediately, and interest runs from its date. *Farquhar v. Morris*, 7 T. R. 124; *Francis v. Castleman*, 4 Bibb, 282; *Rogers v. Colt*, 21 N. J. L. 19; *Purdy v. Philips*, 11 N. Y. 406, 1 Duer, 369; *Selleck v. French*, 1 Am. Lead Cas. 4th ed. 507.

Some authorities also distinguish between an express promise to pay money, and a mere acknowledgment of indebtedness, or an I. O. U. (*Gay v. Rooke*, 151 Mass. 115, 7 L. R. A. 392),—a point unnecessary to inquire into here.

Judgment affirmed.

Giffillan, Ch. J.:

I dissent. The ticket is not a contract. A contract not within the statute of frauds may be shown partly by writing, as letters, for instance, and partly by oral testimony; but in such case I do not think the writings, they not being a contract, exclude oral testimony of what the parties actually agreed on, though it may be contrary to what the writings, standing alone, might indicate, as to some of its terms.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

MANUFACTURERS' ACCIDENT INDEMNITY CO., *Plff. in Err.*,

v.

Susan E. DORGAN.

(58 Fed. Rep. 945.)

1. **The opinion of a witness on the question whether or not it was possible for a person if standing to have fallen in the position in which he was found, is not admissible.**
2. **The question whether or not a person could have rolled from a certain place where he was sitting to that where he was found in a stream is not one on which an opinion of a witness can be given.**
3. **A physician may give an opinion that the condition of the lungs of a person found dead in shallow water was what it would have been if he had fallen and been stunned in the water.**
4. **Error in refusing to strike out plaintiff's testimony is waived if defendant proceeds to introduce evidence.**
5. **Refusing to permit questions leading in form after similar ones have been answered is proper.**
6. **A physician cannot be asked whether or not in his judgment from testimony that he has heard an autopsy was such as to enable a physician to state the cause of death with any degree of certainty, but the question should recite the scope and character of the autopsy.**
7. **A physician who made an autopsy may state that there was no need of what was called an air or water test with the heart when the sufficiency of the autopsy is questioned.**
8. **On the issue whether or not a physician making an autopsy cut open the stomach he may state that he had been told that the deceased had been drinking on the day of his death as bearing on the scope of his investigations.**
9. **The insurer has the burden of showing breach of warranty in the application.**
10. **The burden of proof as to the manner and cause of death is upon the plaintiff in a suit upon an accident policy.**
11. **An anæmic murmur of the heart which indicates no structural defect but comes from mere debility or weakness is not a "bodily or mental infirmity" within the meaning of the provisions for life insurance.**
12. **The words "voluntary exposure," "unnecessary danger" and "hazardous adventure" within the meaning of an insurance policy do not include such exposure as is incident to the ordinary habits and customs of life, but refer to something beyond the ordinary such as wanton or gross carelessness.**
13. **Drowning is the moving sole and proximate cause of death resulting from falling into water, within the meaning of an insurance policy, although the fall may have been due to disease.**

14. **Accidental death by drowning is caused indirectly by disease within the meaning of an exception in an insurance policy against death caused directly or indirectly by disease if drowning ensues upon a fall into the water which is caused by disease.**

15. **A fainting spell produced by indigestion or lack of proper food, which is a mere temporary disturbance or enfeeblement is not a "disease and bodily infirmity" within the meaning of an insurance policy.**

16. **That the unconsciousness of a person during which drowning ensues was caused by a mere temporary affliction may be found by a jury where there is evidence that he was not suffering from disease but he was found drowned in shallow water.**

(November 6, 1893.)

ERROR to the Circuit Court of the United States for the Western District of Michigan, Southern Division, to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due under a policy of accident insurance. *Affirmed.*

Statement by Taft, Circuit Judge:

This was a writ of error brought to reverse a judgment of the United States circuit court for the western district of Michigan, southern division, in favor of Susan E. Dorgan, for \$5,200, on an accident insurance policy or a certificate of membership issued by the defendant company upon the life of Thomas Dorgan, husband of the plaintiff. By the terms of the policy, \$5,000 was payable to Susan E. Dorgan, the plaintiff below, "within ninety days after receipt of satisfactory proof to this company of the death of the above-named member, effected through external, violent, and accidental means, within the extent and meaning of this contract and the condition hereunto annexed, and such injuries alone shall have occasioned death within ninety days of the happening thereof."

The evidence tended to show the following facts:

Early in May, 1890, Thomas Dorgan, the insured, left his home in Kalamazoo, Mich., with three or four companions, on a fishing excursion to a place not many miles distant. The party took with them wine, whiskey, and beer, and provisions. They arrived at their destination in the afternoon, made a camp near the brook in which they intended to fish, slept on cots under a tent, and arose early the next morning, about 3 or 4 o'clock, to go fishing. They fished from that time until shortly before noon, when the members of the party came into camp for lunch. The weather was not very cold, and there was some sunshine in the middle of the day. Dorgan spoke of having some difficulty with his throat and chest before going out on the trip. He took something for breakfast. He

NOTE.—The question when disease is the cause of death within the meaning of a life insurance policy is well illustrated by the case in which the authorities on the subject seem to be very fully

presented. The case is of more than usual interest also for the decision on the question what constitutes a disease or bodily infirmity within the meaning of such a policy.

came in to lunch. The evidence does not disclose how much he ate, if anything. He went back to an island in the brook, where, shortly afterwards, he was seen playing a trout. Twenty minutes later he was discovered lying in the brook, with his face downward, and submerged in six inches of water, dead. The bank was about eighteen inches above the water, and there were in the water stones, egg-size and smaller, upon which he might have struck his head. There were two bruises on his forehead. There was some little froth of a yellowish color about his mouth, and his face was purple. His tongue was somewhat inflamed. An autopsy was held on the evening of the day following the death. The blood in the corpse at the autopsy was rather fluid, and had not coagulated. The brain, the heart, and other vital organs were found in a normal and healthy condition. The autopsy was performed by one physician in the presence of two others. Evidence was introduced by the defendant tending to show that the deceased had suffered from defective action of the heart in its aortic valve. The autopsy failed to reveal any such structural defect, but all the tests were not applied. The evidence as to the defective action of the heart was given by the physician who had examined the deceased during his lifetime, and who testified to a murmur accompanying the beat of the heart, which was said to reveal such structural defect, though he admitted such a murmur is sometimes present when the action of the heart is normal, but the beat and circulation are feeble. There was also some evidence tending to show that the deceased had suffered from dizziness caused by this defective action of the heart.

Section 8 of the certificate of policy provided "that the benefits under this certificate shall not extend to hernia, orchitis, nor to bodily injury of which there shall be no external and visible mark upon the body of the member; nor shall they extend to or cover accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of this certificate, or by blood poisoning, or by coming in contact with any poisonous substance, or by poison in any form, or by inhalation or otherwise of any form of chloride gas, nitrous oxide gas, or any other form of gas or gases of chloroform or ether, or by or in consequence of any surgical operation or medical or mechanical treatment, or by lockjaw, nor to any cause excepting where the injury is the sole cause of the disability or death. No claim shall be made under this certificate . . . where the death or injury may have happened in consequence . . . of voluntary exposure to unnecessary danger, hazard, or perilous adventure, . . . or where death or injury may have happened while the member was, or in consequence of his having been, under the influence of intoxicating drinks. . . . And that these benefits, shall not be held to extend to disappearances, nor to any cause of death or personal injury, unless the claimant under the certi-

ficate shall establish by direct and positive proof that the said death or personal injury was caused by external, violent and accidental means, clearly within the intent and scope of this policy, and was not the result of design, either on the part of the member or any other person."

In the application which Dorgan made for membership in the company (that is, for a policy), he used this language: "Inclosing \$5 for admission fee, I hereby apply for membership, to be based upon the following statement of facts, which I hereby warrant to be true. Certificate to be subject to all its conditions and provisions. . . . (18) I have never had, nor am subject to, fits, disorders of the brain, or any bodily or mental infirmity, except as herein stated. . . . (15) My habits of life are correct and temperate, and I understand that the certificate will not cover any accidental injury which may happen to me either while under the influence of intoxicating drinks (or any other narcotics), or in consequence of having been under the influence thereof. (16) I am aware that the insurance will not extend to hernia, orchitis, nor to any bodily injury of which there shall be no external and visible sign; nor to any bodily injury happening directly or indirectly in consequence of disease; nor to death or disability caused wholly or in part by bodily infirmities, or by disease, or by the taking of poison, or by any surgical operation or medical mechanical treatment; nor to any case except when the accidental injury shall be the proximate and sole cause of disability or death."

At the end of the application, Dorgan signed the following: "Declaration: I, Thomas Dorgan, being desirous of becoming a member of the Manufacturers' Accident Indemnity Company, do hereby warrant the above statements to be true; and I hereby agree that this declaration and warranty shall be the basis of the contract between me and the said company, and that the certificate hereby applied for is accepted subject to all the conditions, classifications, and provisions contained or referred to therein."

The company pleaded the general issue, and gave notice of the intention to prove, under that issue, that Dorgan was, at the time he made the application for the policy, subject to fainting spells or fits, disorders of the brain, heart disease, disease of the throat and chest, and that the statement to the contrary in paragraph 18 of his application above was false and untrue, rendering the policy void. The defendant also gave notice of the intention to prove that Dorgan did not die in consequence of any bodily injury in which there was any external and visible sign, but he died in consequence of disease, and that his death was not caused by any accident or accidental injury which was the proximate and sole cause of his death.

The jury, under charge of the court, returned a general and special verdicts. The special verdicts were as follows: "First. Was Thomas Dorgan afflicted with heart disease at the time he made his application for the insurance policy issued by the defendant company, and at the time the policy in evi-

dence in this suit was issued? Answer. No. Second. Was the death of Thomas Dorgan occasioned solely by accident, or was it occasioned or contributed to by disease or undue and imprudent exposure? Answer. Solely accidental. Third. Was Thomas Dorgan conscious at the time his body entered the waters of Spring brook, where he was found dead? And, if unconscious, was such unconsciousness occasioned by disease or undue and imprudent exposure? Answer. First, unconscious; second, occasioned by some temporary affliction, without undue and imprudent exposure."

Before Jackson and Taft, *Circuit Judges*, and Barr *District Judge*.

Messrs. Osborn & Mills, for plaintiff in error:

The question involved in the first assignment of error was not subject to the objection made to it and sustained by the court.

The information sought was not immaterial or irrelevant and the question called for an answer that would be the assertion of a fact, dependent perhaps in some measure upon opinion, but still competent.

Beatty v. Gilmore, 16 Pa. 463, 55 Am. Dec. 514; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708; *Com. v. Sturivant*, 117 Mass. 122, 19 Am. Rep. 401; *Patrick v. The J. Q. Adams*, 19 Mo. 73.

The evident purpose of the inquiry of the doctor was to prove, by the use of a hypothetical question, an allegation without first introducing in evidence facts from which such a state of affairs might legitimately have been found.

This was not permissible, for a hypothetical question should be based on what has been proved in the case; and there should be evidence before the jury in support of the hypothesis of such probative strength that the judge would be warranted in submitting such facts to the jury for their finding.

Nase v. Tucker, 70 Ind. 15; *Dexter v. Hall*, 82 U. S. 15 Wall. 9, 21 L. ed. 73; *Hathaway v. National L. Ins. Co.* 48 Vt. 336; 1 Greenl. Ev. 531, note D.

All the plaintiff's rights in this action arose under the certificate of insurance and under the contract as the parties thereto made it, and in the light of all the testimony the plaintiff was not entitled to recover.

Tennant v. Travelers Ins. Co. 31 Fed. Rep. 822; *Richardson v. Travelers Ins. Co.* 46 Fed. Rep. 848.

If Dorgan was intoxicated at all, or under the influence of liquor to such an extent as to cause him to fall into the creek and so be drowned, the plaintiff could not recover.

Any degree of intoxication greatly enhanced the liability to accident, and defendant had a right to contract against the assumption of such a risk, and did so.

Shader v. Railway Pass. Assur. Ins. Co. of Hartford, Conn. 3 Hun, 424; *Duran v. Standard L. & Acc. Ins. Co.* 18 L. R. A. 637, 63 Vt. 442; *Bayless v. Travelers Ins. Co. of Hartford*, 14 Blatchf. 143; *Macarobie v. Accident Ins. Co.* 28 Scot. L. Rep. 291.

Messrs. Irish & Knappen, for defendant in error:

2: L. R. A.

The surgeon who operated at the autopsy was properly asked: Q. Supposing a person to have fallen and been stunned in shallow water where he made very little struggle, state whether what you found to be the condition of the lungs would be what would be expected where a man came to his death in that manner.

Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708.

The theory of the plaintiff in the court below is that Dorgan fell and stunned himself, probably on some of the stones, before he rolled into the water, and, being unable to help himself, was drowned. If the accident occurred in this manner, it was the proximate cause of the injury.

Barry v. United States Mut. Acc. Assn. 23 Fed. Rep. 712; *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 839; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42; *Mallory v. Travellers Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 10.

If no permanent disease is shown to have been upon Dorgan, a mere temporary ailment would not have been a defense to the policy.

Brown v. Metropolitan L. Ins. Co. 65 Mich. 306.

Taft, Circuit Judge, delivered the opinion of the court:

There are twenty-five assignments of error. Of these, eleven relate to rulings upon evidence. The court refused to permit defendant to ask this question of a witness who found the body of the deceased in the water: "If he had been standing, in your judgment would it have been possible for him to have fallen in the water in the position in which you found him?" We think the objection to this question was properly sustained. It asked for an opinion of the witness on facts which it was quite possible for the witness to have detailed to the jury, so that the jury might have drawn its own inference. That there are cases where the judgment of a witness as to distance and other circumstances may be directly asked him is true, but such questions are not permissible when it is practicable to draw out with exactness the data upon which such judgment must be founded. *Parker v. Boston & H. S. B. Co.* 109 Mass. 499. It must be left somewhat to the trial court, and in the exercise of its discretion upon this question we do not think the court erred. The same objection was properly sustained to the question: "Had Mr. Dorgan rolled from the position that he was found sitting in at the point of the island to the right in the stream, what would the position of his body have been with reference to the position it was in when you found it?" This was to ask the witness the question whether, in his opinion, Dorgan might have rolled from the place where he was sitting to the place where he was found, and called for an inference which it was proper that the jury alone should draw.

On the other hand, the following question was properly allowed to be put to the physician who performed the autopsy: "Supposing a person to have fallen and been stunned in shallow water, where he made very little struggle, state whether what you found to be the condition of the lungs would

be what would be expected where a man came to his death in that manner." Answer: "I say, yes. It was precisely what we would have expected under all the circumstances. We all agreed to that." The witness was an expert, and it was proper to ask his judgment of the conditions which he found in the body of the deceased, and what they indicated as to the cause of death.

The fourth assignment of error was that the court erred in refusing to strike out the testimony of the plaintiff below when the plaintiff rested her case. This was equivalent to a motion to direct a verdict for the defendant on the plaintiff's evidence. It has been decided a number of times by the Supreme Court of the United States that if, after making such a motion, the defendant introduces evidence, he waives any error which the court may have made in not sustaining the motion. *Accident Ins. Co. of N. A. v. Orandal*, 120 U. S. 527, 30 L. ed. 740; *North-ern Pac. R. Co. v. Mares*, 123 U. S. 710, 31 L. ed. 296; *Union Ins. Co. of Philadelphia v. Smith*, 124 U. S. 405, 31 L. ed. 497.

The sixth and seventh assignments of error are based on the refusal of the court to permit questions which had been previously answered, and which were leading in form. We fully approve the action of the court in refusing to allow these questions to be put after a similar one had been once answered. The practice of counsel in repeating the question for the purpose of emphasizing the answer with the jury is not to be encouraged.

The eighth assignment of error is based on the action of the court in refusing to allow the following question: "You have heard the testimony in this case about the autopsy? Answer. I have. Question. In your judgment, from that testimony, doctor, would you say that the autopsy was such as to enable a physician to state with any degree of certainty the cause of the death of Mr. Dorgan?" This question was clearly incompetent, because it asked the witness, who was a physician, to make his own inference as to what the evidence of the other witness tended to show, and then, upon such inference, to give his opinion. To properly elicit his opinion as to the character of the autopsy, and its usefulness in showing the cause of the death, counsel should have stated the scope and character of the autopsy as he understood it, so that the jury, in weighing the answer of the witness, could know exactly upon what facts it was based. The difference between this question and the one put to the physician performing the autopsy is that here the witness was asked to weigh other men's evidence, a function peculiarly belonging to the jury, while there the witness was asked an expert opinion of bodily conditions which he saw with his own eyes. Had the physician whose judgment of the autopsy was asked been present at the autopsy, a question calling for his opinion as to its evidential weight in determining the cause of death would have been a proper one.

The ninth and tenth assignments of error are based on the ruling of the court allowing the physician who made the autopsy to answer the question whether there was any oc-

casional for making what was called an air or water test with the heart of the deceased. He stated that there was no need of such a test. We think that this was competent, because the sufficiency of the autopsy to show the normal or abnormal condition of the heart had been questioned by evidence introduced for the defendant, and it was, of course, proper to show that the test suggested by the defendant's witnesses were in this case not necessary.

The eleventh assignment of error was based upon the action of the court in sustaining the objection to this question put to the physician making the autopsy: "Had it been intimated to you in any way that Thomas Dorgan had been drinking that day?" Answer: "It had." The witness had stated previously that he had examined the stomach to see if there was any trace of alcohol in it. It was an issue of fact as to whether he cut open the stomach or not. He said that he did, and, as a circumstance tending to corroborate him, it was here sought to show that his intention had been directed to the question whether Dorgan had been drinking that day. This question was clearly admissible and relevant. It was no more than to ask the witness what the purpose and scope of his investigation was.

The twelfth assignment of error was based on the refusal of the court to instruct the jury that on the undisputed evidence in the case the plaintiff was not entitled to recover. We are very clear that this request was rightly refused.

The defendant made two issues. The first issue was that the policy was void by reason of the alleged misrepresentation by the insured that he had not had, and was not subject to, fits, disorders of the brain, or any mental or bodily infirmity. The evidence of the autopsy at the time of his death was that his vital organs were in a normal condition, though he was suffering from a slight cold in the bronchial tubes. The evidence of two witnesses introduced by the defendant was that he had a structural defect of the heart which caused dizziness. The normal condition of the heart, as testified to by the physician performing the autopsy, tended to rebut this evidence, and the question of fact was for the jury, the burden being upon the company to show a breach of the warranty.

The second issue was as to whether the manner and cause of the death brought it within the policy. The burden of proof on this issue was upon the plaintiff. The deceased was found in the water, with his face in such a position that death might have come from suffocation by drowning, if he had been rendered unconscious before or after striking the water. There were bruises upon the forehead of the deceased, indicating that his head had struck something hard, and the bruises were of a character sufficient, as testified to by an expert witness, to have produced unconsciousness. The circumstances surrounding the death, therefore, were consistent with the theory that the deceased had slipped and fallen in such a way as to strike upon his head against a hard substance, producing unconsciousness, in which helpless state suf-

focation by drowning followed. This was one explanation of the death consistent with the absence of disease as a moving or contributing cause to the accident, and certainly brought the case within the terms of the policy. Then there was another possible view which the jury in fact took, and which will be discussed hereafter. Whether one or the other theory, or still another, satisfied the circumstances of the case, it was for the jury to decide. The court had no right to usurp the functions of the jury in this respect.

The sixteenth assignment of error is based on the following charge to the jury. "I have been requested by the plaintiff's counsel to instruct you something in regard to the inferences to be drawn from the condition of Dorgan at the time of this insurance, or about that time, as disclosed by the testimony about the condition of the heart, as is covered by the physicians, as giving out the alleged rattle or murmur. Now, gentlemen, if the murmur or sound of disordered action which were indicated at or before the time when Dorgan made this application for insurance was simply an occasional consequence or mere debility,—an 'anaemic condition' they term it in scientific language (which means the same thing, more or less); no more or less than a debilitated, enfeebled condition, lacking of strength and vitality,—if that was the case, if what Dr. Pratt heard, and afterwards what Dr. Osborn heard, was simply an anaemic murmur, an occasional result only of a weakened and enfeebled condition of the body, that would not, be such a disease or bodily infirmity as is warranted against. This is but an amplification of what I have already explained to you, and is a mere continuation by parts of the general proposition which I have laid down to you, namely, that the defect or disease must be one of a definite and somewhat permanent character."

The charge was in relation to the warranty that the insured had never had, and was not subject to, fits, disorders of the brain, or any bodily and mental infirmity.

The court had charged the jury previously that it was not material whether the insured knew his actual condition or not at the time he made his application, if in fact his warranty was not true. The court told the jury that in determining the question whether the insured was or was not inflicted with any disease or bodily or mental infirmity they were to inquire whether he had some specific ailment; that it would not come within the scope of this warranty that he might, like other men or the generality of men, have been subject to occasional attacks of the kinds that are specified, "but there must have been some specific determination towards such condition of the body, or some part of it, as would amount to a disease or a bodily infirmity."

It seems to us that the court accurately stated the legal effect of the contract contained in the application and the policy. An anaemic murmur, it was admitted, indicated no structural defect of the heart, but arose simply from mere temporary debility or weakened condition of the body. We do

not think that this comes within the definition of "bodily or mental infirmity," as the term is used in the application. The statement in the application by the insured did not, either in his contemplation or that of the company, refer to any mere temporary ailment or indisposition which did not tend to weaken and undermine the constitution at the time of taking membership. *Pudritzky v. Supreme Lodge K. of H.* 76 Mich. 428; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306; *Mutual Ben. L. Ins. Co. v. Daviss*, 87 Ky. 541; *Manhattan L. Ins. Co. v. Francisco*, 84 U. S. 17 Wall. 672, 21 L. ed. 698.

The seventeenth assignment of error is based on the following charge of the court: "If the condition of Dorgan contributing to his death was produced by imprudent and wanton exposure of himself to the perils of the day,—the cold,—and such exposure was grossly imprudent, in consequence of any physical condition that he may have been in, then his death, if that imprudence contributed to his death, would not be within the scope of his policy or entitle a recovery."

This should be taken in connection with the part of the charge recited in the twenty-second assignment of error: "It is not such exposure as men usually are going to take; such as is incident to the ordinary habits and customs of life. Such an exposure as that does not come within the range of a defense. An exposure, in order to have been a contributing cause, and so defeat the plaintiff's right to recovery in this case, must be something beyond the ordinary, or a wanton, a piece of gross, carelessness, as we would term such in our designation of a person's conduct in the usual walks of life. If Dorgan was at the time in an enfeebled physical condition, that circumstance may be taken into account in determining whether he was making an imprudent, wanton, and reckless exposure of himself,—of his life and health; but if the exposure to which he submitted himself was of a less degree than that, and such as I have described, then it is not within the terms of the policy."

We think the language of the court properly explained to the jury what was meant by the words "voluntary exposure, unnecessary danger, and hazardous adventure." It is questionable whether there was anything in the evidence requiring the plaintiff to exclude the possibility that death might have occurred by reason of exposure.

The eighteenth assignment of error was based on this charge of the court: "If you are satisfied from the evidence that he was at the time intoxicated, so as not to be able to manage himself,—that is, not the result of simply taking a drink, one or more, perhaps, but if he was so intoxicated, as that he was not fairly able to take care of himself prudently and properly,—and that contributed to the result, then such a result would not be within the scope of the policy."

It is objected to this charge that by the policy, if the death happened while the insured was under the influence of intoxicating drinks, no recovery could be had, even if such condition did not contribute to the result. It is not necessary for us to

answer the question of construction thus suggested, because of the evidence as to intoxication. There was no evidence that the insured was intoxicated, except so far as two circumstances tended to show it. These were—First, the opportunity to drink afforded by the liquor which the fishing party brought with them; and, second, the circumstances of the death, which were of such a character that the result might have been contributed to by the intoxication of the deceased. Without this latter possibility there would have been no evidence of any intoxication which the court could have submitted to the jury. Unless the intoxication did contribute to the death, therefore, no ground existed for saying that insured was intoxicated at all. Hence the plaintiff in error was not injured by the failure of the court to cover in his charge a hypothetical case which there was no evidence to support.

The twentieth and twenty-first assignments of error are based on exceptions taken to the following charge of the court: "If you find that branch in favor of the plaintiff, you will then pass on to the second, and inquire whether or not this death resulted from some accident; simply as from, well, being in the brook, stumbling there and falling down, and becoming unconscious, and then drowning. Was that the fact, or was it, or might it with equal probability have been, the truth that from some condition that he was in, either one of considerable long continuance or short duration, it is no matter which, he fainted away, and fell into the brook? Whether he fell in before or after his death would be of no consequence. Inquire what was the fact in reference to that. You must be satisfied by a preponderance of the evidence, gentlemen, before you can render a verdict for the plaintiff in this case on that branch of the case; you must be satisfied that a preponderance of the evidence establishes the fact that the death was the result of an accident only, without the concurrence of any cause resulting from any disorder or disease or infirmity or deformity of Dorgan's vital organs."

We think this correctly stated the law of the case. The language expressly excepted to, namely, "Whether he fell in before or after his death would be of no consequence," had application to what the court stated immediately before, namely, that if his fainting away and falling into the brook had been the result of his bodily condition, whether of considerable long continuance or short duration, the death would not be within the policy, and that, no matter whether he fell in before or after his death, he could not recover. As the charge is printed, the sentence is separated from that to which it evidently belongs, and a different sense at first is given to it. We have no doubt that in the charge to the jury the sentence was put where it really belongs, as a mere qualification or explanation of the sentence immediately preceding.

The twenty-third assignment of error is based on the language of the court given to the jury in answer to the question put by them. The language was as follows: "Gen-

tlemen of the jury, I received a communication from your foreman that you wish instructions upon this question of whether deceased, when he was on the bank of the brook, was overtaken with some temporary trouble that caused him to fall in and was drowned, would that be considered only accidental? I instruct you, if he was at that moment overtaken with a trouble of which he was subject,—that is, from a recurrence of a trouble to which he was subject,—and he then fell in the brook and was drowned, that that would not be a case where a recovery could be had upon the policy because his physical condition was a part of the causes contributing to the death; but if the temporary trouble spoken of in this question was one of which he was not subject, but was something entirely unusual and uncommon with him, and that he at that time fell into the brook and was drowned, that would be an accident, and the death would be accidental only."

The jury found that the insured was unconscious when he fell into the brook, and that the unconsciousness was due to a temporary affliction, in accordance with this charge.

The twenty-fifth assignment of error is based on the refusal of the court to vacate and set aside the verdict on the ground that the three special findings of the jury could not sustain their general verdict.

Upon these two assignments of error arises the main, difficult, and doubtful question in the case. The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to "any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death."

It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew v. Railway Assur. Co.* 6 Hurlst. & N. 838; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42; *Reynolds v. Accidental Ins. Co.* 22 L. T. N. S. 820.

We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The

disease would be but the condition; the drowning would be the moving, sole, and proximate cause.

In *Winepear v. Accident Ins. Co.*, L. R. 6 Q. B. Div. 42, the terms of the policy provided "that it should cover any personal injury caused by accidental, external, and visible means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease." The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

In *Lawrence v. Accidental Ins. Co.*, L. R. 7 Q. B. Div. 216, the policy provided: "This policy covers injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, . . . or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury."

The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the railway, when an engine and carriages which were passing went over his body, and killed him. It was held that "the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable."

Mr. Justice Watkin Williams said in this case: "The true meaning of this proviso is that, if the death arose from a fit, the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation."

After giving some illustrations, the learned justice continued: "I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff."

These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the Supreme Court in case of *Accident Ins. Co. of N. A. v. Crandal*, 120 U. S. 527-532, 20 L. ed. 740-742. They sufficiently establish the proposition that, if the deceased

in this case died by drowning, then drowning was in law the sole and proximate cause of the disability or death.

We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been "caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease." In our opinion the adjective "accidental" qualifies not only "injuries," but also "death," and therefore an accidental death by drowning does result from, and is caused indirectly by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The exception is broader than the exceptions in the policies considered in the *Winepear* and the *Lawrence Cases*, and is made so by the use of the word "indirectly." As can be seen from the words of Mr. Justice Williams quoted above in the *Lawrence Case*, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable.

We are therefore finally brought to the question what the words "disease and bodily infirmity" include. We think the charge of the court below upon this point must be sustained. In a broad, generic sense, any temporary trouble by reason of which a man loses consciousness is a disease. It is a condition of the body not normal, and produced by the imperfect working of some function, but as the imperfect working is not permanent, and the body returns at once, or in a short period of time, to its normal condition, it does not rise to the dignity of a disease. A fainting spell produced by indigestion or a lack of proper food for a number of hours, or from any other cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words "disease and bodily infirmity," as used in this policy.

It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company. Policies are drawn by the legal advisers of the company, who study with care the decisions of the courts, and, with those in mind, attempt to limit as narrowly as possible the scope of the insurance. It is only a fair rule, therefore, which courts have adopted, to resolve any doubt or ambiguity in favor of the insured and against the insurer. *Fitton v. Accidental Death Ins. Co.* 17 C. B. N. S. 122; *Accident Ins. Co. of N. A. v. Crandal*, 120 U. S. 527-532, 30 L. ed. 740-743; *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; *Healey v. Northwest Mut. Acc. Assn.* 133 Ill. 556, 9 L. R. A. 371. Our view of what the word "disease" must be limited to in this policy is sustained by the decisions of the supreme court of Michigan in *Fudritsky v. Supreme Lodge K. of H.* 76 Mich. 428, and

Brown v. Metropolitan L. Ins. Co. 65 Mich. 806, and also by *Mutual Benefit L. Ins. Co. v. Davies*, 87 Ky. 541.

In *Manhattan L. Ins. Co. v. Francisco*, 84 U. S. 17 Wall. 672, 21 L. ed. 698, a physician testified that the person, who had died twenty-four days after the policy issued, had the disease of indigestion, torpid liver, and colic, and that he died from acute hepatitis; whereas several acquaintances of the deceased testified that they had never known him to be unwell, or if so more than very slightly, and that they considered him to be a healthy man. The defense of the insurance company was that the decedent had answered, in reply to the usual questions, that he had no sickness or disease. In reference to this issue the court instructed the jury that it was for them to determine from the evidence whether the person whose life was insured had, during the time mentioned in the questions propounded on making the application, any affliction that could properly be called a "sickness or disease," within the meaning of the term as used, and said: "For example, a man might have a slight cold in the head or slight headache, that in no way seriously affected his health, an affliction which might be forgotten in a week or a month, which might be of so trifling a character as not to constitute a 'sickness or disease,' within the meaning of the term as used, and which the party, would not be required to mention in answering questions."

This charge was held good.

The point made under the twenty-fifth assignment of error is that there was no evidence to sustain the finding of the jury that the unconsciousness of the deceased, during which drowning ensued, was caused by a temporary affliction. There certainly was no direct evidence of this cause. No one was

present to see how the death in fact did occur. The conclusion of the jury in any case must be based upon inference from circumstances, and not from direct evidence. There was the circumstance that the deceased was found dead, with his face submerged in water, in such a position that drowning might have caused his death. There was the expert evidence of the physician who performed the autopsy to the effect that the condition of the body of the deceased after death indicated death by drowning, and was what might be expected if the deceased had been drowned. There was the evidence of the same physician that the vital organs of the deceased were normal, and indicated the presence of no disease. Assuming these facts proven (and, there having been evidence to prove them, the jury had a right to conclude that they were facts), it would be a very reasonable inference that a man would not drown in water only six and a half inches deep unless he were unconscious as he lay in the water. Something must have produced the unconsciousness. It was not produced by disease, because the autopsy tended to show that the deceased was not suffering from disease likely to cause unconsciousness, and the jury might well have inferred that the bruises upon the head did not indicate a sufficient concussion to produce unconsciousness. Reasoning by exclusion, therefore, the jury might from the circumstances properly have found the verdict which they did find, namely, that the unconscious and helpless condition of the insured in which drowning ensued arose, not from disease, but from indigestion or want of food, or some other temporary cause.

The judgment of the court below is affirmed, with costs.

NORTH CAROLINA SUPREME COURT.

Malvina T. WHITE, *Appl.*,

v.

NORTHWESTERN NORTH CAROLINA RAILROAD.

(118 N. C. 610.)

4. An abutting owner is entitled to damages for the diminution of the value of the property caused by reducing the width of the street, or by excavations rendering it unsafe and dangerous, in constructing a steam railroad therein.

(December 5, 1893.)

1. The presumption in the absence of evidence is that the fee of a street remains in the abutting proprietor.

2. The use of a street for a steam railroad is a perversion of the street from its original and proper public purpose.

3. An abutting owner, whether owning the fee in a highway or not, has certain proprietary rights which cannot be taken away without compensation, even under the authority of the legislature.

A PPEAL by plaintiff from a judgment of the Superior Court for Forsyth County in favor of defendant in a proceeding to recover damages alleged to have resulted to plaintiff's property by reason of the construction of defendant's railroad. *Reversed.*

The action was to recover for damages caused by blasting during the construction of the road and for damages for the interference with the street in front of plaintiff's property.

NOTE.—The more liberal doctrines which have steadily gained ground in recent years as to the property rights of abutting owners which are in the nature of easements, independent of the ownership of the fee and the nature of a "taking" within the law of eminent domain are both well illustrated in the above case.

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As to what constitutes a taking, see, in connection with the above case, *St. Louis v. Hill (Mo.)* 21 L. R. A. 226; *Memphis & C. R. Co. v. Birmingham S. & T. R. R. Co. (Ala.)* 18 L. R. A. 166, and reference *note* thereto; also *Vanderlip v. Grand Rapids (Mich.)* 3 L. R. A. 247.

The court refused to submit to the jury the question of damages for interference with the street and the plaintiff submitted to a nonsuit and took this appeal.

Further facts appear in the opinion.

Mr. E. B. Jones, for appellant:

When a street has been dedicated or condemned by a city for use of the public, the further appropriation of the same street by a railroad is the imposition of a new servitude for which the owner is entitled to compensation.

2 Wood, Railway Law, p. 724.

Municipal or state legislatures have no authority or power to authorize the taking of highways by a railroad company, without compensation to owners.

2 Wood, Railway Law, p. 740.

The owner of an abutting lot injured by the construction of a railroad track in a street may recover compensation from the railroad, notwithstanding the grant of right of occupancy by the municipal authorities.

Elliott, Roads & Streets, p. 532.

In *Moose v. Carson*, 7 L. R. A. 548, 104 N. C. 431, this court has declared that a statute or ordinance which attempts to divest a person or corporation of private property for private purposes, or for public purposes, unless upon just compensation, and in a manner provided by law, is unconstitutional.

See also *Rich v. Minneapolis*, 37 Minn. 423; 3 Kent, Com. 432; 2 Dill. Mun. Corp. 725; Mills, Em. Dom. § 204; Lewis, Em. Dom. § 111; *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *South Carolina R. Co. v. Stein*, 44 Ga. 546; *Daly v. Georgia Southern & F. R. Co.* 80 Ga. 793; *Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 178; *Kucheman v. Cleveland, O. & D. R. Co.* 46 Iowa, 366; *Indianapolis, B. & W. R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Phipps v. Western Maryland R. Co.* 66 Md. 319; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168.

Messrs. Glenn & Manly for appellee.

Shepherd, Ch. J., delivered the opinion of the court:

The plaintiff is the owner of a lot abutting upon one of the streets of the city of Winston, and brings this action to recover damages for various injuries to her said property, inflicted by the defendant by reason of its having entered upon and constructed its railroad through the said street. It appears from the complaint that prior to the plaintiff's purchase of the property, in 1879, the street had been "located and opened for the use and benefit of plaintiff and others, and the public generally, who owned property north of Liberty street, which was almost inaccessible by or over any other street." It also appears that in the construction of its road the defendant made an excavation in front of said property 223 feet in length, and 35 or 40 feet in depth and width, and thereby reduced the width of the street from 30 to 18 feet. It is further alleged that by "reason of the nature of the soil and the proximity of the cuts, travel along the said street is rendered dangerous, and that, in order to sustain the width of the same 15 to 18 feet, the defendant has

put in pillars or posts to hold and retain the earth composing the street in position, which plaintiff alleges is insecure and unsafe, and liable to destroy and render useless the said street." It is furthermore alleged that by reason of such excavation and occupation by the defendant the street at certain points along the line of plaintiff's property is almost entirely destroyed, and that plaintiff is greatly endamaged. These allegations, extracted from the complaint, must, for the purposes of the appeal, be taken as true, as no evidence seems to have been introduced on the trial; and his honor rejected the issue as to the alleged damages sustained by the plaintiff on the ground that the defendant "had a license from the city to construct its road, and use the street if necessary." The questions presented, therefore, are whether, as against the abutting owner, the city can authorize the use of its streets for the purposes of an ordinary steam railroad, and whether such abutting owner has any proprietary rights, for the violation of which she can maintain an action. It does not appear how the city acquired its title to the street in question, nor do we learn from the record whether it owns the fee in the soil, or simply an easement therein. In the absence of evidence, however, the presumption is that the city has an easement only, and that the fee remains in the abutting proprietor. Elliott, Roads & Streets, 110; *Rich v. Minneapolis*, 37 Minn. 423; 3 Kent, Com. 432. In such a case "the abutting owner is entitled to every right and advantage in that part of the street of which he owns the fee, not required by the public. The easement of the public is the right to use and improve the street for the purposes of a highway only." Lewis, Em. Dom. 113. It must follow, therefore, that if the city perverts the streets to illegitimate purposes, it is an interference with the proprietary rights of the abutter, and that he is entitled to relief at the hands of the courts.

This introduces us to the very important question, never before passed upon by this tribunal, whether or not the use of a steam railroad is a perversion of the street from its original and proper public purposes. There has been much discussion, and not a little conflict of judicial decision, upon this subject; but it is believed that the weight of authority greatly preponderates in favor of the affirmative view of the proposition. Judge Dillon, after a careful investigation, states his conclusion as follows: "The weight of judicial authority undoubtedly is that where the public have only an easement in the streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." 2 Dill. Mun. Corp. 725. In Mills on Eminent Domain (sec. 204) the same doctrine is laid down, and it is said: "The legislature may authorize the use of a street by the railroad, so as to make the entry lawful; but the use is an additional burden,

and the right will not become fixed in the company until compensation is made. If no remedy is provided, there is remaining the remedy at common law." In *Lewis on Eminent Domain* (sec. 111) the able and discriminating author remarks: "To us it seems so clear that a railroad is foreign to the legitimate uses of a highway that we never have been able to understand how a court could reach a contrary conclusion." After stating that highways have from time immemorial been devoted to the common use of every citizen, and that no one had a private right or any exclusive privilege therein, the author proceeds: "The railroad does not fall within the scope of such uses. It requires a permanent structure in the street, the use of which is private and exclusive. It gives to an individual or corporation a franchise and easement in the street inconsistent with the public right. To hold that a railroad is one of the proper and legitimate uses of a street leads to the absurd consequence that a street might be filled with parallel tracks, which would practically exclude all ordinary travel, and still be devoted to the ordinary uses of a highway. The law ought not to tolerate such a consequence." In *Elliott on Roads & Streets* (page 528) the author cites many authorities, and concludes by saying that the weight of authority is that such an appropriation of a street is "a new and additional burden," for which the abutter is entitled to compensation. In support of his proposition he quotes the following language of *Judge Cooley*: "Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it. The two uses, on the other hand, come seriously in conflict. The railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it, and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious." *Const. Lim.* 3d ed. 688. In *Hare on American Constitutional Law*, 361, the foregoing doctrine is fully approved, and it is said: "It is immaterial, as regards the principle, whether the land is given voluntarily or taken under the right of eminent domain. If the owner dedicates the land, it is for the continuing uses of a street; if it is condemned, such also is the end in view. To convert a common highway over a man's land into a railroad is, therefore, to impose an additional burden upon the land, which greatly impairs its value, considered as a whole; and if the owner is not compensated his consent must be proved. It cannot be said with truth that in assenting to the laying out of the highway upon his land he consented to the building of a railroad upon it, because they are essentially different. The

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one benefits his lands, renders access to it easy, and enhances the price; while the other makes access to it difficult and dangerous, and renders it comparatively valueless.

Nor can it be justly contended that a railway is merely an improved highway.

Were the transaction between individuals, every one would see the injustice of such a conclusion. The doubt arises from the supposition that the public interest is involved; and it was to guard against the bias arising from this source that the constitution interfered to protect the citizen. It follows that the dedication of land as a street does not preclude the owner from bringing trespass or ejectment or obtaining an injunction against a railway company which is about to enter upon and occupy the way, and that the company cannot (in the absence of the exercise of the right of eminent domain) rely upon a grant from the legislature and the license or consent of the municipality as a justification." *Booth*, in his work on *Street Railways* (sec. 78), after stating that in the early history of commercial railroads the current of authority was contrary to the views above stated, remarks: "But, according to the weight of judicial opinion as expressed during the last thirty years, where the fee of the street remains in the adjoining owner, such use is inconsistent with the purposes of the original acquisition, and, without compensation, can only be acquired by the exercise of the power of eminent domain."

In the discussion of the question, we have preferred to reproduce the conclusions of eminent text-writers, rather than attempt a review of the numerous decisions upon which they are founded. These decisions and others we could cite fully establish, upon principle and by weight of authority, the proposition, that, where the public have only an easement in the street, and the fee of the soil of the street is retained in the abutting owner, a steam railroad cannot, under the constitutional guaranty of private property, be lawfully constructed and operated thereon against his will and without compensation. *Grand Rapids & I. R. Co. v. Heisel*, 47 Mich. 393; *Southern Pac. R. Co. v. Reed*, 41 Cal. 256; *Imlay v. Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Daly v. Georgia Southern & F. R. Co.* 80 Ga. 793; *Cox v. Louisville, N. A. & O. R. Co.* 48 Ind. 178; *Kucheman v. Cleveland, C. & D. R. Co.* 46 Iowa, 366; *Indianapolis, B. & W. R. Co. v. Hartley*, 87 Ill. 439, 16 Am. Rep. 624; *Phipps v. Western Maryland R. Co.* 66 Md. 319; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Harrington v. St. Paul & S. C. R. Co.* 17 Minn. 215 (Gil. 188); *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123; *Chamberlain v. Elizabethport Steam Cordage Co.* 41 N. J. Eq. 43; *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 609, 80 Am. Dec. 791; *Carl v. Sheboygan & F. du L. R. Co.* 46 Wis. 625; *Buchner v. Chicago, M. & N. W. R. Co.* 60 Wis. 264; *Indianapolis & O. R. Co. v. McAhren*, 12 Ind. 552; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Adams v. Chicago*,

B. & N. R. Co. 39 Minn. 286, 1 L. R. A. 493. The principle, then, being established that the use of a street for steam railroads is not a legitimate use of the street for public purposes, it must, of course, follow that the city had no right, in the exercise of its usual and ordinary powers relating to its highways to authorize the entry and occupation of the same by the defendant, and that the bare license of the city can afford no justification for the infringement of the rights of the plaintiff. The plaintiff, therefore, taking her allegations to be true as to the damage inflicted upon her property, very plainly has a cause of action against the defendant. If, however, we are wrong in the assumption that the plaintiff is the owner of the fee in the said street, and if it should appear upon another trial that the city has acquired it either by dedication, grant, or condemnation, it will be necessary to determine whether the plaintiff has an easement in said street to the extent that it shall be used only for street purposes, and whether her rights are "property rights," which cannot be impaired or destroyed except under the exercise of the right of eminent domain. Distinctions based upon the legal ownership of the fee in respect to the rights of the abutting proprietor have produced much confusion, resulting in many conflicting decisions; but the true principle, which has been slowly but surely evolved from protracted discussion and experience, is that in respect to the use of the soil for the purposes of a street (and apart from those reversionary or other rights peculiar to legal ownership) it is wholly immaterial where the legal title resides. The very power to take private property for public use, as well as the capacity of a municipal corporation to acquire it in any way, necessarily implies that it is to be held in trust for public purposes; and in the case of land acquired for the purposes of a street there is something in the nature of a contract, under which two coexistent and inviolable rights are created,—one belonging to the public to use and improve the street for the ordinary purposes of a street; the other, to the abutting owner to have access to and from his property, and to enjoy such use of the street as is customary and reasonable. If the owner voluntarily dedicates or grants a strip of land to a city for a street it must be presumed that he does so in consideration of the contemplated benefits accruing to his adjoining property by reason of the strip being used for the legitimate purposes of a street only. If the grant be made upon a pecuniary consideration, it is also fair to assume that in estimating the amount to be paid the value of the benefits above mentioned were likewise considered. In such cases, says Mr. Lewis (*Em. Dom.* § 114): "To make the right a part consideration of the grant, and then allow the public to invade or destroy it at pleasure, would be a fraud, which the law will neither impute nor allow. Therefore, in the case of such a grant there arises by operation of law a private right to use the street in connection with the lot of the proprietor, which is as inviolable as any other right of property." So,

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if the city acquire the land by condemnation, such advantages or benefits to the adjoining property are usually assessed at a fixed value, and deducted from the estimated damages; and it would, says the above author, be "the grossest inequity to compel a man to pay for advantages, whether in the form of deductions from the price to be paid, or of an assessment of benefits, unless those advantages are secured to him by a clear title. . . .

The existence of these private rights and easements is strictly independent of the mode in which the highway is established, or of the estate or interest which the public acquires in the soil of the street."

The true principles applicable to this question have been declared by the court of appeals of New York in *Story v. New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146, and *Lahr v. Metropolitan Elev. R. Co.* 104 N. Y. 268. These cases have been followed by subsequent decisions of other states, and their doctrine has been approved by the most prominent writers upon the subject. The opinions are very elaborate, and we cannot do better than to adopt Judge Dillon's summary of some of the principles enunciated: "These judgments, and those that follow them, rest upon the foundation principle that whether the fee in the street is in the abutter, subject to the rights of the public,—that is, to the paramount rights of the public for street uses proper,—or whether the fee is in the public for street uses proper, in either case, and generally in both cases, the abutter is entitled to the benefit of the street for all uses except street uses proper, subject, of course, to legislative and municipal regulations; and that such rights are property or property rights in the abutter, which can only be taken away by the legislature on the condition of making compensation. And the abutting owner's rights in the street are not affected by the source from which he derives his title. . . . If the abutter owns the fee of the street, his rights may be said to be legal in their nature. If he does not own the fee, those rights are in the nature of equitable easements in fee,—the soil of the street being the servient, the abutting owner's lot being the dominant, tenement. Among the most important of such rights or easements is the abutter's right to access, to light, and to air. The court accordingly held that, so far as the elevated railway structures interfered with such rights or easements, while the legislature might authorize their erection and use, yet this could only be done as respects the abutter by the exercise of the right of eminent domain, viz. on condition of making compensation to the abutting owner for the damage which his property actually sustained." "The result of the author's reflections upon this subject is that the views of the court of appeals are sound and just,—sound, because they recognize the paramount nature of the public right to put the street to this new and necessary form of public use; just, because they recognize and declare that the abutter has special proprietary rights or easements in their nature which he is not called upon unequally to sacrifice without compensation for the public use. In

effect, the court says the just and true doctrine is, "Take, but pay." 1 Hare, Am. Const. L. 370, 375; Lewis, Em. Dom. §§ 114, 115; Booth, Street Railway Law, § 81; *Barney v. Keokuk*, *supra*; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; 1 Rorer, Railroads, 524; *Story v. New York Elev. R. Co. supra*; *Haynes v. Thomas*, 7 Ind. 38; *South Carolina R. Co. v. Steiner*, 44 Ga. 546; *Theobald v. Louisville, N. O. & T. R. Co. supra*. The contrary view, laid down in Wood's Railway Law (vol. 2, p. 727), seems to be based upon the restricted interpretation of the word "taken;" it being applied by some of the courts only to property actually taken and occupied, and all incidental damages to adjoining proprietors are regarded as "consequential" in their character, and *damnum absque injuria*. The learned author admits that such would not be the case if the words used were "taken or damaged," but by a reference to the opinion in *Staton v. Norfolk & C. R. Co.*, 111 N. C. 278, 17 L. R. A. 838, it will appear from the cases cited that this restricted meaning of the word "taken" is not in accord with the more recent and better authorities, and is being rapidly submerged by the steady and increasing current of judicial decision. Lewis, Em. Dom. 58; *Pumpelly v. Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

The result of the numerous authorities is that in either view of the case—that is, whether the fee is in the plaintiff or in the city—the plaintiff has certain proprietary rights, of which she cannot be deprived, even under the authority of the legislature, without compensation. If her property is in any way injured by the use of the street for legitimate purposes, she cannot complain. But if the enjoyment of her private rights in the street is interrupted by a perversion of the street to uses for which it was not intended, and which the public right does not justify, and her property is thereby injured, and its value impaired, she may maintain an action, and recover such damages as she may have sustained. These proprietary rights in the use of the street for proper public purposes are practically, as we have seen, the same irrespective of the ownership of the soil, and are not confined to the mere right of access, since this may not be disturbed although the street may be reduced in width to 10 or 15 feet. This view is well sustained in the leading case of *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 1 L. R. A. 493, in which the court said: "Take a case in one of the

states where the fee of the street is in the state or municipality, and of a street 60 feet wide. The abutting lot owners have paid for the advantages of the street on the basis of that width, either in the enhanced price paid for their lots, or, if the street was established by condemnation, in the taxes they have paid for the land taken. In such a case, if the state or municipality should attempt to cut the street down to the width of 10 or 15 feet, would it be an answer to objection by lot owners that the diminished width would be sufficient for mere purposes of access to their lots? It would seem as though the question suggests the answer." The interest of the abutting owner in the entire width of the street, subject to the proper uses of the public, upon the authority of the above decision, has been declared by this court in *Moose v. Carson*, 104 N. C. 481, 7 L. R. A. 548, and cannot be regarded as an open question. See also *Haynes v. Thomas, supra*. If, then, the value of the property is lessened by reducing the width of the street, or if such damage is caused by excavations rendering it unsafe and dangerous, as stated in the complaint, the plaintiff is entitled to recover. It will be observed that the defendant did not introduce its charter, or show that it had condemned any part of the street or the rights or easement of the abutting proprietor. It justifies its conduct solely upon the mere license of the city of Winston, and in this view of the case its occupation, in so far as it affects the plaintiff, must be regarded as unlawful. If this be so, the plaintiff may maintain a common-law action for damages to be assessed up to the time of the trial; or it seems she may sue for the permanent damage, if any, which has been inflicted upon her property by reason of the location and construction of the defendant's road, and by so doing confer upon the defendant (so far as she is concerned) an easement to occupy the street. Had the defendant entered under some statutory authority, it would be important to consider whether the plaintiff would not be confined to the statutory remedy; but, as it does not appear to have entered under any other authority than the bare unauthorized license of the city, and as the ruling of the court is based expressly upon the validity of such license, we must conclude that the plaintiff has a right to maintain the present action, and that the issue as to the damages actually sustained should have been submitted to the jury. As the facts were not fully developed on the trial, we do not deem it proper to further pursue the discussion.

New trial.

MARYLAND COURT OF APPEALS.

Selig G. PUTZELL, *Appt.*,
v.
DROVERS & MECHANICS NATIONAL
BANK OF BALTIMORE.

(.....Md.....)

A wall standing partly on the premises of each of adjoining owners, the portions of which are owned by them in severalty with an easement for the support of the building of one of them, may be removed by the other for the purpose of erecting a new and better wall, although some inconvenience is thereby occasioned to the other owner, provided a new one is built within a reasonable time and with the least inconvenience to the other party and which shall furnish him the same right of support, and that he shall be indemnified for necessary expenses thereby occasioned him in consequence of the removal of the wall.

(January 12, 1894.)

APPPEAL by complainant from a decree of the Circuit Court for Baltimore City dismissing the bill in a suit brought to enjoin defendant from taking down a wall which supported one end of complainant's building. *Affirmed in part. Reversed in part.*

The facts sufficiently appear in the opinion.

Messrs. Richard M. Venable and Lewis Putzell for appellant.

Messrs. James McColgan and Bernard Carter, for appellee:

Appellant has not attempted to show, either by himself or his witnesses, any exclusive use of this wall such as required by the rule in *Casey v. Inloes*, 1 Gill, 500; *Armstrong v. Risteau*, 5 Md. 275-279, 59 Am. Dec. 115; *Walsh v. McIntire*, 68 Md. 418.

The appellee in this case is pecuniarily able to pay any damages that may be recovered against it; and if the appellant suffers any damages or inconvenience from the acts or negligence of the defendant, he has a full and adequate remedy at law, and a jury would certainly give him ample compensation. This alone would disentitle him to an injunction.

Whalen v. Delashmutt, 59 Md. 258; *Hamilton v. Ely*, 4 Gill, 38; *Amelung v. Seekamp*, 9 Gill & J. 472.

The acts of possession relied on to make out an adverse holding must be sufficient to establish ouster or disseisin.

To establish such ouster or disseisin, the acts of possession must be hostile, open, notorious, and exclusive, and must have been continuous for twenty years. They must be such as unmistakably indicate a claim of the absolute title in fee.

Walsh v. McIntire, *Armstrong v. Risteau*, and *Casey v. Inloes*, *supra*.

The occupation of the ground covered by the said wall was not, and could not be, on

the part of appellant, and those under whom he claims, exclusive, hostile, and notorious, as required by the rule laid down in the above cases.

Phillipson v. Gibbon, L. R. 6 Ch. App. 428.

If there be a party wall between two houses, and the owner of one of the houses pulls it down in order to build a new one, and with it he takes down the party wall belonging equally to him and his neighbor, and erects a new house and new wall, he is bound on his part to pull down and reinstate it in a reasonable time, and with the least inconvenience.

8 Kent, Com. § 437; *Cubitt v. Porter*, 8 Barn. & C. 257; *Campbell v. Meier*, 4 Johns. Ch. 384, 1 L. ed. 858, 8 Am. Dec. 570; *Hicatt v. Morris*, 10 Ohio St. 523, 78 Am. Dec. 280; *Glenn v. Davis*, 35 Md. 213.

No such easement can be acquired by any lapse of time.

Solomon v. Vintners' Co. 4 Hurlst. & N. 590; *Peyton v. London*, 9 Barn. & C. 734.

Bryan, J., delivered the opinion of the court:

Selig G. Putzell filed a bill in equity against the Drovers & Mechanics Bank of Baltimore. It was alleged that the defendant without right or justification was about to tear down the rear wall of the complainant's dwelling house and thereby render it untenable and to do him irreparable damage. The bill prayed an injunction to restrain the defendant from proceeding as alleged and it was accordingly granted before answer. There was also a prayer for general relief. After answer, the defendant moved a dissolution of the injunction. Testimony was taken on both sides, and when the cause came to final hearing the injunction was dissolved, and the bill dismissed. Complainant appealed.

We think that a statement of the material facts of the case as they appear to us will sufficiently show the grounds of our opinion, without the necessity of a discussion of the testimony of the different witnesses. Putzell, the complainant, is the owner of a leasehold interest for ninety-nine years, renewable forever, in a lot of ground in the city of Baltimore, on the west side of Eutaw street, between Fayette and Lexington streets. He acquired this property in the year 1866. For many years before his purchase, and ever since then, there has been on this lot a substantial brick dwelling house, which extended back to its westernmost boundary. The Drovers & Mechanics Bank, in the year 1888, became the owner of a leasehold interest in a lot of ground fronting on Fayette street and running back northly to Marion street, and binding for a portion of its easterly line on the westernmost boundary of Put-

NOTE.—The above case is in some respects a peculiar one. As to the right of one owner of a party wall to make changes therein, see *Graves v. Smith* (Ala.) 5 L. R. A. 298; *Matthews v. Dixey* (Mass.) 5 L. R. A. 102; *Everett v. Edwards* (Mass.) 5 L. R. A. 110. 22 L. R. A.

As to destruction or removal of wall, see also *Fowler v. Saks* (D. C.) 7 L. R. A. 649; *Heartt v. Kruger* (N. Y.) 9 L. R. A. 135; *Clemens v. Speed* (Ky.) 19 L. R. A. 240.

zell's lot. It is not distinctly stated in the record, but this leasehold interest is evidently for ninety-nine years, renewable forever. The bank's lot and Putzell's lot are separated by a division wall, which, by the measurements proved in the case, is shown to be built partly on the ground of one of these parties, and partly on the ground of the other. This wall has been standing for a very long time, certainly for more than thirty years before the transactions which are the subject of complaint in this case.

As far as we can ascertain from the testimony Putzell's house, as originally built, had this division wall as its rear wall; but the rear wall was not built higher than the top of the division wall. In eighteen hundred and seventy Putzell put an additional story on the back building, placing its rear wall on the top of the division wall. This division wall was used by the owners and occupants of the lot now owned by the bank for the purpose of designating the boundary line between it and the Putzell lot. There was evidence of the use of it also for a series of years as a support for the frame of a grape arbor. The bank in the year eighteen hundred and ninety-two commenced the erection of a large six-story building for the purposes of its business, and in the prosecution of the work proposed to take down the entire wall separating the two lots, and erect on the same line another wall of sufficient strength and thickness to support the new building, not encroaching on Putzell's lot, and offering to give him the benefit of the new wall as a partition wall for the benefit of any building to be erected on his lot. The question in the case is whether this action on the part of the bank would be a legitimate exercise of its rights of property.

No one seems to know when the wall in question was built; in all probability the time was beyond the limit of living memory. There is some reason to think so from the fact that the deeds which created the leasehold interests in these lots were executed towards the close of the last century and early in the beginning of the present. It seems to have been erected for the purpose of making the boundary between the lots and to have been always used for that purpose. The soil of the respective owners was covered by it; and this was the use of his soil which each owner elected to make for his own benefit. Each one owned the portion of the wall which was on his own ground. There seems to have been no cessation of the use of it, in the way in which it was intended to be used; that is to mark the boundary line. There was no ouster of the possession of the soil. Each coterminal proprietor owns the portion of the wall which rested on his ground, as he had continued to own it from the beginning; and he has actual and beneficial possession of the soil by reason of the occupation and use of it by means of his portion of the wall. Surely there could not be a more distinct and unequivocal exercise of the right of ownership than to build on one's own land, a house, or a wall, and to use it continuously for the purposes to which it is suitable. It is hardly necessary to refer to decided cases; 22 L. R. A.

but one case was cited in the argument having such peculiar features, that it may well be mentioned while we are considering this subject. The question was about the title to certain property in the city of London, which was occupied by a brick house. In the south wall of the house there was a stone tablet bearing an inscription which stated that when New street was widened, nearly a century before the time in question, this wall had been built by the East India Company, and that it remained their property.

The house had been claimed by the plaintiffs and their predecessors in title, and occupied by their tenants for thirty-eight years, and during all that time there had been no acknowledgment of the title of the East India Company, upon these facts the question of adverse possession was presented. The court, however, speaking of the inscription on the tablet, said: "It was, in truth, a statement on the wall itself, that the wall forming a substantial part of the property, had been erected by and was the boundary wall of the adjoining owner, for the East India Company, of course, continued to be the owner of the soil of the street, although dedicated to the public. There was nothing, therefore, whatever to lead to the presumption that any title had been gained adverse to that of such adjoining owner by adverse possession. Where there is a boundary wall, and that boundary wall remains undisturbed, and an inscription is allowed to remain on it which states that it is the boundary wall of the adjoining property, it seems to us idle to suppose that any question of the statute of limitation or of adverse possession or of cause of cessation of possession could properly arise. It was, therefore, manifest that the wall belonged to the East India Company." *Phillipson v. Gibbon*, L. R. 6 Ch. App. 428. We pass by the use of the wall as a support for the grape arbor, because that was significant only as tending to show an act of ownership, and we think that the ownership is fully maintained on the grounds already stated. But, although there was no mention of the possession by the owners of the bank lot, it does not follow that Putzell had not acquired some rights to the use of the division wall. He had used this wall for more than twenty years as a support to his house; the enjoyment of it for this purpose had been notorious, peaceable, uninterrupted, and "as of right." Under these circumstances the law considers that he had a prescriptive title to the use of it in the manner in which he had enjoyed it.

It is conducive to the peace of society that the claims of right, which for a long time, have been acquiesced in and regarded as settled, should be protected by the law, and the space of twenty years has been adopted as the period for ripening claims of this description into titles. Putzell used this division wall as the rear wall of the lower part of his house, and also used it as a support for the wall of an additional story. To the extent of such use his title is clearly established. We have said that this use was not an ouster of the coterminal owner from the possession of the soil. It was an easement for the support of

the rear wall of the house. By the common law easements must be established against an owner of an estate of inheritance, although they may arise from user, such user is regarded by fiction of law only as evidence of a grant, and as the right claimed is of a permanent nature, it is said that the supposed grant could have been legally made only by a party who could impose a permanent burden on the servient tenement; that is to say, by the owner of an estate of inheritance. But in this case we have no concern with this principle of the common law, and need not inquire into its application, or into seeming modifications of it. Both of the lots in question are held under leases for ninety-nine years, renewable forever; and it is well settled that the holders of such leases have the absolute control and management of the property; they usually have, in point of fact, far more valuable interests in it than the reversioner who holds the estate of inheritance. *Crouce v. Wilson*, 65 Md. 481, 482, 57 Am. Rep. 843. The bank retained all its rights in the division wall, which are not inconsistent with the enjoyment of the easement. It was bound to permit it to be used as a support for Putzell's house in the accustomed manner; but this is the limit of its obligation. It would be unreasonable to deny to it the right to improve its own property according to its interests and inclinations; provided it did not infringe the rights of other persons.

In fact the wall which it proposed, to take down was insufficient to support the building which it desired to erect. If this should be taken down and another larger and stronger one built in its stead; it would thereby exercise its own legitimate rights of property, and if it gave to the adjoining house the same right of support in the new wall, which it had in the old one, it would not injure its neighbor. This seems to us the just settlement of this controversy. Putzell may be put to some inconvenience while the building is going on, but this is one of the unavoidable consequences of living in a closely built city. We have said that each portion of this division wall belonged in severalty to the proprietor on whose ground it stood, but even if these proprietors had been tenants in common of this wall, the result would not have been practically different. In *Standard Bank of British South America v. Stokes*, L. R. 9 Ch. Div. 72, *Sir* George Jessel cites, with marked approval, *Cubitt v. Porter*, 8 Barn. & C. 257. He quoted as follows from the opinion of *Mr. Justice Bayley*: "There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the

party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made." And in a subsequent part of his opinion, he says: "As I have read the law from the statement of eminent judges, he (that is a tenant in common) has a right to pull down when the wall is neither defective, nor out of repair; if he only wishes to improve it, or put up a better or handsomer one." *Chancellor Kent* was of the same opinion. In the following passage from his *Commentaries* (vol. 8, p. 437) he assumes the rights as settled: "If there be a party wall between two houses, and the owner of one of the houses pulls it down in order to build a new one, and with it he takes down the party wall belonging equally to him and his neighbor, and erects a new house and wall, he is bound on his part to pull down and reinstate it in a reasonable time, and with the least inconvenience." And from the remarks of *Chief Justice Bartol* in *Glenn v. Davis*, 35 Md. 219, it may be readily inferred that the opinion of this court was the same.

The allegations of the bill of complaint were sufficient to give a court of equity jurisdiction, and they justified the preliminary injunction. The complainant has not proved the precise title to the wall which is alleged; although he has proved a title to a portion of it, and an interest in the other portion by way of easement. For the reasons which we have stated we approve of the dissolution of the injunction, and to that extent the decree below will be affirmed. But the right to take down the wall is not absolute and unconditional; it is qualified in the manner which we have explained in a previous part of this opinion. The bank is bound to finish the division wall at its own expense, and to allow to Putzell's house the same right of support which it had in the old wall, and to indemnify him for the necessary expenses which he has incurred and may incur in protecting his property from the consequences of the removal of the old wall. For failure to do these things it would be liable to an action at law. But as a court of equity had jurisdiction of this case, although it could not give the precise relief prayed, it was proper, according to well-settled principles, to do complete justice between the parties, and thus avoid multiplication of suits in the future. It ought to have retained the bill for the purpose of settling and adjudicating any claim which may arise in favor of Putzell against the bank in accordance with the principles which we have stated. We disapprove of that portion of the decree which dismisses the bill.

Decree affirmed in part, and reversed in part, and cause remanded for further proceedings, the costs in this court to be equally divided between the parties.

OREGON SUPREME COURT.

Eugene AHERN, *Respt.*,
v.

OREGON TELEPHONE & TELEGRAPH
CO., *Appt.*

(.....Or.....)

1. A variance between an allegation that a person came in contact with a wire in the dark while walking on the sidewalk and received a shock while attempting to remove it from his pathway, and evidence that he touched it in groping to find packages which he had dropped when he slipped and fell on the sidewalk, is not a failure of proof which is fatal, under Hill's Code, § 98.
2. It is negligence to allow a wire which from its environment is liable to become charged with electricity to hang over a street or sidewalk at such a height as to obstruct and endanger ordinary travel.
3. A telephone company which instead of removing its wire on taking it out of a residence leaves it hanging upon an electric light company's pole is bound to look after it and is liable for an injury to a traveler who comes in contact with it after it has been removed by employees of the electric light company and hung upon a telephone pole, where it is accidentally touched by a traveler on a sidewalk while it was charged by contact with an electric light wire or a street railway company's wire.
4. Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk is a proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric light company or a street railway company, at least, where it does not appear that these were out of their proper position.
5. Charging that electricity requires the "utmost caution to control" is not erroneous in an action by one who, while passing along a sidewalk, was injured by contact with a telephone wire which was hanging near the walk and was heavily charged by an electric light wire, —especially where immediately afterwards the jury are told to measure defendant's conduct by that of a "cautious and prudent man."

(June 19, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. R. & E. B. Williams & Carey*, for appellant:

Negligence in this case must be proved as a fact, and not presumed from the circumstance that plaintiff was injured.

Walsh v. Oregon R. & Nav. Co. 10 Or. 250; *Coughtry v. Willamette Street R. Co.* 21 Or.

NOTE.—As to liability for dangerous electric wire in highway, see *Hayes v. Hyde Park (Mass.)* 12 L. R. A. 249; *Bourget v. Cambridge (Mass.)* 16 L. R. A. 605; *Southwestern Teleg. & Teleph. Co. v. Robinson* (C. C. App. 5th C.) 16 L. R. A. 545.
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245; 1 *Shearm. & Redf. Neg.* § 60; *Parrott v. Wells*, 82 U. S. 15 Wall. 537, 21 L. ed. 211; *Schultz v. Pacific Railroad*, 36 Mo. 31; *Baker v. Fehr*, 97 Pa. 70; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Bachelder v. Heagen*, 18 Me. 82; *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 38 Am. Rep. 566.

When an injury may have come of either one of two causes, either of which may have been the sole proximate cause, it devolves on the plaintiff to prove by a preponderance of evidence that the cause for which the defendant was liable was culpable, and the proximate cause.

16 Am. & Eng. Encyclop. Law, p. 445; *Patterson, Railway Accident Law*. 435; *Searles v. Manhattan R. Co.* 101 N. Y. 661; *West Mahanoy Twp. v. Watson*, 112 Pa. 578; *Marble v. Worcester*, 4 Gray, 397.

In this case the accident must be ascribed to the circumstance that the wire had become charged with electricity, and not alone to the position of the wire at the sidewalk.

It cannot be said that the proof that the wire was charged for twenty-four hours previous to the accident is constructive notice or is evidence to go to the jury upon the question of negligence.

Elliott, Roads & Streets, p. 461.

Where a plaintiff avers a particular state of facts, he is entitled to a verdict only in virtue of giving evidence tending to prove the state of facts so averred.

Waldier v. Hannibal & St. J. R. Co. 71 Mo. 514; *Buffington v. Atlantic & P. R. Co.* 64 Mo. 246; *Stout v. Coffin*, 28 Cal. 65; *Neudecker v. Kohlberg*, 81 N. Y. 296; *Boardman v. Griffin*, 52 Ind. 101; *Woodward v. Oregon R. & Nav. Co.* 18 Or. 289; *Knahtia v. Oregon Short Line & U. N. R. Co.* 21 Or. 136.

Under the facts and circumstances of this case the defendant was no more chargeable with extraordinary caution in handling electricity than a person who made no use of electric wires whatever.

Wabash, St. L. & P. R. Co. v. Locke, 113 Ind. 404.

The duty imposed does not require the taking of every possible precaution to avoid injury to individuals, nor that the company should have employed any particular means, which, it may appear after the accident, would have avoided it; it was only required to use such reasonable precaution to prevent the accident, as would have been adopted by prudent persons prior to the accident.

Wabash, St. L. & P. R. Co. v. Locke, supra; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367; *Pollock, Torts*, 86; *Volkmar v. Manhattan R. Co.* 26 Jones & S. 125; *Daniels v. Potter*, 4 Car. & P. 262; *Holden v. Liverpool New Gas & C. Co.* 3 C. B. 1.

No man can be charged with neglect if he used due care according to the circumstances, although there could have been even more elaborate and effective precautions conceived of by some one else.

16 Am. & Eng. Encyclop. Law, p. 398, title, *Negligence; Ordinary Care.*

If a party be guilty of an act of negligence,

which would naturally produce an injury to another, but before such injury actually results a third person does some act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is not responsible even though the injury would not have occurred but for his negligence.

Cooley, Torts, p. 78; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *West Mahanoy Twp. v. Watson*, 116 Pa. 849.

An intervening efficient cause, sufficient to break the causal connection between the original wrong complained of and the injury, may be either culpable, or not culpable, accidental or intentional, animate or inanimate. The test is: Was the new and independent force, acting in and of itself in causing the injury and superseding the original wrong complained of, so as to make it remote in the claim of causation; although it may have remotely contributed to the injury as an occasion or condition thereof?

16 Am. & Eng. Encyclop. Law, 445; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Washington v. Baltimore & O. R. Co.* supra; *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 44, 19 L. ed. 65; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658; *Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259; *Merchants Wharfbat Asso. v. Wood*, 64 Miss. 662, 60 Am. Rep. 76; *Tutein v. Hurley*, 98 Mass. 211, 98 Am. Dec. 154; 2 Thomp. Neg. p. 1084, et seq.; 33 Cent. L. J. note p. 450.

The proximate cause of the injury must be alleged in the complaint with particularity, and strictly proved on the trial.

Woodward v. Oregon R. & Nav. Co. 18 Or. 289; *Knahla v. Oregon Short Line & U. N. R. Co.* 31 Or. 186.

Since the facts are not disputed, the question whether the acts of defendant were the remote or the proximate cause of the injury, is a question for the court, and not for the jury, and should be determined by this appeal.

West Mahanoy Twp. v. Watson, 116 Pa. 844; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 658; *Henry v. St. Louis, K. & N. R. Co.* 76 Mo. 288, 48 Am. Rep. 762; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404; *Baker v. Fehr*, 97 Pa. 70; *Woodward v. Oregon R. & Nav. Co.* supra; *Langford v. Jones*, 18 Or. 307; *Gibson v. Oregon Short Line & U. N. R. Co.* (Or.) Feb. 20, 1898.

On petition for rehearing.

Whatever the rule may be in the cases of bailments, in other cases of negligence the distinction between slight, ordinary, and great care should be repudiated, and the true test should be whether the defendant exercised such care as ordinarily prudent men, in view of the probabilities of danger, would have exercised.

16 Am. & Eng. Encyclop. Law, 398, 402, 420; Whart. Neg. §§ 44, 65, 66; Cooley, Torts, *681, 682; Deering, Neg. § 11; Bishop, Non-Cont. L. §§ 439, 442; 2 Redf. Railways, 229, note 5.

Mankind might be capable of taking precautions that would be extraordinary, unnecessary L. R. A.

sary, and impractical, but ordinary caution in the management and control of electricity does not reach so far. Even if the utmost caution is to be required, it is the caution that is practical and not that which is simply conceivable.

Hutchinson, Carr. § 502; *Indianapolis & St. L. R. Co. v. Horst*, 98 U. S. 296, 23 L. ed. 899; *Tuller v. Talbot*, 23 Ill. 357, 76 Am. Dec. 695; 2 Redf. Railways, 239; 2 Wood, Railway Law, 1058, note 1.

The "utmost care" is the "utmost practicable care."

2 Wood, Railway Law, 1058, note 1 and cases cited; *Levy v. Campbell* (Tex.) April 19, 1892; Schouler, Bailm. § 652.

The care that would be exercised by "very cautious persons."

Smith v. Chicago & A. R. Co. 108 Mo. 243; Story, Bailm. § 601; 2 Wood, Railway Law, 1058, note 1 and cases cited; *Maverick v. Eighth Ass. R. Co.* 86 N. Y. 380; *Edwards v. Lord*, 49 Me. 279; *Bowen v. New York Cent. R. Co.* 18 N. Y. 406, 72 Am. Dec. 529; *Gilson v. Jackson County Horse R. Co.* 76 Mo. 282.

The defendant was not engaged in managing or controlling a dangerous current of electricity and the rule of extreme caution does not measure its responsibility.

Kelly v. Manhattan R. Co. 3 L. R. A. 74, 112 N. Y. 450; *Palmer v. Pennsylvania Co.* 3 L. R. A. 252, 111 N. Y. 488; *Morris v. New York Cent. & H. R. Co.* 106 N. Y. 678; *Lafflin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 26 Am. Dec. 629; *Moreland v. Boston & P. R. Corp.* 141 Mass. 81.

Messrs. James Gleason and McGinn, Sears & Simon, for respondent:

The motion for a nonsuit was very properly denied.

Code, §§ 246, 247; *Grant v. Baker*, 13 Or. 329; *Anderson v. North Pacific Lumber Co.* 21 Or. 281; *Herbert v. Dufur* (Or.) Feb. 6, 1893.

Where a telegraph wire is left swinging across a public highway, at such a height as to obstruct and endanger ordinary travel, such fact unexplained and unaccounted for, raises a presumption of negligence.

Thomas v. Western U. Teleg. Co. 100 Mass. 156; *Dickey v. Maine Teleg. Co.* 46 Me. 483; Thomp. Neg. § 24, p. 859; *Western U. Teleg. Co. v. Eysler*, 2 Colo. 141; *Stephens & U. Transp. Co. v. Western U. Teleg. Co.* 8 Ben. 502; *Gray v. Boston Gas Light Co.* 114 Mass. 149, 19 Am. Dec. 324.

A telephone company which for several weeks permits its wire to remain suspended across a public highway a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm, and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire.

Southwestern Teleg. & Teleph. Co. v. Robinson, 16 L. R. A. 545, 2 U. S. App. 203, 50 Fed. Rep. 810; *United Electric R. Co. v. Shelton*, 89 Tenn. 423.

It is the duty of a telephone company using a public highway for its poles and wires to so construct and maintain its line as not to accommodate the public use of the highway for the purpose of travel and transportation, whether by ordinary vehicles, or by street railways.

Central Pennsylvania Teleph. & S. Co. v. Wilkes-Barre & W. S. R. Co. 11 Pa. Co. Ct. Rep. 417; *Cincinnati Inclined Plane R. Co. v. City & S. Teleg. Asso.* 12 L. R. A. 534, 48 Ohio St. 390.

If the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages from either.

2 Thomp. Neg. p. 1088 *et seq.*; 15 Am. & Eng. Encyclop. Law, p. 440.

Lord, Ch. J., delivered the opinion of the court:

This is an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in permitting its wire to come in contact with an electric wire, whereby it became heavily charged with electricity, and in allowing such wire to hang down so near the ground at the corner of K and Twenty-First streets as to endanger the life and limb of those traveling upon such streets.

The errors assigned relate to the refusal of the trial court to grant a nonsuit, and to certain instructions given and refused. Upon the first point the contention is that the evidence does not prove the cause of action alleged, although it may be sufficient to constitute a ground of action, and consequently that the variance is fatal to the plaintiff's recovery. It is no doubt true that the plaintiff must state the facts which constitute his cause of action, and that he cannot state one and prove another. The Code, with all its comprehensive liberality, will not admit, as Sherwood, Ch. J., said, "a plaintiff to sue for a horse and recover a cow." *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 518. Such variance is fatal, for the reason that the cause of action is unproved in its entire scope.

The inquiry, then, is whether the testimony for the plaintiff establishes a cause of action different from the one alleged. That there is some variation between the evidence and the complaint may be conceded, but it consists only in matter of detail, or as to how the injury occurred. There is no absolute departure in the proof from the original theory of the case. The point to which the variance relates is this: The allegation, in substance, is that the plaintiff was walking along the sidewalk, and came in contact with the wire, which, owing to the darkness, he was unable to see; and that he attempted to remove the same from his pathway, and in doing so he caught hold of the wire, and the electricity with which it was impregnated passed into his body, etc.; whereas his testimony shows that he was walking along the sidewalk, and, it being dark, and, owing to the rain, the pavement slippery, that he slipped, and fell on his elbow, causing his hat to fall off, and some packages to drop out of his hands, and that in groping for his hat and packages his hand came in contact with the wire, which, being impregnated with electricity, "grabbed" it, and, as he could not let go, he put out his other hand to remove the same, when it "grabbed" that hand, etc. Plainly, the variation here is only of detail, or as to the circumstances under which

the plaintiff came in contact with the wire and received the injury. The elements of negligence alleged, namely, in permitting its wire to come in contact with the electrical wire, and to hang so near the ground as to endanger life or limb, are present in either aspect of the case, or as much under the testimony as the allegation. Such variance does not present a case where the cause of action is unproved in its entire scope and meaning, within the construction of the Code. Section 98, Hill's Code. Hence there is not a failure of proof, and without such failure the variance is not fatal, or such as would entitle the defendant to a judgment of nonsuit.

The principal ground of complaint remains, however, to be considered. This is, Was the negligence of the defendant the proximate cause of the injury? There are some other minor questions suggested by way of criticism upon the charge of the court, but the remoteness of its acts, and the intervention of other agencies directly contributing to plaintiff's injury, are relied upon as its chief defense. It was the failure of the court, as indicated by the instructions given and refused, to properly apply the law in this regard that constitutes the main grievance of the defendant. To comprehend the force of this objection, we must first know and understand the facts. The plaintiff is a laboring man, and was employed by the gas company to shovel coal into its furnace. On the day of the accident he quit work after 5 o'clock P. M., and started for his home, but on his way went to market, made some purchases, and went out G street to Twenty-First, and, when passing down that street, near the corner of K, he slipped on the sidewalk, and fell on his elbow, his hat falling off, and the packages which he carried flying out of his hands. After he got up he groped for his packages and hat, when his hand rubbed against a wire, one end of which was hanging down over the sidewalk at the intersection of the streets. His testimony on this point is: "My hand rubbed against this wire, grasping hold of me fearfully. I then took the notion to put up this hand to hit this one away from there. It grabbed that one, and held on to it fearfully. I could not let go; it was too strong. I don't know what part of my hand caught hold of it. My fingers rubbed it first. It tore me fearfully, like machinery with about 200 pounds of steam. I was screaming awfully, and finally I saw people around the sidewalk; and this hand after a while dropped from the wire. That must have been the time my toes got burned. It whirled me up in all sorts of shapes. I don't know how I was. When this hand dropped I hung on with it until I was released. After this hand dropped I had no more memory at all. I lost my senses. I don't know what happened after that." Several persons hearing his screams for help, two men ran from J street to his assistance, and one of them slashed at the wire with his knife, and received a severe shock, but did not sever it. After some hesitation, he slashed it again, and succeeded in cutting the wire. The defendant was assisted

to his home and put to bed, when it was found that three toes were badly burned. Afterwards he was taken to the hospital, and one toe was amputated and the others were trimmed off. It was after 6 o'clock, and quite dark, when the accident occurred, and the sidewalk was slippery from recent rain. The defendant could not see the wire, nor did he know that it was hanging down over the street, nor that it was charged with electricity. The wires of the telephone company were strung on K street, running east and west, and the wires of the electric light company and the electric street-railway company were strung along Twenty-First street, running north and south, so that the wires of the defendant were at right angles to the wires of the two electric companies.

The evidence further shows that the defendant had an arrangement with the electric light company by which either might use the poles of the other upon which to string a wire when it had no poles at the place, and only a short distance of wire was to be used; that the defendant used the poles of the electric light company when wiring the residence of a Mr. Bates, at the corner of H and Twenty-First streets, but that some three months before the accident the wire was disconnected from the telephone at his residence, and wrapped around the electric pole, and made fast by tying it on a bracket and winding around the pole and around itself; that such wire had not been used by defendant after it was so disconnected, nor had the company made any inspection of it from that time until the accident; that during this interim the electric company changed its poles and wires along Twenty-First street, and in doing so took down the pole belonging to it upon which the telephone wire was fastened as aforesaid, coiled up the wire, and hung it on a pole belonging to the defendant, near K and Twenty-First streets, where the accident happened; but that the defendant had no knowledge that the electric company had taken down its poles, or taken down its wire, and hung it on the pole as aforesaid. Richard Gerdes testified that he was in the employ of the electric light company, and that on the night of the accident he received a message by telephone that a man had been hurt by an electric light wire; that he went at once to the place where the accident occurred, and found the wire hanging on the pole; that he cut it above the coil; that it was heavily charged with electricity by contact with a wire belonging either to the electric street railway or the electric light company; that it must have been the wire of one or the other that charged it with electricity, as there was no other heavily charged wire in that vicinity. The evidence further shows that the day before the accident the wire was hanging in the form of a coil on a stick at the side of the telephone pole, and that the bottom of it was two or three feet from the ground; that it was heavily charged with electricity, and that one witness, who touched it with a wire, was thrown to the ground from the shock.

Among other things, the court, in substance, instructed the jury that the question

here submitted is "whether it was negligence or not to leave a wire along a public thoroughfare, where it might be found in the way of pedestrians, or where it might be liable to be handled or interfered with by boys or by irresponsible persons." That it was for them to determine from the evidence "whether or not there was a proper inspection made of these wires, so as to know what their condition was, and to ascertain whether anybody had been interfering with them, making them more dangerous than they otherwise would be." That "the fact that this company used the poles of another company, and the fact that other electric companies had wires upon the same street, does not detract at all from the strict requirements which should be made of the defendant company. Unless it had loaned its wire to the electrical company, or the electrical railway company, and placed them under the control of that company, it could not be absolved from the duty of looking after them and ascertaining and knowing what their condition was, and of anticipating and foreseeing what might happen in connection with them; and that, unless you should find from the evidence that this defendant had turned over the use and control of its wires to these other companies on whose pole this wire was suspended, you have no right to say that those companies were liable, and not this company, if this company was guilty of any negligence. Unless this company was negligent, there could be no recovery on the part of the plaintiff. If you find that it was not guilty of any negligence, then your verdict should be for the defendant." The counsel for the defendant requested the court to instruct the jury as follows: "If the jury finds that the defendant was not negligent in leaving its wire attached to the pole near Mr. Bates' house, as it did leave it, and that the wire was not dangerous as left by it, and could not and did not become dangerous except by the act or neglect of some other person or company, the defendant is not liable;" but the court refused to charge as requested, but gave it with the following modification: "I give you that in connection with the general instruction which I gave you that the defendant must have parted with the control of its wires in order to be exonerated by the reason of the negligent act of some other person." The defendant also requested the court to charge that "it is claimed by the defendant that it placed its wires in a safe and secure position, and that it did not become dangerous except by the acts and omissions of others, without its knowledge or consent. If you find this is true, the defendant is not liable, unless the intervening acts or omissions of such other persons should have been contemplated and guarded against by the defendant as consequences likely to follow, and which might have been reasonably anticipated." And again: "If it was not negligent in leaving the wire as it did, it is not liable, unless it could have reasonably foreseen that some one would take down the wire, and place it where it injured the plaintiff, and that it might come in contact with some other electric wire that was charged with a

current of electricity that would make it dangerous." And again: "Even if the defendant had left its wire coiled up or hanging over the sidewalk, so that pedestrians might come in contact with it, it would not be liable for damages to the plaintiff for injury sustained by an electric shock from the wire unless the fact that the wire left there was the immediate or proximate cause of the injury, the wire not by itself being dangerously charged with electricity, and becoming so charged only by intermediate circumstances, namely, that of interfering with or crossing some heavily charged wire," etc. The court refused to so instruct the jury, and to its rulings thereon the defendant duly accepted.

It appears from the instructions that the theory of the law as applied to the facts by the trial court was that it is negligence to allow a wire, which, from its environment, is liable to become charged with electricity, to hang over the street at such a height as to obstruct and endanger ordinary travel. That it was the duty of the defendant, owing to the location of its wire and the use of the poles of the electric light company, to look after it, and see that it was in proper condition, and that, when the wire was disconnected from the Bates residence, if, instead of taking down the wire, the company chose to hang it upon the electric pole, the duty still devolved upon it to take care of such wire, and that this was a continuing duty, from which it would not be absolved unless it had parted from the control of its wire to the electric companies. This requirement imposed upon the defendant the obligation of looking after and ascertaining the condition of its wire, and of anticipating or foreseeing results which were likely to happen by reason of its connection or location as to the electric wires so as to avoid liability to danger arising therefrom. In this view of the law, the taking up of the pole by the electric light company and hanging the defendant's wire upon its pole at the intersection of K and Twenty-First streets would not authorize the jury to find that the electric companies were liable, and not the defendant, if it was negligent in not removing its wire when it ceased to use it at the Bates residence. It is earnestly insisted by counsel that this view of the law is a wrong conception of the defendant's duty, for the reason that it makes the company liable for the wrongful acts of third persons in taking down the wire and hanging it on the pole where it became charged with electricity, which he claims, are the responsible causes of the injury. This is based on the assumption that there intervened between the negligence of the defendant, if any there was, and the injury to the plaintiff, an independent, adequate cause of the injury, namely, the wrongful act of the electric company, which was the proximate cause of the injury. What is the proximate cause of the injury is ordinarily a question for the jury. It is only when the facts are undisputed that it becomes a question for the court. Wherever, therefore, there is any doubt, the question of proximate cause should be submitted to a

jury to be decided as a matter of fact according to the circumstances of the case. To warrant a jury in finding that negligence is the proximate cause of the injury it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. ed. 259. The question, therefore, whether the stretching of the defendant's wire on the electric poles instead of its own poles, and whether the omission of the defendant to remove the same when it ceased to use it at the Bates residence, was negligence, and, if it was, whether the intervening act of the electric company and its consequences were such as could have been reasonably anticipated and guarded against by the defendant, was for the jury to determine in the light of the facts and circumstances. The record discloses that the electric light company gave the defendant permission to use its poles upon which to string its wire when the defendant needed them to connect its wire to a residence where it had no poles. When the defendant disconnected its wire from the telephone at Bates' residence it had no longer any need to use the electric poles, and the permission or license given to use them ceased, or was at an end, and necessarily the defendant ought to have removed its wire from the electric poles; and if it did not do so, but coiled and hung it on one of them, where it had no right to be, the defendant was bound to look after it, and to expect, if it failed to do so, that the electric company would remove it when such wire incommodated that company, or its business required the removal of its poles, as did happen. The jury found that the stretching of the wire upon the electric poles was dangerous, and that the omission of the defendant to remove it, when it disconnected the same from the Bates residence, and ceased to use it, was negligence, and that the intervening act of the electric company and its consequences could have been foreseen as likely to happen, or possibly to follow, from leaving the wire coiled and hung upon the electric pole near the Bates residence, and necessarily that the defendant was responsible for its wire being coiled and hung upon its own pole at the intersection of K and Twenty-First streets. This responsibility is based on the principle that if the defendant, instead of removing its wire, chose to hang it upon the electric pole, where it had no right to be, it was bound to look after it, and that, if the defendant had done so, it would have discovered the removal of the same, and its condition, so that the injury might have been avoided, and consequently that the company must be taken to have foreseen as likely to happen, or possibly to follow, the consequences which resulted from its omission to remove the wire when it was disconnected from the telephone at the Bates residence. This is in accordance with the rule that a person guilty of negligence or an omission of duty "should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which

in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow if they had been suggested to his mind." *Shearm. & Redf. Neg.* § 29. But this phase of the case is met with the argument that the telephone wire itself is not dangerous, and that the main or efficient cause of the injury was the electric current from the wires of the electric companies, with the production of which the defendant had nothing to do. In other words, that, if the defendant was negligent, it was the dangerous force of electricity which intervened, and with the production of which the plaintiff had nothing to do, that communicated the injury to plaintiff, and therefore it was the proximate cause of the injury. It is no doubt true that where there is negligence, and injury following it, and there is also an intermediate cause, disconnected from the negligence, and the operation of this cause produces the injury, the person guilty of the negligence cannot be held responsible for the injury. The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. *Milwaukee & St. P. R. Co. v. Kellogg*, *supra*. If the intervening cause and its probable consequence be such as could reasonably have been anticipated by the original wrongdoer, the causal connection between the wrongful act and the injury is not broken, and the defendant is liable for the injury. In *White Sewing Mach. Co. v. Richter*, 2 Ind. App. 394, it is said: "Intervening agencies sometimes interrupt the current of responsible connection between negligent acts and injuries, but as a rule these agencies, in order to accomplish such result, must entirely supersede the original culpable act, and be in themselves responsible for the injury, and must be of such a character that they could not have been foreseen or anticipated by the original wrongdoer. If it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one will not exculpate the other, because it would still be an efficient cause of the injury." The intermediate cause must supersede the original wrongful act or omission, and be sufficient of itself to stand as the cause of plaintiff's injury, to relieve the original wrongdoer from liability. "One of the most valuable of the criteria furnished us by the authorities," *Mr. Justice Miller* said, "is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient as the cause of the misfortune, the other must be considered as too remote." *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 52, 19 L. ed. 67.

There is no claim that the wires of the companies transmitting electrical power were not in their proper position, or that the companies were negligent in the use of their wires. We must take it, upon the facts as disclosed by this record, that their wires were where they had a right to be, and were not an obstruction, endangering the life or

limb of any one traveling along the street. It was the telephone wire, suspended on a pole, as shown by the evidence, that furnished the means by which the currents of electricity passing over the electric companies' wires were diverted and conducted so close to the ground as to render passage along the public thoroughfare exceedingly dangerous. As a consequence, it was the defendant's wire so hanging upon the pole that furnished the means by which the electrical current was communicated to and injured the plaintiff. It is true that the electrical current was a new power which intervened, and with the production of which the defendant had nothing to do, but it was harmless, or could not have been communicated to the plaintiff, but for the suspended wire of the defendant. As an intermediate cause it was connected with the primary fault, and not self-operating, and therefore is not sufficient itself to stand as the cause of plaintiff's injury. The language of *Mr. Justice Bruce* clearly illustrates this point: "To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is, in fact, to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force of power which intervened, with the production of which the telephone company had nothing to do, but upon this point, in *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 52, 19 L. ed. 67, the court says: 'If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' The new force of power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account." *South-western Teleg. & Teleph. Co. v. Robinson*, 3 U. S. App. 205, 50 Fed. Rep. 813, 16 L. R. A. 545.

It thus appears that the defendant's negligence was the primary and proximate cause of the injury. In view of this result the other errors assigned are of little importance, and not such as would authorize the reversal of the case.

It results that *the judgment must be affirmed.*

A petition for rehearing was subsequently granted after which on January 8, 1894, *Lord, Ch. J.*, on behalf of the court delivered the following opinion:

The suspended telephone wire, while it was charged with electricity from contact with the electric wire, was not less dangerous than the electric wire itself would have been, similarly suspended as to the street. It was this condition of affairs that led the court, in its charge, to refer to electricity generally as a "subtle and dangerous agency," which required the "utmost caution to control." As the telephone wire was liable to become charged with such dangerous agent, and thus to become dangerous to the travel-

ing public, the duty of inspecting and ascertaining the condition of the wires, and whether there was any interference making them more dangerous than they otherwise would be, was necessarily involved. In view of these circumstances, the degree of care imposed was commensurate with the danger. "Due care is a degree of care corresponding to the danger involved." Cooley, Torts. It is not the same in all cases. The term is relative, and its application depends on the situation of the parties, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances. Hence, a wire liable to be charged with an agency so dangerous and difficult to manage, while so located, needed to be looked after with that degree of care and vigilance as would guard the public against liability to accident from

it. The court then said: "The question is here submitted to you whether it was negligence or not to leave a wire along a public thoroughfare where it might be found in the way of pedestrians, or where it might be liable to be handled and interfered with by boys or by irresponsible persons." It further added: "Negligence," in cases of this kind, means the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect. Applying those definitions to this case, the inquiry to be solved by you is, What did this defendant do that a cautious and prudent man would not have done, in connection with the wire which has been described to you in the testimony, and which is mentioned in the pleadings?" These instructions, taken in connection with the instructions referred to in the main opinion, we think fairly present the law governing the case.

MICHIGAN SUPREME COURT.

Harry MEE *et al.*, *Appts.*,

v.

Edwin E. BENEDICT *et al.*

(.....Mich.....)

1. **Purchasers of an undivided interest in timber from tenants in common** of the land, although not entitled to a partition of the timber, may, in equity, enforce a partition of the land, setting off the parcel on which the timber will belong to them, even if, by subsequent conveyances, the whole title to the land has been acquired by one person.
2. **A deed of standing timber to be removed** within ten years passes the title and does not constitute a mere license to take off chattels within the time limited.
3. **The omission to mention the state where the lands are situated** in an instrument purporting to sell standing timber will not destroy the effect of the record as notice although the instrument is executed in another state if it is properly acknowledged and recorded in the county where the lands are situated and the record title there stands in the name of the grantor.
4. **Recording an instrument purporting to convey standing timber in a book called "miscellaneous records"** will not prevent its being constructive notice to the world of the rights of the purchaser, if the record is properly indexed and there is nothing to prevent the register from providing such a book.

(Grant, J., dissents from proposition 1.)

(December 22, 1893.)

APPEAL by complainant from a decree of the Circuit Court for Manistee County in favor of defendants in a proceeding brought

to compel partition of certain lands so as to permit complainants to obtain timber which they had purchased from certain of the tenants in common. *Reversed.*

The facts are stated in the opinion.

Messrs. P. W. Niskern and C. W. Sessions, for complainants:

The timber deed to complainants Torrent, Haines & Company and the record thereof are good and valid.

The question of record is always one of notice. A conveyance need never be recorded as between the parties nor as to parties having full notice.

Battershall v. Stephens, 34 Mich. 68; *Stetson v. Cook*, 39 Mich. 750.

The deed being duly executed and acknowledged, and being a conveyance of an interest in lands, within the clear decisions of the supreme court, and the express terms of the statute has every effect as such record that it could have if it were an ordinary deed in the book of deeds.

Russell v. Myers, 82 Mich. 523; *Johnson v. Moore*, 28 Mich. 3; How. Anno. Stat. §§ 5680, 5685.

Such timber deeds are not void in Michigan.

Campau v. Godfrey, 18 Mich. 34, 100 Am. Dec. 133; *Butler v. Boys*, 25 Mich. 53, 12 Am. Rep. 218; *Fitch v. Boyer*, 51 Tex. 836. See also *White v. Sayre*, 2 Ohio, 110; *Green v. Arnold*, 11 R. I. 364, 23 Am. Rep. 466; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Duncan v. Sylvester*, 16 Me. 388; *Barnhart v. Campbell*, 50 Mo. 597; *Camoron v. Thurmond*, 56 Tex. 32; *Arnold v. Cauble*, 49 Tex. 533; *Bogges v. Meredith*, 16 W. Va. 1; *Ballou v. Hale*, 47 N. H. 347, 98 Am. Dec. 438; *McKey v. Welch*, 22 Tex. 390; *Dorn v. Dunham*, 24 Tex. 366; *Good v. Coombs*, 28 Tex. 84; *Stark v. Barrett*, 15 Cal. 362; *Gates v. Salmon*, 35

NOTE.—The decision that purchasers of an undivided interest in timber from tenants in common of the land may compel a partition of the land in order that their interest in the timber may be fixed

32 L. R. A.

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is one of very great importance, and we believe marks one more step in the enlargement of equitable remedies to meet the necessities of a situation.

Cal. 576, 95 Am. Dec. 139; *Sutter v. San Francisco City and County*, 36 Cal. 115; *Prentiss v. Case*, 7 Ohio, pt. 2, p. 129; *Treon v. Emerick*, 6 Ohio, 391; *Dennison v. Foster*, 9 Ohio, 126; *Robinett v. Preston*, 2 Rob. (Va.) 278; *Orook v. Vandevort*, 13 Neb. 505; *Markoe v. Wakeman*, 107 Ill. 263; *Worthington v. Staunton*, 16 W. Va. 208; *Orocker v. Tiffany*, 9 R. I. 505; *Freem. Coten*, § 200.

As to the pretended conveyance of the timber by Mee and Seymour to Hart, the grantors did not own the timber and knew they did not. Grantee knew it also. There is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense.

1 *Parsons, Cont.* *476; *Barlow v. Scott*, 24 N. Y. 40.

One relying upon a contract must show that the minds of the parties met.

Ferguson v. Hemingway, 38 Mich. 159; *Keller v. Holderman*, 11 Mich. 248; *Woods v. Ayres*, 39 Mich. 352, 33 Am. Rep. 396.

If there is a part, or a condition, upon which the minds of the parties did not meet, the whole contract becomes inoperative and void.

1 *Parsons, Cont.* *477; *Tuttle v. Love*, 7 Johns. 470; *Vassar v. Camp*, 11 N. Y. 441; *Peltier v. Collins*, 3 Wend. 459, 20 Am. Dec. 711.

If the transaction was wholly a mistake and misunderstanding of fact, the parties equitably entitled to relief should have it.

Even if the mistake were one of law, the parties with clean hands, who have paid their money, and can otherwise have no relief, are not precluded because of such mistake.

Hunt v. Rousmanier, 21 U. S. 8 Wheat. 215, 5 L. ed. 599.

Where the mistake of law is occasioned by fraud, imposition, or misrepresentation, a party suffering thereby may have relief in equity.

Ladd v. Rice, 57 N. H. 874; *Brown v. Rice*, 26 Gratt. 467; *Hardigree v. Mitchum*, 51 Ala. 151; *Whelan's App.* 70 Pa. 410; *Goodenow v. Eber*, 16 Cal. 470, 76 Am. Dec. 540; *Spurr v. Home Ins. Co.* 40 Minn. 425; *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708, and *notes*.

The acts and position of Benedict and Hart, as now claimed by them, are surely both an "imposition" and "fraud" upon their grantors, and especially upon the rights of those who had paid for the timber, to their knowledge.

Griswold v. Hazard, 141 U. S. 260, 35 L. ed. 678; *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 337. See also *Silbar v. Ryder*, 63 Wis. 108; *Hagenah v. Geffert*, 73 Wis. 641.

Those who take by quitclaim deed are not bona fide purchasers and only take the interest which their grantor had.

Peters v. Cartier, 80 Mich. 124. See also *Johnson v. Williams*, 37 Kan. 179, and cases there cited.

The sale of the timber to Torrent, Haines & Company was a sale of an interest in land.

Russell v. Myers, 32 Mich. 523; *Johnson v. Moore*, 28 Mich. 8.

In *Benedict v. Torrent*, 11 L. R. A. 278, 83 Mich. 186, this court explicitly holds that it conveyed to Torrent, Haines & Co. all the title which Mee and Seymour had in the timber upon the land. The title to the timber is 22 L. R. A.

passed absolutely by the terms of the deed, and the license is a mere condition subsequent.

Williams v. Flood, 63 Mich. 487 and cases cited; *Haskell v. Ayres*, 35 Mich. 90; *Johnson v. Moore*, 28 Mich. 4; *Spalding v. Archibald*, 52 Mich. 368, 50 Am. Rep. 253.

The deed is only to be treated as void so far as it injuriously affects the cotenants, and is good against the grantor and those claiming under him.

McKey v. Welch, 22 Tex. 390.

One claiming title to land is chargeable with notice of every matter affecting the estate which appears on the face of any deed in his chain of title, and of every matter he would have learned by any inquiry suggested by the recitals in any such deed.

Roll v. Rea, 50 N. J. L. 264.

A quitclaim deed passes no title as against the grantor's prior, though unrecorded, conveyance.

Pastel v. Palmer (Iowa) March 9, 1887.

A purchaser who acquires his title by a quitclaim deed cannot be regarded as a bona fide purchaser without notice, but takes only such title as the grantor can lawfully convey.

McAdoo v. Black, 6 Mont. 601; *Peters v. Cartier*, 80 Mich. 124; *Partridge v. Hemenway*, 89 Mich. 454; *Wines v. Woods*, 109 Ind. 291; *Snornden v. Tyler*, 21 Neb. 199; *Johnson v. Williams*, 37 Kan. 179; *Tram Lumber Co. v. Hancock*, 70 Tex. 812; *O'Neal v. Seizas*, 85 Ala. 80; *Bradford v. Carpenter*, 18 Colo. 30; *Hop v. Blair*, 105 Mo. 85; *Hersey v. Lambert*, 50 Minn. 373; *American Mortg. Co. v. Hutchinson*, 19 Or. 334; *Putnam v. Russell*, 86 Mich. 389.

Mr. E. E. Benedict, for appellees:

There is no law making this medley called miscellaneous records evidence to be read in any court. A book not authorized by law is not admissible in evidence when there is no law requiring it to be kept or declaring it to be in evidence.

Smith v. Lawrence, 12 Mich. 481; *Barnard v. Campau*, 29 Mich. 162.

A record in an unauthorized book is not constructive notice. For example the record of a deed absolute on its face, but intended as security for a debt, must be recorded according to its true import, and its record as a deed is void and is not constructive notice for any purpose.

Brown v. Dean, 3 Wend. 208; *Dey v. Dunham*, 2 Johns. Ch. 182, 1 L. ed. 340; *Manufacturers & M. Bank v. Bank of Pennsylvania*, 7 Watts & S. 335, 42 Am. Dec. 240; *Jagues v. Weeks*, 7 Watts, 261; *Edwards v. Trumbull*, 50 Pa. 509; *Jackson v. Van Valkenburgh*, 8 Cow. 260; *Purdy v. Huntington*, 42 N. Y. 334, 1 Am. Rep. 532.

The irregular registration of a deed is not notice. As where the instrument is authorized by law to be recorded, but is actually recorded without authority.

Hiles v. Atlee, 80 Wis. 219; *Hodgson v. Butts*, 7 U. S. 3 Cranch, 140, 2 L. ed. 391; *De Witt v. Moulton*, 17 Me. 418; *Giddings v. Smith*, 15 Vt. 344; *Duncan v. Duncan*, 1 Watts, 322; *Tidd, Pr. 31*; *Rushin v. Shields*, 11 Ga. 636, 56 Am. Dec. 436.

No presumption of notice arises from the record of an instrument unless it is recorded

by authority of law and unless that authority has been duly and fully pursued.

Tillman v. Cowand, 12 Smedes & M. 262.

The court, in *Benedict v. Torrent*, 11 L. R. A. 278, 83 Mich. 186, says: "It is well settled that they (Torrent, Haines & Co.) could not become purchasers of Mee & Seymour of any interest in the land to the prejudice of their covenants.

One tenant in common has no right over the property of his cotenant.

Clow v. Plummer, 85 Mich. 560; *Freem. Coten. § 251*; *Elwell v. Burnside*, 44 Barb. 447.

Only such timber is conveyed as shall be cut and removed within ten years. No timber has yet been cut and removed, consequently no title has yet passed to any timber.

Haskell v. Ayres, 32 Mich. 93; *Williams v. Flood*, 63 Mich. 487.

License to enter on land and cut timber, without the consent of all parties in interest, is license to commit waste, and waste is made by the statute unlawful in a cotenant.

How. Anno. Stat. §§ 7942, 7956.

An easement given by a tenant in common is void as to the other cotenants who have not consented thereto.

2 Wait, Act. & Def. 666; 8 Kent, Com. 436; *Hutchison v. Chase*, 39 Me. 508, 68 Am. Dec. 645.

If one tenant in common of land ousts his cotenant, the latter may maintain ejectment.

Goodtitle v. Tombs, 3 Wils. 118; *Brackett v. Norcross*, 1 Me. 89.

A deed by a cotenant of a whole or a part, without any words to indicate the passing of an undivided interest, is void.

Bogges v. Meredith, 16 W. Va. 27.

A tenant in common may demise or convey an undivided share, but a demise of a specific portion, as "west half" is void.

Shepardson v. Rowland, 28 Wis. 108; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614.

As the act licensed is contrary to the prohibition of the statute the license must be void and cannot be the basis of an estoppel.

Every one dealing with a cotenant must be held to understand the law. He cannot base a right on his ignorance and disregard of it.

It is essential to an estoppel that the person relying on it should be misled.

Diller v. Brubaker, 32 Pa. 498, 91 Am. Dec. 177.

The grantee who claims estoppel must not only be ignorant of the true state of the title, but also of any convenient and available means of acquiring that knowledge.

Brant v. Virginia Coal & Iron Co. 93 U. S. 326, 23 L. ed. 927.

In *Duncan v. Sylvester*, *supra*, it was held that a conveyance by metes and bounds of a portion of the common estate by one tenant in common is void and not merely voidable at the election of a cotenant.

Boston Franklin Co. v. Condit, 19 N. J. Eq. 894; *Mobie v. Matteson*, 17 Wis. 1.

The person granting an easement must be sole tenant and not a tenant in common. For the rights of the tenants being equal, the grantee would gain no right as against the other tenants.

Marshall v. Trumbull, 28 Conn. 183, 73 Am. 22 L. R. A.

Dec. 687; *Clark v. Parker*, 106 Mass. 557; *Earl of Portmore v. Bunn*, 1 Barn. & C. 694; *Crippen v. Moras*, 49 N. Y. 63; *De Witt v. Harvey*, 4 Gray, 494; *Daniel v. North*, 11 East, 372; *Parker v. Frammingham*, 8 Met. 260; *Scott v. State*, 1 Sneed, 629; *Story*, Partn. 90; *White v. King*, 87 Mich. 107.

Mere mistake as to the legal effect of an instrument constitutes no ground for relief.

Martin v. Hamlin, 18 Mich. 354, 100 Am. Dec. 181; *Tripp v. Hasceig*, 20 Mich. 254, 4 Am. Rep. 388.

Unless there was fraud practiced as to the terms of the deed there is no relief.

Martin v. Hamlin, *supra*; *White v. Port Huron & M. R. Co.* 13 Mich. 356; *Tripp v. Hasceig*, *supra*; *Reynolds v. Campbell*, 45 Mich. 529; *Ludington v. Ford*, 33 Mich. 123.

Montgomery, J., delivered the following opinion:

The bill is filed to determine the rights of the complainants in and to the timber growing upon certain lands described in the bill. It appears that the lands were held by several tenants in common. The owners of twenty-three twenty-fourths of the land conveyed all their right, title, and interest in the timber to complainants. One Hart was the owner of the remaining one twenty-fourth which was not conveyed to complainants. Subsequently, those from whom complainants purchased and Hart also conveyed to the defendant Benedict; Benedict being the owner of the entire field, subject to any rights that complainants have in the timber. In the case of *Benedict v. Torrent*, reported in 83 Mich. 181, 11 L. R. A. 278, this court considered the rights acquired by the respective parties. It was there held that the conveyance by the owners of the twenty-three twenty-fourths of their rights in the timber did not confer a right upon Torrent to ask and have a partition of the timber; that a partition of the timber distinct from the lands could not be had. It was said: "The only interest which such a purchaser takes is the interest in the timber upon such lands as in partition proceedings shall be set off to his grantor. Such partition must be made of the entirety of the estate, according to the shares held by each. When this is done, the purchaser of the timber would be entitled to all the rights secured by his conveyance. The cross-bill in this case is filed for the sole purpose of effecting a partition of the timber. It is not framed to obtain a partition of the entire estate." The present bill is framed to meet the objection, and alleges, in substance, that the purchase of the interest by Benedict of the several owners, so as to invest Benedict with the title to the whole, with a view to defeating a partition of the lands, by means of which the complainants' equity is to be worked out, amounted to a fraud upon the rights of complainants. The transaction need not necessarily be so characterized. When the title rested in complainants' grantors, they having conveyed their interest in the timber upon the lands, the only means of making that conveyance effectual to carry into effect the intent of the parties was for said grantors of timber to ask and obtain partition of

lands. This they had the right, and it was their duty, to do, and equity would require and compel action on their part to that end. To deny this would be to permit the grantors of the timber to perpetrate a legal fraud upon their vendees. They have received a consideration for the timber, and have granted all the timber upon the lands to the complainants. This clearly includes all interest which they acquire on partition. See *Ounningham v. Pattes*, 99 Mass. 250; *White v. Sayre*, 2 Ohio, 112; *Stark v. Barrett*, 15 Cal. 370; *Harlan v. Langham*, 69 Pa. 288; *Whitton v. Whitton*, 88 N. H. 133, 75 Am. Dec. 163; *Barnhart v. Campbell*, 50 Mo. 599; *Freem. Coten*, §§ 206, 207, 199; and *Campau v. Godfrey*, 18 Mich. 32, 100 Am. Dec. 133. In this latter case the question was raised, but not decided, as to whether the purchaser of a distinct parcel, less than the whole, from one cotenant, could sustain a bill for partition against the cotenant. The query was also suggested as to whether, if any of the cotenants bring a bill for a partition, there would be any difficulty in making the purchaser a defendant. It was said: "The necessity of making the purchaser a party, or even of having two suits or two partitions in the same suit, instead of one, if the shares can still be fairly set off to the cotenants, might seem to be a consideration going only to the costs of the proceeding, rather than an objection upon which alone the deed could be held void."

The question in this case is, Shall the grantor be permitted to retain the consideration, and say to the purchaser that, as he (the purchaser) cannot ask for partition of the timber distinct from a partition of the entire estate in common, therefore the title which thus he assumed to convey shall prove ineffectual? Are the rules of equity so unyielding as to sanction this monstrous injustice? We think not. We do not depart from the doctrine that such conveyance is void as against the cotenant, but it is void only in so far as it affects the cotenant's rights. He may give assent to the conveyance, and thereby make it effectual. It is void so far as that the cotenant's interests shall not be injuriously affected by the conveyance; but it is not void as against the grantor, and we think it is competent, under the general equity powers of the court, to compel the grantor of a special interest to take such steps as to make his conveyance effectual. It is within his power to do so. He has received the consideration for the specific thing, to wit, the timber, to which his conveyance shall attach upon partition. He is in law and morals bound to take such steps as shall give effect to his conveyance. It would be a premium on fraud for a court of equity to admit its inability to compel the performance of this plain duty. The complainants having the right, it follows that it cannot be defeated by the fact that the entire title is now merged in Benedict. It is true that some of the cases speak of the transfer purporting to convey, by metes and bounds, an estate less than the entire of that of the cotenant, as being void as against the cotenant, and this supposition of absolute invalidity has led to results in some cases not altogether just. But it seems

to me the more correct way to state the result of the authorities is that such a conveyance is good as between the parties to it, but that it is not to be permitted to affect injuriously the rights of the cotenants. This results in nothing more than that, on partition, the cotenant should be entitled to partition precisely as though no conveyance had been made. But it seems to me a manifest perversion of justice to say that, because the law declares that the cotenant may not have his rights injuriously affected by such a conveyance, he may profit by the fact that he is a cotenant, and that circumstance shall enable him to defeat the right vested in the grantees of his cotenant. Mr. Freeman, in his excellent work on Cotenancy, says: "Although the deed does not impair the rights of the other cotenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor by transferring it to the grantee. The latter acquires rights which the cotenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest in the property." *Freem. Coten*, § 200. And so the courts in Ohio, Virginia, California, Missouri, Pennsylvania, and New Hampshire have held that a grantee of a cotenant is a necessary party to proceedings in partition. See cases above cited. Mr. Freeman further sums up the result of these cases upon the effect of a conveyance, as follows: "We are not sure that the difference in the decisions of many of the courts upon this subject has not been more in form of expression than in matters of substance. If, however, there remain any states wherein the courts really intend to assert that a conveyance by one cotenant of part of the common property is void in any other sense than that such conveyance will not operate to diminish or impair the rights of the non-assenting cotenants, such courts are falling into the minority, as the more recent decisions tend strongly and surely towards the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantor to certain rights that the cotenants of the grantor cannot wantonly disregard." *Freem. Coten*, § 204. This conclusion is not only sustained by the cases hereinbefore referred to, but by the further cases of *Orook v. Vandervoort*, 13 Neb. 505; *Camoron v. Thurmond*, 56 Tex. 22; *Markoe v. Wakeman*, 107 Ill. 263; *Crocker v. Tiffany*, 9 R. I. 505; and *Worthington v. Staunton*, 16 W. Va. 208.

The precise question involved in this proceeding has perhaps never been directly passed upon in the same form of proceeding, but the principle which we apply has been fully asserted in at least two cases. In the case of *McKee v. Barley*, 11 Gratt. 340, John T. McKee and Andrew Bratton owned a tract of land, including a small triangular piece, which John T. McKee conveyed by metes and bounds to the defendant, Barley. Subsequently John T. McKee and Andrew Bratton conveyed to Samuel W. McKee the entire tract, including that previously conveyed to

Barley by John T. McKee. The court says: "If, upon a partition, that part of the land described in this deed, or affected by the water privileges, had been assigned to John T. McKee, he would have been in a condition to have executed his contract, if he would not, in that event, have been estopped by his deed from disturbing his vendee; and his son, claiming under his subsequent conveyance with full notice, can occupy no higher ground. A court of equity, in making a partition, would have respected the rights acquired by a fair purchaser, provided no injury was done thereby to the coparcener."

As the conveyance of both joint owners to the appellant, Samuel, has invested him with the legal title to the entire tract, he is now in a condition to perfect the title of the appellee, according to the terms of the contract, as evidenced by the deed from John T. McKee. This is all the decree requires him to do, and I think it should be affirmed."

The same doctrine is affirmed in *Crocker v. Tiffany*, 9 R. I. 512, where it is said: "If one of two tenants in common should convey his interest in a distinct part of the estate to a third person, and should afterwards convey his interest in the remainder to his cotenant, both conveyances would be valid, for the cotenant could not affirm his own title under the second conveyance without impliedly recognizing the right of the grantor thus to convey the estate by distinct parcels." See also *Great Falls Co. v. Worster*, 15 N. H. 415. We think that the conclusions which we have heretofore stated are clearly within the principles to be deduced from the prevailing authorities. I concur with the Chief Justice upon the other points discussed by him. A decree should be entered directing that the lands be partitioned. The partition will not be of the timber, as distinct from the lands, but of the lands and timber as a whole. Twenty-three twenty-fourths should be assigned to one parcel, and one twenty-fourth to another, and, upon such partition being made, the complainants will be declared to be the owners of the timber upon the larger parcel, and entitled to cut and remove it from the lands within the time provided in their deeds of purchase. The complainants should recover costs of both courts.

McGrath and Long, JJ., concurred with **Montgomery, J.**

Hooker, Ch. J., delivered the following opinion:

The complainants, with the exception of Harry Mee, claim the ownership of the undivided twenty-three twenty-fourths of timber upon the land in controversy. The testimony shows that complainant Mee was made a party without his consent. Defendant Edwin E. Benedict claims the premises in fee simple. Defendant Sara B. Williams is Benedict's sister, and holds a mortgage upon the land, given by him. Defendants Hart, Sparrow, and Seymour have no present interest in the property. On April 29 the title to said land stood as follows: Hart, one twenty-fourth; Pease, twelve twenty-fourths; Mee and Seymour, eleven twenty-

fourths. Upon that day, Pease conveyed by instrument in writing, to Mee and Seymour, all of his interest in the timber upon the land. On May 4, 1887, Mee and Seymour conveyed all of their interest in said timber to complainants Torrent, McKillip, Haines, and Hopper, copartners, doing business under the name of Torrent, Haines & Co. They claimed that this conveyance vested the title to twenty-three twenty-fourths of the timber in them. The defendants claim that at most it conveyed eleven twenty-fourths. On March 1, 1888, Pease deeded his remaining interest in the premises to complainant Mee in trust for Hart, and on March 22d Mee deeded all of his interest to Hart. On the same day, Seymour deeded her interest to Hart. No reservation of timber was made in any of these deeds. April 17, 1888, Hart deeded the land to Sparrow, and June 11, 1888, Sparrow deeded the same to Benedict, who held some tax titles upon the premises, which are admitted to have been invalid. By the conveyance from Pease to Mee and Seymour, the latter acquired title to twelve twenty-fourths of the timber if the conveyance was valid, which, together with the interest they had as owners of eleven twenty-fourths of the fee, gave them the title to twenty-three twenty-fourths of the timber. The following is a copy of the record of that instrument: "Copy from Miscellaneous Records of Manistee County, Liber 8, page, 178, made May 4, 1887, at 11½ o'clock A. M.: 'Know all men by these presents, that I, Frank B. Pease, of the city of Chicago, in the county of Cook and state of Illinois, of the first part, for and in consideration of the sum of five hundred (\$500) dollars, lawful money of the United States, to me in hand paid at or before the enrolling and delivery of these presents by Harry Mee of Manistee, Michigan, party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and delivered unto the said party of the second part all the goods, chattels, and property, to wit, all his interest in and to the timber on the premises described as follows, to wit: The S. W. qr. of the S. E. qr. of sec. 80, township 21 N. R. 14 west; also, the W. fractional half of the S. W. qr. and the S. W. qr. of the N. W. qr., sec. 21, township 21 N. R. 14 west; and the W. qr., sec. 80, and the N. W. fr. qr. of the N. E. qr., and the east half of N. W. qr., and the east half of S. W. qr., and the N. E. qr., of sec. 31; and the west half of the N. W. qr. of sec. 32, township 21 N. R. 14 W.; and the south half of the N. E. qr., and the N. E. qr. of the N. E. qr., and the N. E. qr. of the S. W. qr., of sec. 36, township 21 N. R. 15 W.; and lot 4, sec. one (1) and lot one (1), sec. 2, township 20 north, range 15 west,—and all the above-described land west of the principal meridian, and contains in all, 1,084 88-100 acres, more or less; with license for the term of ten years to the said parties of the second part, his heirs and assigns, to enter upon the said lands to cut and remove the said timber, and all such timber not so cut and removed during the said term shall belong to said party of the first part. It is also agreed that the said party of

the second part shall pay all taxes on the land above described during the term above mentioned, or so much thereof as may be used in cutting and removing said timber. To have and to hold the said goods, chattels, and property unto the said party of the second part, his heirs, executors, administrators, and assigns, and for his own proper use and behoof, forever. And the said party of the first part does vouch himself to be true and lawful owner of the said goods, chattels, and property, and have in himself full power, good right, and lawful authority to dispose of the said goods, chattels and property in the manner as aforesaid; and I do, for myself, my heirs, executors, and administrators, covenant and agree to and with the said party of the second part, to warrant and defend the said goods, chattels, and property to the said party of the second part, his executors, administrators, and assigns, against the lawful claims and demands of all and every person or persons whomsoever. In witness whereof I have hereunto set my hand and seal the 29th of April, one thousand eight hundred and eighty-seven. Frank B. Pease." Here follow, in usual form, the acknowledgment, Chicago, Ill., April 29, 1887; certificate of office of notary Chicago, Ill., April 30, 1887."

This instrument is assailed upon several grounds, viz.: (1) That the book called "Miscellaneous Records" is not a book of deeds or mortgages, and the record in that book was notice to no one; (2) the instrument does not show in what state the lands described are situated; (3) the instrument was a mere license to take off goods and chattels within ten years from its date. Standing timber is an interest in lands that may be acquired by deed (see *Johnson v. Moore*, 28 Mich. 3; *Wait v. Baldwin*, 60 Mich. 622; *Williams v. Flood*, 68 Mich. 487; *Monroe v. Bowen*, 26 Mich. 528); and the fact that it must be removed within a definite period does not prevent the title to the timber vesting in the grantee (see cases above cited). The land was described by the section, township, and range. Pease, the maker of the instrument, had title of record to these lands. Although the acknowledgment was taken in Chicago, the certificate of the official character of the notary was appended and the paper placed on record in Manistee county, where the lands are situated. This we think sufficient evidence to identify the lands sought to be described. *Russell v. Sweezy*, 22 Mich. 235; *Smith v. Brown*, 34 Mich. 455; *Slater v. Breese*, 36 Mich. 77. The failure of Pease to affix a seal to the writing did not render it invalid, for, if the seal should have been affixed, the statute (How. Anno. Stat. § 7778) provides that its absence shall not invalidate the instrument. *Fowler v. Hyland*, 48 Mich. 181; *Lockwood v. Bassett*, 49 Mich. 549; *McKinney v. Miller*, 19 Mich. 151. The instrument was duly acknowledged, thereby becoming entitled to record. How. Anno. Stat. §§ 5678, 5709, 5712. The record shows that this instrument was recorded in a book devoted to the exceptional instruments offered for record, such as bills of sales of timber, land contracts, deeds of cemetery lots, leases, of buildings, and various other kinds of

papers. There is nothing to show that this record was not properly indexed, and the register might properly provide a book for miscellaneous documents. Such is believed to be the uniform practice throughout the state, and we think it a lawful and commendable one. The record of this writing was constructive notice of the rights of Mee and Seymour under it, to the world. How. Anno. Stat. § 5712. There is no merit in the point that the original writing was necessary to prove the sale of this timber. The record could be used for the purpose, and was prima facie evidence of the execution of the instrument. Id. §§ 5680, 5685; *Bassett v. Hathaway*, 9 Mich. 31. This covers all of the questions that arise upon the introduction of the instrument (similar in character) by which Mee and Seymour attempted to convey their interest in the timber to Torrent, Haines & Co.

It remains to discuss the effect of these writings and the rights of the several parties under them. At the time that they were made, Hart was a tenant in common of the lands, and it is asserted that they were void as to him. It is a doctrine of long standing that one tenant in common cannot convey a distinct parcel of the common tract so as to bind his cotenant. *Smith v. Benson*, 9 Vt. 141, 31 Am. Dec. 614; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Great Falls Co. v. Worster*, 15 N. H. 412, 449; *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Peabody v. Minot*, 24 Pick. 329; *Johnson v. Stevens*, 7 Cush. 431; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Griswold v. Johnson*, 5 Conn. 363; *Hartford & S. Ore Co. v. Miller*, 41 Conn. 112; *Cogswell v. Reed*, 12 Me. 198; *Scott v. State*, 1 Sneed, 629; *Markoe v. Wakeman*, 107 Ill. 263; *Worthington v. Staunton*, 16 W. Va. 208; *Shepardson v. Rowland*, 28 Wis. 108; *Jewett v. Stockton*, 3 Yerg. 492, 24 Am. Dec. 594.

Cases might be multiplied upon this point, but these will suffice. Some hold the deed absolutely void, but the greater number treat it as valid between the parties, and that, if a partition should be made by which the parcel conveyed should be allotted to the grantor, it would inure to the benefit of the grantees by estoppel. Some courts have evolved the doctrine that the conveyance is binding to some extent upon the cotenant; holding that it is binding so far as it does not injure, and that the courts may give relief to the grantee, taking care not to deprive the cotenant of any rights. Others have gone to the extent of holding that such conveyance is valid as against the cotenant, and, as in *Prentiss' Case*, 7 Ohio, pt. 2, p. 180, that he can be compelled to partition with each of several grantees of different parcels of the tract. It may be mentioned that the case of *White v. Sayre*, 2 Ohio, 112, upon which this decision is based, was by a divided court. In Missouri the court has gone so far as to hold that the deed is valid against the cotenant, and that the grantee may have relief, because the statute authorizing a sale furnishes a means of giving adequate relief to the cotenant in all cases. The various phases of this question may be seen by consulting the fol-

lowing cases: *Stark v. Barrett*, 15 Cal. 370; *Gates v. Salmon*, 35 Cal. 588, 95 Am. Dec. 189; *Sutter v. San Francisco City and County*, 36 Cal. 115; *Crook v. Vandervoort*, 18 Neb. 505; *Camoron v. Thurmond*, 56 Tex. 22; *Arnold v. Cauble*, 49 Tex. 533; *Bogges v. Meredith*, 16 W. Va. 27.

Some of my brethren think that a court of equity may properly grant relief to the grantee in all such cases by requiring the tenants in common to partition the land, but I cannot assent to that doctrine. In the case of the conveyance of a single parcel, no hardship might result from such a course; but if several parcels should be carved out and sold to different purchasers, as, in one case, which one tenant in common platted and sold village lots from a part of the tract, or where different interests, such as minerals, stone, sand, clay, and the like, are granted, it would be more difficult to preserve the rights of the cotenant. I think the great weight of authority is against it. But while the conveyance of a portion by one tenant in common may be disregarded by his cotenant, if such cotenant, or any other person, shall, with notice of the grantee's interest, choose to unite the different titles by purchasing the remaining interest of the grantor, he may be held to thereby assent to such conveyance by recognizing the right of the grantor to deed in parcels, and he will take the title of the grantor subject to the rights of the prior grantee, which equity may compel him to recognize and satisfy. While a tenant in common may insist upon his own, he will not be permitted, in such a case, to collude with his cotenant, or profit by his fraud. *Hartford & S. Ore Co. v. Miller*, 41 Conn. 113; *Goodwin v. Keney*, 49 Conn. 563; *Adams v. Manning*, 51 Conn. 5; *Crocker v. Tiffany*, 9 R. I. 512; *Great Falls Co. v. Worster*, 15 N. H. 418. Hart saw fit to unite in himself the titles of all his cotenants. He could only buy what they had left to sell, and, as he took these interests with the notice of the sale of the timber, he cannot justly claim such timber. By his act he has put it out of the power of the complainants' grantors to deliver this timber, but he cannot be said to have acquired the title to it. He has chosen to recognize the sale to the complainants by purchasing the remaining interest. His grantees are in no better position. There are many allegations in the bill which are unnecessary in the view that I take of the case, but sufficient appears to justify a decree that complainants recover the timber upon twenty-three twenty-fourths of the land, and that partition of the premises be made, to determine the same. Complainants *Torrent, Haines & Co.* should recover their costs against defendants *Benedict and Williams*. As to other defendants, the decree of the circuit court dismissing the bill will be affirmed.

Grant, J., dissenting:

I cannot concur in the opinions of my brethren in this case. In my judgment, the logical conclusion of the former decision is that complainants are without remedy as against these defendants. The bill was not then

framed to test the question now involved, and we therefore refrained from expressing any opinion upon it. The like course was pursued in *Adam v. Briggs Iron Co.*, 7 Cush. 361. In that case one Lane, the owner of the fee simple of three undivided fourths of the lot in question, in December, 1790, sold and conveyed the same to three grantees, reserving to himself all the iron and other ores in and upon the land, with the right of way to pass and repass, and to dig for and cart away the same from the land. He occupied the premises and took ore therefrom till the year 1800. He then sold his reserved and excepted rights to one Forbes, who used the ore bed during his lifetime. The complainants were the heirs of Forbes. The grantees in the deed from Lane, of December 21, 1890, conveyed to the defendant company, which took possession of land, and dug and carried away the ore, driving the complainants therefrom. The bill prayed for an accounting, injunction, and general relief. A demurrer to the bill was interposed, which was sustained. It was urged upon the argument that the bill showed a tenancy in common of the mine, and therefore the court had jurisdiction. The court held that no such case was set out in the bill, and declined to take jurisdiction on that ground. The bill was afterwards amended, averring the complainants were tenants in common of three quarter parts of the ore and ore beds, and the defendants were tenants in common of one quarter part. The learned *Chief Justice Shaw* delivered the opinion of the court. It was there said: "It is entirely settled, as a rule of law in relation to land, that the conveyance of any separate estate by a tenant in common, by metes and bounds, is void as against the cotenants, and is available only by way of estoppel against the grantor and his heirs."

... I have a moiety. My cotenant has a moiety. He may convey a quarter of the whole estate to one, an eighth to another, a sixteenth to another, and so on indefinitely, letting in other cotenants with me; but, all being seised of aliquot parts in the same estate, and of like kind and quality, my right to partition is not disturbed by the number of cotenants; but, if he could convey his aliquot part in specified parcels of the estate, he might diminish the value of my right, if not render it worthless." The opinion then states the mischief and inconvenience arising from the act of one cotenant in attempting to convey his undivided part in a particular parcel, instead of an aliquot part in the whole common estate; and states that for the same reasons an attempt to "parcel out rights, in their nature indivisible, in definite portions of the inheritance, as the mines to one, and the general estate to another," is void against cotenants. The conclusion reached was that the reservation in the deed from Lane was void, and a subsequent deed to Forbes was also void, and that no interest in the estate or ore beds passed by it. For the like reason a conveyance by a cotenant of his interest in the timber, ore, minerals, clay beds, and the like, would be void. To the same effect is *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394, which was

cited in the former case, and where it was held that a grantee of the right to dig ores, from one tenant in common, cannot call for a partition of the premises. These are the only cases I have been able to find, and we are cited to no others, which involve the sale by one tenant in common of an interest in the common estate, which in its nature is indivisible.

The cases of *White v. Sayre*, 2 Ohio, 112; *Stark v. Barrett*, 15 Cal. 870; *Harlan v. Langhan*, 69 Pa. 288; *Whitton v. Whitton*, 38 N. H. 138, 75 Am. Dec. 163; and *Barnhart v. Campbell*, 50 Mo. 599,—are cited as analogous in principle to the present case, and therefore sustaining the claim of the complainants. None of these cases involve the conveyance by a tenant in common of any interest in the timber, or ores, or minerals, or other interests in the land. They involve only the effect of a conveyance of an undivided interest of a part of the common estate, or a conveyance in severalty, by metes and bounds, of a part thereof. All these authorities hold that such conveyances do not affect the rights of the other cotenants. None of them, except *White v. Sayre*, hold that the grantees of such parties can maintain partition against their grantor's cotenants. The extent of the holding is that when partition is had of the entirety, and a specific part is partitioned to their grantors, they are then estopped by their deeds from denying the rights of their grantees. The purchaser of a specific parcel may get nothing, for none of the land conveyed to him may be set apart to his grantor. In such case he is without remedy unless it be an action at law to recover the purchase prices for failure of consideration under the covenants in his deed. With these decisions I find no fault. They may safely be granted to rest upon sound principle, and still they do not, in my judgment, affect the question now under consideration, where an aliquot part of the common estate is not conveyed. The same will, in my judgment, be found true of the other cases cited by my brethren.

It is also held, with good reason, that where the cotenants have assented, by deed or in some other proper manner, to the act of the cotenant, they thereby ratify the act, but mere absence of objection is not sufficient. *Hartford & S. Ore Co. v. Miller*, 41 Conn. 132; *Goodwin v. Keney*, 49 Conn. 568. In the former case, decided in 1874, the court says: "In New Hampshire, as in Massachusetts, the doctrine that such conveyances may be made valid and effectual by the act of the cotenant is well established. *Great Falls Co. v. Worster*, 15 N. H. 412; *Whitton v. Whitton*, 38 N. H. 137, 75 Am. Dec. 163. In view of the authorities in this state and elsewhere, we think the true doctrine to be that a deed of one tenant in common of a part of the common property, by metes and bounds, is inoperative as against the other tenants; but if the cotenants, then or subsequently, by a suitable conveyance confirm the grant, the grantee still holding under his deed, it becomes, in effect, operative and binding upon all concerned." I am unable to concur in the view that a cotenant, taking a deed without

any reservation, thereby assents to the transfer of such an interest as is here conveyed. The rule must be the same, in the case of an undivided interest of a stone quarry, coal mine, minerals and ores of all descriptions, or any valuable deposit which may exist beneath the surface, as in the case of timber. The grant of mines gives the right to work them unless there is some positive restraint in the language of the grant itself. *Bainbridge, Mines & Mining*, 81. Now, complainants' vendors had the right to sell the land, and any person, including their cotenants, had the right to buy. The deeds contained no reservation, but purported to convey the entire fee of the land. Their grantors did not agree that they would not sell, or that they would obtain partition for the benefit of their grantees. There are now no cotenants entitled to partition unless complainants, by their purchase of the timber, are such cotenants; but it was decided in the former suit that they are not. It is, I think, a sufficient reply that the statute makes no provision for partition in such cases, and this court cannot, therefore, assume jurisdiction. Under the clear weight of authority, complainants did not, by their purchase, become tenants in common with the other cotenants, and cannot, therefore, invoke the benefit of the partition statute, which is applicable only to joint tenants and tenants in common. How. Anno. Stat. § 7850. But, aside from this, the rights of the cotenants and subsequent purchasers from them may be seriously affected if one cotenant may lawfully sell an undivided interest in any valuable thing that may exist on the land. It is true, as in the present case, that their possession would be only temporarily interfered with, for the timber can be speedily removed; but the purchase of a similar interest in a mine or other like property would entitle the purchaser to the like possession to explore, to erect plants, to remove his ore, and he would thus become entitled to the permanent possession of the land, or so much thereof as was necessary for his purpose. Would not this affect adversely the rights of the cotenants? May a cotenant convey his interest in the coal to one, in the iron to another, in the clay to another, in the stone to another, and so on, and, because their grantor refuses to take steps to secure a partition, or has sold his remaining interest in the land to his cotenants, may they institute partition suits in the name of their grantor, and have the land partitioned, so that each may have possession to work his mines, quarries, or clay beds?

Another difficulty presents itself. If partition of land cannot be made without great prejudice to the owners, it must be sold, and the proceeds divided among the cotenants. Very often, if not generally, mining lands cannot be partitioned without great prejudice, and must therefore be sold. Upon such sale, how could the value of an undeveloped mine or other deposit be separated from the value of the land in other respects, so as to give to the purchaser of an undivided part thereof his proportionate share? Yet by this rule such purchaser would have the right to have the land sold, in order that he might

receive the supposed value of what he purchased. I do not think that such a rule is founded upon reason or authority. Principles must not be determined by the hardships of an individual case. A principle established to relieve from hardship in one case may lead to greater hardships in another. An important principle is here involved, which must be considered and determined regardless of what the complainants may suffer. It is no answer to the principle to say that the action of complainants' grantors in conveying an interest to them, and the rest of the estate to other parties, is a fraud, intentional or con-

structive. If it was a fraud in fact, complainants have a remedy at law. But there is no question of fraud involved. Complainants purchased with full knowledge of the facts; so did the defendant and his grantors. The title was of record when complainants purchased the timber, and they are chargeable with knowledge that their grantors held only undivided interests in the land as tenants in common. Defendants also purchased with full knowledge of the facts. The sole question is therefore one of law. The decree should be affirmed.

LOUISIANA SUPREME COURT.

Charles J. RANDALL, *Appt.*,
v.

William E. HAMILTON.

(45 La. Ann. —.)

***1 Plaintiff in an action for damages for a libel has the right to specifically af-**

***Headnotes by NICHOLLS, Ch. J.**

NOTE.—Libel by defamatory words in pleading.

The above case presents the strongest possible illustration of malicious and libelous charges under the guise of a pleading. It will be noticed that the decision was upon the sufficiency of the complaint upon exceptions in the nature of a demurrer, and the complaint alleges that the defamatory pleading was not necessary, and in fact was not used in the real suit, but in the fraudulent simulation of a suit. No case yet decided on such an extreme state of facts has upheld a claim of privilege.

In *Runge v. Franklin*, 3 L. R. A. 417, 72 Tex. 585, it was held that no action for libel can be maintained for any defamatory matter contained in a pleading in a court of civil jurisdiction, as such a publication is absolutely privileged. But that case did not decide what would be the rule if the pleading was not filed in a bona fide suit.

So pertinent allegations in a bill in chancery, even if malicious, were held absolutely privileged, in *Johnson v. Brown*, 18 W. Va. 73, but it was not decided whether they would be so if the suit was not bona fide, but brought as a cover for the scandal.

In the early case of *Buckley v. Wood*, Cro. Eliz. 230, 247, it was held that it was actionable to charge one with felony by a bill in star chamber, because there was no jurisdiction of the offense and so the bill was not in a proceeding in the course of justice. While the present English doctrine is in favor of absolute privilege for all words used in judicial proceedings the question as to lack of jurisdiction, in *Buckley v. Wood*, does not seem to have had any recent adjudication.

The great weight of American authority clearly limits the privilege for defamation in pleadings to matter which is pertinent or relevant to the case in which the pleading is made. So it is expressly held in a modern Massachusetts case that charges of gross criminal conduct in a pleading to which they are not pertinent are not privileged, but will sustain an action for libel. *McLaughlin v. Cowley*, 127 Mass. 816.

So an attorney may be indicted for libel, where he sets out in a pleading irrelevant, gratuitous, and malicious attacks or insinuations against the character of the opposite party. *Gilbert v. People*, 1 Denio, 41, 43 Am. Dec. 646.
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firm in his pleadings, and on a trial to prove, the nonexistence of the conditions upon which would be dependent a right of exemption from liability, grounded on the fact that the matters complained of were charged on a judicial proceeding. He cannot be cut off from establishing an allegation to that effect by an exception of no cause of action.

2 The fact that matter defamatory and libelous in its character was

The privilege is sustained in other cases on the ground and to the extent that the defamatory allegations are relevant. *Vinas v. Merchants Mut. Ins. Co.*, 32 La. Ann. 1265; *Hardin v. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427; *Wallis v. New Orleans & C. R. Co.*, 29 Ann. La. 66.

In *Forbes v. Johnson*, 11 B. Mon. 48, it was declared that defamatory matter in a pleading was not libelous if it was pertinent, unless the pleading was made as a cover for malice and not in good faith for the purpose of the case.

So allegations in a regular pleading, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged, however false and malicious they may be. *Wilson v. Sullivan*, 81 Ga. 238.

And it is said that to show libel in a complaint in a judicial proceeding it must be shown that the pleader knew that what he alleged was false and was actuated by malice, or made use of legal proceedings in bad faith as a cloak to his libelous utterances. *Dada v. Piper*, 41 Hun. 254.

A petition in a suit is absolutely privileged, if the matter is pertinent to the action, and in that case the bona fides of the pleader is immaterial. *Gardeal v. McWilliams*, 48 La. Ann. 454.

In *Torrey v. Field*, 10 Vt. 353, it was decided that pertinent matter in a bill in chancery was privileged, but only so far as the language was warranted by the ordinary forms of process and pleading. The court declared that the language was not actionable "however slanderous or malicious the suit may be, if founded on probable cause, although for the leading purpose of scandalizing" the opposite party.

Thus statements made in a petition by a receiver against a co-receiver, though malicious and false, charging him with embezzlement of the trust funds, are privileged. *Bartlett v. Christliff*, 69 Md. 219.

A statement in a petition for the removal of a guardian that he has in his family a girl whom he has ruined, is privileged if the words were used in good faith and with probable cause, and in that case will give no right of action to such girl for defamation, although she was not a party to that proceeding; but if the words are not used in good faith and

charged in the petition of a plaintiff against a defendant does not of itself carry absolute exemption from liability for damages claimed by reason of said defamatory and libelous charges; other facts must concur to bring about that result.

3. There is a great difference between an absolute exemption from liability for damages for acts done in the course of judicial proceedings under a given state of facts proven, and an absolute exemption from liability to a suit for the purpose of testing whether such a state of facts exists as would convey with it such protection from damages, and between the situation of parties at the end of a lawsuit after evidence adduced, and that of parties at its beginning, standing on pleadings.

(October 10, 1893.)

A PPEAL by plaintiff from a judgment of the District Court for the Parish of Caddo in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. M. S. Jones, Alexander & Blanchard, and Leonard & Thatcher* for appellant.

Messrs. Wise & Herndon for appellee.

Nicholls, Ch. J., delivered the opinion of the court:

The defendant in this case having filed an exception of no cause of action to plaintiff's demand, the allegations of the petition will have to be given in full. Plaintiff avers that on or about June 22, 1892, William E. Hamilton, through his attorney, instituted in the district court for Caddo a suit entitled "*The Shreveport Electric Railway & Motive Power Company v. The City of Shreveport et al.*," by filing a petition verified by his oath made and subscribed to before Cal D. Hicks, notary public of said parish, on June 21, 1892, whereon he obtained from the Honorable S. L. Taylor, judge of said court, on June 22, 1892, a writ of injunction. That in said petition and affidavit said Hamilton repre-

with probable cause, they may be actionable. *Ruohs v. Backer*, 6 Helsk. 305, 19 Am. Rep. 598.

In a bill to remove a trustee, a charge of his bad character for honesty is privileged. *Strauss v. Meyer*, 48 Ill. 385. In this case no limitation is expressed to the doctrine that defamatory matter in pleadings is privileged.

In *Weil v. Israel*, 42 La. Ann. 955, an allegation in an answer to a suit by a clerk for the value of services, to the effect that he is so notoriously unreliable as a clerk that he cannot obtain employment where known, was held libelous and slanderous, where it was filed in court and read in the presence of many witnesses; although nothing is said in the case on the question of privilege but the defense of truth was set up.

Although English decisions as to libel in pleadings are not numerous, it must be taken as settled that the privilege as to defamatory statements in pleadings is absolute whether pertinent to the case or not, since it is established by *Dawkins v. Rokeby*, L. R. 7 H. L. 744, affirming L. R. 8 Q. B. 265, that the testimony of witnesses is privileged no matter how immaterial or malicious, and by *Munster v. Lamb*, L. R. 11 Q. B. 588, that the privilege of counsel is expressly held to extend to all words spoken in reference to the case, even if malicious and irrelevant; while it is the general doctrine of the English courts expressly declared in *Dawkins v. Rokeby* that the same rule of privilege exists as to judges, counsel, witnesses, and parties.

In *Brown v. Michel*, Cro. Eliz. 500, it was held that an action would not lie for charging untruth in an answer to a bill in equity. See *Buckley v. Wood*, Cro. Eliz. 230, 247.

Some Canadian cases state the rule as to privilege least favorably to the claim of privilege.

Thus in *Benning v. Rielle*, Mont. L. Rep. 6 Q. B. 365, it is held that defamatory matter in a pleading is actionable, if the allegations are false and without probable cause.

So in *Charlebois v. Bourassa*, Mont. L. Rep. 5 Super. Ct. 423, it is held that the pertinency of a libelous allegation in a pleading is a justification only when the allegation is made in good faith, with probable cause, and without intention to injure.

A client is not liable for defamatory allegations made by his attorney in a pleading, if they were not made by the client's direction. *Hardin v. Cumstock*, 2 A. K. Marsh. 480, 12 Am. Dec. 427.

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Other papers connected with pleadings.

The rule applicable to pleadings applies also to the same extent to motions and other papers filed in a cause.

Statements of testimony in the case in a brief are privileged, although by the final decision the alleged slanderous testimony is excluded as incompetent. *Stewart v. Hall*, 83 Ky. 375.

Specifications of opposition to an insolvent's discharge, charging him with fraud, being pertinent to the subject under investigation, are absolutely privileged, and malice cannot be shown. *Hollis v. Meux*, 60 Cal. 625, 58 Am. Rep. 374.

So objections filed by counsel to a discharge in bankruptcy are subject to privilege in alleging that the testimony of a witness for the bankrupt was perjured, if the truth of that testimony is a material and pertinent question. *Marsh v. Ellsworth*, 50 N. Y. 309.

Defamatory words in a bill of particulars furnished in a libelsuit under order of court, charging the plaintiff with adultery with a third person, being pertinent to the case, were held privileged. *Prescott v. Tousey*, 21 Jones & S. 53.

Neither can they be made the basis of an action for libel by the individuals so named. *Perzel v. Tousey*, 20 Jones & S. 79.

A motion for an order upon an attorney to pay over money, stating pertinent facts only, is privileged and not libelous. *Hawk v. Evans*, 76 Iowa, 593.

But defamatory matter in a sworn application for an extension of time to file a transcript on appeal, charging collusion of the attorney with the attorney for the opposite party, being wholly foreign to the application, is not privileged. *Wyatt v. Buell*, 47 Cal. 624.

Defamatory words in cross-interrogatories to lay the predicate for impeaching a witness, used in honest belief of right, are not actionable. *Lawson v. Hicks*, 38 Ala. 279, 81 Am. Dec. 49.

A distress warrant being a proceeding to enforce a legal right is within the rule which denies an action for libel for statements contained therein. *Bailey v. Dean*, 5 Barb. 297.

A remonstrance against the granting of a liquor license being a part of the pleadings, is privileged, unless filed maliciously. *Metzler v. Romine*, 9 Pa. Co. Ct. Rep. 171, 47 Phila. Leg. Int. 484.

The same rule that applies to pleadings applies also to affidavits, as to which see note to *Cooper v. Phipps* (Or.) post, —, on the question of privilege as to defamatory matter in testimony. B. A. R.

sented himself to be the president of a pretended corporation, styled in said petition "The Shreveport Electric Railway & Motive Power Company," and therein falsely described as a corporation duly chartered, organized, and existing under the laws of the state of Louisiana. That in said petition, among others, the following allegations are made, viz.: "That said pretended company had been granted and vested with certain rights, privileges, and franchises, by an ordinance of the council of the city of Shreveport of July 28, 1891, and that such rights, privileges, and franchises were held by and vested in said company. That in the exercise of such rights, said Hamilton, as president of said company, employed a gang of laborers, and was with them engaged in constructing a railroad along Southern avenue, in said city, on June 20, 1892, when the police officers of said city, acting under the authority of the mayor and council of said city, arrested him and said laborers, and forcibly prevented them from continuing such work. That said policemen, mayor, and council, in their interference with the rights vested in said company by said ordinance, claimed that said ordinance, and all rights thereby vested, were repealed by said council at its session on June 9, 1892. That said pretended repealing or demand is an attempt to divest vested rights, and is illegal, null, and void. That Herman Herold, Charles J. Randall, W. D. Scofield, John C. Wimbish, and Henry H. Youree, members of the council of said city, entered into a conspiracy with certain persons connected with and interested in the City Railroad Company, a rival corporation, to pass said pretended repealing ordinance. That said conspiracy was conceived and executed solely in the interest of said City Railroad Company and its owners, and without any regard to the rights of said Hamilton Company or of the public. That such conspiracy, so concocted, was kept a profound secret from the mayor and from the remaining members of the city council, and from the people; and maintaining inviolable the injunction of secrecy imposed on them by said parties whose interests alone they were to subserve, the said members of said council refused to entertain a motion to postpone for investigation, made by a member not a party to said conspiracy, and refused to hear the opinion or follow the advice of the city attorney, because they had already taken the advice of the retained counsel of said City Railroad Company. That said conspiracy, and all the acts in pursuance thereof, on the part of the aforesaid members of the city council, were illegal, wrongful, tortious, and a fraud on the rights of said Hamilton Company. That all of which foregoing fully appeared from a certified copy of said petition, annexed and made part hereof. That said suit was dismissed by judgment of the district court for Caddo, on exceptions of defendants thereto, for reasons assigned in said judgment, which said exceptions and judgment therein are made part hereof by reference. That he is now, and was at the time of the adoption of the Ordinance of July 28, 1891, purporting and

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intending to grant certain franchises fully set forth in the petition of said W. E. Hamilton in said suit, a member of the city council, and that he voted as a member of the city council against said ordinance. That he is now and was a member of the city council on June 9, 1892, and as such voted for the ordinance enacted on said date by said council, repealing the ordinance granting certain rights to the Shreveport Electric Railway & Motive Power Company, and that it was his right and his duty so to vote, for the reasons (among others) assigned by the Caddo district court in the opinion and judgment dismissing said suit No. 4,001. That the charges made against him and his fellow members of said council, in the petition in said suit No. 4,001, and verified by the oath of said W. E. Hamilton, and the allegations of said petition with regard to himself and to his said fellow members, in so far as they affect the petitioner, are false, libelous, and slanderous, designed and calculated to injure and destroy the character and reputation of petitioner as a private citizen and public official, and his credit and repute as a business man; and that said charges and allegations constitute a charge of felony, and a criminal and infamous offense under the laws of the state of Louisiana; and that said W. E. Hamilton well knew when he published said charges, and verified them by his oath, that same were false, libelous, and slanderous, and same were maliciously made and with full advice; that said charges and allegations were so made and published by said W. E. Hamilton without cause, wantonly, maliciously, and with intent to injure petitioner, and that said charges, as made and published in said petition, the said Hamilton has verbally reiterated, made, and published, at various times before and after the institution of said suit No. 4,001, to citizens of Shreveport and to others, with design to injure petitioner, and destroy his character and credit. That the said petition of the said Hamilton in said suit No. 4,001 shows on its face no cause of action against petitioner and the other members of the common council named thereon, and that he and said other members were made defendants in said suit wantonly, maliciously, and for the corrupt purpose of influencing thereby the official action of petitioner and said other members in the interest of said Hamilton and a certain corporation, to wit, the Shreveport Railway & Land Improvement Company, wherein said Hamilton is a large stockholder, together with his father-in-law, Edward Jacobs, his brother-in-law, Walter B. Jacobs, and wherein said W. E. Hamilton, Edward Jacobs, and the said W. B. Jacobs and First National Bank of Shreveport (whereof said W. E. Hamilton is vice president and said W. B. Jacobs is cashier) are large stockholders, and are otherwise largely interested; it being the purpose and intention of said Hamilton to destroy the value, and force the sale to said Shreveport Railway & Land Improvement Company, of the property and franchises of the Shreveport City Railway Company, a rival corporation. That, since the judgment of the Caddo district court dismissed said suit No. 4,001, the road and

franchise of said City Railroad Company have been purchased by the Shreveport Railway & Land Improvement Company, or by the parties principally interested therein. That if it be true, as alleged in the said petition of said Hamilton, that the ordinance of June 23, 1891, therein set forth, vested rights and privileges in the Shreveport Electric Railway & Motive Company, then the repealing clause of June 9, 1892, was unconstitutional, null, and void, and such rights and privileges were not thereby in any manner impaired or affected; and if said company held no vested right under said ordinance of July 23, 1891, then said company had no right nor cause of action, as set forth in petition in said suit No. 4,001. That under either supposition he and his fellow members of the city council could not properly be made parties defendants to said suit No. 4,001. That there was no occasion to make him and his fellow members parties defendants in said suit, or to make the charges therein made against them. That the allegations and charges made in said petition and affidavit, against him and his fellow members of the city council, were not pertinent to the issue, or in any way or manner necessary for the protection of the rights therein alleged to exist. That said suit No. 4,001 is not, and never has been, a real suit,—that same was and is the fraudulent simulation of a suit,—that there was no party plaintiff thereto; and that the pretended corporation, styled therein 'The Shreveport Electric Railway & Motive Power Company', has no existence and has never existed,—all of which said William E. Hamilton well knew, at the time he made said false, malicious, and slanderous charges against petitioner and his said fellow members. That his reputation was in all respects good, prior to the said charges as aforesaid, falsely, wantonly, and maliciously made and published by said W. E. Hamilton. That the said charges so made and published by said W. E. Hamilton have injured his reputation; have been detrimental to his standing and social position in the community where he lives and elsewhere; have had a tendency to degrade him with his fellow men; have impaired his credit and injured his business, which is that of a cotton buyer and factor, and caused same to materially decline, to his great financial loss; have subjected him to mortification and insult; and have outraged his feelings to an extent which cannot be sufficiently measured by money, but at least to the extent of \$15,000. That he was entitled to exemplary and punitive damages against said Hamilton, to the amount of at least \$10,000. That he was compelled to employ counsel to defend him in said suit No. 4,001, at an expense to him of \$150, for which amount, also, he should have judgment against said Hamilton." He prays that Hamilton be cited, and that he have judgment against him for \$25,140, interest and costs. The district court held that the exception was well taken, and dismissed the suit. Plaintiff has appealed.

In the reasons for judgment, the district judge said: "There can be no doubt that the averments of the petition of suit No. 22 L. R. A.

4,001 are libelous in their character. To charge a public official with having been a party to a fraudulent conspiracy, and to have been influenced in his official capacity by corrupt motives, is certainly a defamation likely to cause a breach of the peace, and great wrong to the sufferer. Such a charge, if published in a newspaper, would undoubtedly be actionable in damages, if it were shown to be false and malicious. But defendant contends that this charge was made in the course of judicial proceedings, in good faith, that it arose upon a proper occasion, and was pertinent to the issue, and is therefore protected as a privileged communication. Under the common law of England, no action lies against an attorney or litigant for defamatory words spoken or written in a pleading in judicial proceedings, even though they were unnecessary to support the case of the client, and were uttered or published without any justification or excuse, and from personal ill will towards the party defamed, arising from some previously existing cause, and are irrelevant to every question of fact in issue before the court. It seems, then, that under the English law the mere fact that the defamatory language was used in a judicial proceeding is an absolute protection regardless of all the considerations. Plaintiff's counsel contend that in Louisiana privileged communications in judicial proceedings are unknown to our law, and that article 2315 of the Revised Civil Code furnishes the true and only rule for determining the right of action in all cases—libel and slander included—where damages are claimed for torts, even though the defamatory matter be published in a judicial proceeding. Many authorities are cited to support this position, notably that of *Miller v. Holstein*, 18 La. 389. I have examined these proceedings, and they undoubtedly show that the English law of absolute protection does not prevail here, and that the foundation and measure of liability for a libel uttered in a judicial proceeding are found in article 2315 of the Code; but I do not understand them as holding that no sort of privileged communications is known to our law." The learned judge then proceeded to cite and quote a number of decisions in which the defendants in suits brought against them for damages had been protected from liability, by reason of the acts complained having occurred in the course of judicial proceedings; and from those decisions he reached the conclusion that in some cases an absolute exemption from liability existed, and that the present case was one of that character. There is a great difference between an absolute exemption from liability for damages under a given state of facts proven, and an absolute exemption from liability to a suit for the purpose of testing whether such a state of facts exists as would convey with it such protection from damages. There is a great difference between the situation of parties at the end of a lawsuit, and after evidence adduced, and that of parties at the beginning of a lawsuit, standing on pleadings. There can be no doubt that the fact that an act complained of occurred in judicial pro-

ceedings may have a great bearing and influence upon both the burden and sufficiency of proof on the final result, on a question of liability to damages for that act. Such a fact being shown, with its attendant circumstances, may sometimes afford partial protection, sometimes afford absolute protection; but it may also frequently intensify and aggravate a wrong. The determination of such questions depends almost necessarily upon facts resting still *in pais*, which can only be positively and finally ascertained through the instrumentality of a suit. While it may be true that, given a particular state of facts, legal protection from liability would follow as a matter of law, it is none the less true that the facts themselves on which exemption is based are opened to inquiry and to judicial scrutiny. Any other doctrine would convert the courts of the country into instrumentalities for wrong and into engines of oppression. Nothing in the *Gardner Case*, 43 La. Ann. 454, which was one tried on its merits and turned upon the burden and sufficiency of proof, is out of line with the views herein expressed. In that case, this court, speaking of privileged communications, said: "In privileged communications the party is protected from the damages, unless

the occasion was used as a means of inflicting a willful and malicious injury upon the plaintiff," and, referring to protection arising from judicial proceedings, it declared: "If extended to those who were in the honest pursuit of private right." It was never once intimated that the courts of our state were places from which, as from places of secure refuge, parties could with impunity perpetrate wrong. *Weil v. Israel*, 42 La. Ann. 955.

We have examined plaintiff's pleadings very carefully. They are both full and precise. If, in their consideration, we strike out and eliminate the question of "privilege," it must be conceded plaintiff's petition disclosed a course of action. If we replace that question, we find that plaintiff has specifically affirmed the nonexistence of the conditions upon which the right of exemption is dependent. He has a right to go to trial on that issue, as one of fact, to be ascertained by evidence.

For the reasons herein assigned, *it is ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided and reversed*, the case reinstated, and that it be remanded for further proceeding according to law.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut, *ex rel.* John
RYLANDS,

v.

John P. PINKERMAN, *Appt.*

(.....Conn.....)

1. An appeal from a decision in quo warranto will not be dismissed because the appellant pending the appeal has been removed from office for insubordination in taking the appeal.
2. A message of disapproval of the acts of the board of aldermen by the mayor has no effect when the charter provides for his approval and disapproval only of measures passed by both boards which constitute the common council.
3. A person appointed to fill a vacancy in a board of police commissioners is appointed only till the end of the term of his predecessor under a charter providing generally for appointment to fill a vacancy but which provides for two year terms and for the expiration of a part of them on each year with other provisions as to a non-partisan board.
4. Members of a board of police commissioners need not remain actually in their seats during the time in which a warrant of arrest is being served on absent members to procure a quorum.
5. A misrecital of the hour of meeting in a warrant for arrest of absent members of a board of commissioners which could mislead no one will not impair the validity of the warrant.

6. The casting vote of mayor may be given on the choice of officers as well as on a measure of legislation.
7. An alderman is not deprived of the right to vote against the confirmation of a person to succeed him in the office of police commissioner by his interest in the result.
8. The vote of aldermen when once given and counted by the mayor and his declaration of the result can be rejected for interest only by action of the board and does not make an appointment to office by such vote subject to collateral attack.
9. The specification of certain objects in a notice of a meeting of a board of aldermen does not exclude action upon any others which are within the range of its general powers.
10. A person is not a de facto police commissioner when he has not the reputation of being such or his acts and authority are not generally recognized or acquiesced in or such as to lead men to suppose that he was such officer, especially where there is a rightful commissioner who is claiming the office.
11. Want of notice to rightful commissioners of the meeting of a pretended board is fatal to action by the latter without a quorum of legal members.
12. An office created by ordinance may be abolished by ordinance.
13. A chief of police under that title is not required for a city so as to prevent abolition of that office and the devolution of its functions on a captain of police by a statute referring to such an officer or by the city charter making a similar reference where these manifestly refer

NOTE.—Among the interesting questions in the above case to which we call attention is that as to the right of an alderman to vote against the con-

firmation of a person to succeed him in another office. As to this question, see note to *Fort Wayne v. Lake Shore & M. S. R. Co.* (Ind.) 13 L. R. A. 367.

to the functions of the office and not to the name of the officer.

(*Carpenter, J., dissents.*)

(June 5, 1893.)

APPEAL by defendant from a judgment of the Superior Court for Fairfield County in favor of relator in a proceeding in the nature of quo warranto to establish the right of relator to the office of chief of police of the city of Bridgeport. *Reversed.*

Defendant claimed that relator had been removed from the office of chief of police by the board of police commissioners for cause, and the duties of his office had been committed to defendant. Also that the office of chief of police had been abolished by ordinance. A demurrer was filed to the latter defense, which was sustained. To the other allegation a replication was filed claiming that the attempted removal by the board of police commissioners was irregular and void. A trial resulted in judgment of ouster. After the appeal was perfected, relator filed a plea in abatement of the appeal and also a motion to dismiss on the ground that since it was taken, defendant had been removed from office and his successor appointed and that consequently the relator was in full exercise of the duties of the office of chief of police. Appellant replied that he had been removed for prosecuting the appeal.

Further facts appear in the opinion.

Mr. J. B. Klein, for appellant:

The argument that the duties constitute the office and therefore if the duties continue the office continues, is unsound when the office has been abolished and the duties transferred to a known existing office.

Offices peculiarly local, as boards of public works, water commissioners, etc., must necessarily be controlled and regulated by the municipality. To give the legislature power over these local offices would be subversive of all local self-government.

State v. Denny, 4 L. R. A. 79, 118 Ind. 400; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People v. Albarton*, 55 N. Y. 50.

If the charter vests in the council the power to establish a force and create and designate the offices of that force, it cannot be contended in the absence of charter restriction that the power to create offices may not abolish them.

The ordinance is valid and the office of chief of police abolished.

The validity of the ordinance must be conceded and the office of chief of police abolished if the common council have the power to pass such an ordinance.

Volk v. Newark, 47 N. J. L. 119; *Butcher v. Camden*, 29 N. J. Eq. 478; *People v. Mahaney*, 18 Mich. 482; *Williams v. Newport*, 12 Bush, 488; *Augusta v. Sweeney*, 44 Ga. 468, 9 Am. Rep. 172; *Mechem*, Pub. Off. 466.

On June 13 last Mr. Rylands was dismissed from the police force on charges of willful disobedience of the orders of the police board after notice given him of the charges, an opportunity to be heard, a hearing had, evidence taken, a special meeting had to review the testimony before rendering decision, each member of the board duly notified of the particular object of

each meeting held, and the resolution of dismissal adopted by the concurrence of three members.

Here was ample cause of which under section 58 of the charter the board of police commissioners are the sole judges and every element of a legal removal.

Dill. Mun. Corp. § 250.

We maintain the legality of the board which dismissed Mr. Rylands. There is no contention about the legality of two of the members of the board, viz., Messrs. Grant and Rishor. The contention is over the legality of Messrs. Walsh and Bogart. They were appointed for a term of two years, and their term began with their appointment and continued two years.

It is claimed that the appointing power nominated Mr. Walsh for the unexpired term of Mr. Beardsley, therefore, Mr. Walsh by the terms of his appointment held for an unexpired term. The appointee holds for the term provided by the charter, not for the period designated by the mayor.

People v. Burbank, 12 Cal. 379; *State v. Brady*, 42 Ohio St. 507; *People v. Hall*, 104 N. Y. 176; *Stadler v. Detroit*, 13 Mich. 346; *People v. Lord*, 9 Mich. 227; *State v. Batt*, 38 La. Ann. 955.

The act of the mayor in appointing for the unexpired term is a nullity, if the charter makes the term of office two years.

In all cases in which it was deemed desirable by the legislature to provide for the filling of vacancies by a limitation to the unexpired term of the late incumbent, it seems to have been carefully provided for; and from the fact that the legislature did so express their intention in these cases and failed to do so in others, it is apparent that their omission to do so in the latter was not accidental, but designated the maxim, "*expressio unius est exclusio alterius*" should be most critically applied.

Atty-Gen. v. Brunst, 3 Wis. 794; *Sansbury v. Middleton*, 11 Md. 299.

Appointments to fill a vacancy are appointments to fill vacancies in the office of police commissioner, not in the term of office.

Atty-Gen. v. Brunst and Sansbury v. Middleton, *supra*; *State v. Ware*, 13 Or. 380.

At common law, vacancy *ex vi termini* means vacancy in the office, and not in the term. And this is ordinarily the meaning attached to the word when a vacancy is spoken of.

The term of an office is said to be a fixed period prescribed for holding the office; and is the estate or interest which the incumbent has in it.

2 Bl. Com. 144; *People v. McClave*, 90 N. Y. 87; *Hughes v. Buckingham*, 5 Smedes & M. 649; 2 Ops. Atty-Gen. p. 833.

Upon the office being filled, the incumbent will have a right to the office for a full term from the date of his appointment.

2 Ops. Atty-Gen. p. 838; *People v. Green*, 2 Wend. 267; *People v. Coutant*, 11 Wend. 132; *Coutant v. People*, 11 Wend. 511; *Powers v. Hurst*, 2 Humph. 24; *Brewer v. Davis*, 9 Humph. 213, 49 Am. Dec. 706; *Opinion of the Judges*, 61 Me. 601; *Banton v. Wilson*, 4 Tex. 400; *Shelby v. Johnson* (Tex.) Dall. Dec. 597; *Keys v. Mason*, 3 Sneed, 6; *People v. Burbank*, *supra*; *Wammack v. Holloway*, 2 Ala. 31; *State*

v. Hutson, 1 McCord, L. 840; *McAfee v. Russell*, 29 Miss. 85; Paine, Elections, § 207.

The nominations of Sperry and Reynolds are upon the table of the board of aldermen, and Walsh and Bogart hold over under the charter, section 5.

Cushing, Law and Practice of Legislative Assemblies, §§ 1444, 1449, 1452.

The rules of order adopted by a city council are binding on that body.

State v. Hoyt, 2 Or. 246.

It goes without saying that this was no legal confirmation. An arbitrary ruling of the mayor cannot have the effect to nullify the act of a majority of the council.

Chariton v. Holliday, 60 Iowa, 894.

The mayor cannot confirm his own nomination.

All parts of the charter are to be construed together as one harmonious whole. If there be a conflict between the provisions, the last one shall prevail.

People v. McClave, *supra*.

You cannot make nominations by and with the consent of the board of aldermen, if the mayor can vote on his own nominations.

If the charter provides a method of giving notices of meetings, that must be strictly obeyed.

1 Dill. Mun. Corp. 4th ed. 268; *Lord v. Anoka*, 36 Minn. 176.

The meeting two days after the call was illegal.

South School District v. Blakeslee, 13 Conn. 284; *Morawetz, Priv. Corp.* § 481; *State v. Bonnell*, 35 Ohio St. 10.

Every resolution or ordinance (chap. 8, § 7, p. 109, of Ordinances) must be approved by the mayor.

That approval can only be proved "by a written declaration attested by his signature" upon the nominations made, and a vote not thus approved became inoperative.

The action was final and must be approved by the mayor. Signing the minutes of the meeting of May 23 is not equivalent to signing a resolution.

Graham v. Carondelet, 33 Mo. 268; *Saxton v. Beach*, 50 Mo. 488; *Kepner v. Com.* 40 Pa. 124; *People v. Schroeder*, 76 N. Y. 163.

Mr. Henry Stoddard also for appellant. *Messrs. Daniel Davenport and Stiles Judson, Jr.*, for appellee:

Since judgment was rendered and execution issued by the superior court in favor of the relator, the respondent has been dismissed from the police force by the lawful police commissioners, and his successor duly appointed, and the respondent has ceased to be captain of police or to perform, or claim to perform, any of the said powers and duties pertaining to said office.

Under such circumstances "even if the court below had committed error, a new trial should not be granted."

State v. Tudor, 5 Day, 329, 5 Am. Dec. 163; *State v. Porter*, 58 Iowa, 19; *State v. Jacobs*, 17 Ohio, 143; *State v. Taylor*, 12 Ohio St. 130; *State v. Ward*, 17 Ohio St. 543; *Morris v. Underwood*, 19 Ga. 559.

The office of chief of police under existing laws is not only so imbedded in the charter as to place it beyond the destructive tendencies

exhibited by the city council of 1891, but the incumbent of such offices is a state officer, and recognized as such by the general statutes of the state.

Farrell v. Bridgeport, 45 Conn. 195; *Burch v. Hardwicke*, 30 Gratt. 24. 32 Am. Rep. 640; *Andrews v. King*, 77 Me. 230.

Samis v. King, 40 Conn. 309, and *Farrell v. Bridgeport*, *supra*, have expressly decided that the action of the council in attempting to legislate out of office the chief of police and the whole police force of the city, by repealing the ordinance which provided for them was void in all respects, as being in conflict with both the language and spirit of the charter.

If the common council has the power to pass a valid ordinance of the description of the one in question, then the power of appointment or removal of any officer of the force is entirely in the hands of the common council.

Its purpose and effect was to remove Mr. Rylands from and to appoint Mr. Pinkerman to exercise the powers and discharge the duties for which the board had selected Mr. Rylands and had not selected Mr. Pinkerman.

Thus the common council would be enabled to do that by indirection which it was expressly restrained from doing by the carefully devised provisions of the charter.

Such a construction of the charter must be wrong and the court will not adopt it.

Hoke v. Henderson, 15 N. C. 27, 25 Am. Dec. 677; *State v. St. Louis Police Comrs.* 88 Mo. 145; *People v. Garey*, 6 Cow. 646; *People v. Albertson*, 55 N. Y. 57; *State v. Brunst*, 26 Wis. 414, 7 Am. Rep. 84; *Warner v. People*, 2 Denio, 283, 43 Am. Dec. 740.

Where the tenure of office is established in the constitution, the legislature may not abridge the term, and when established in the charter of a municipal corporation it cannot be abridged by the common council.

Brewer v. Davis, 9 Humph. 214, 49 Am. Dec. 706; *Keys v. Mason*, 8 Sneed, 6; *State v. Douglas*, 26 Wis. 430, 7 Am. Rep. 87; *Stadler v. Detroit*, 13 Mich. 346; *State v. Draper*, 65 Mo. 333, 27 Am. Rep. 287; *State v. Thoman*, 10 Kan. 191; *People v. Dubois*, 23 Ill. 549; 1 Dill. Mun. Corp. p. 324; *Mechem, Pub. Off.* § 387.

And where a method of removal is prescribed in the organic law, only that method can be followed.

Love v. Com. 3 Met. (Ky.) 237; *Brown v. Grover*, 6 Bush, 1.

The recognition in the charter of such officer as the "chief of police," and the imposing of specific duties upon such officer, creates the office itself in the most full and ample manner.

Fant v. Gibbs, 54 Miss. 412; *Brown v. Blake*, 46 Conn. 550; *People v. Squires*, 14 Cal. 16; *People v. Bedell*, 2 Hill, 198; *Mechem, Pub. Off.* § 467; *Ford v. California Harbor Comrs.* 81 Cal. 36; *Bow v. Allenstown*, 34 N. H. 356, 49 Am. Dec. 489; 1 Dill. Mun. Corp. p. 75.

The powers, authority, and jurisdiction constitute the office and are of the essence of it and inseparable from it.

Com. v. Gamble, 62 Pa. 348, 1 Am. Rep. 422; *People v. Langdon*, 40 Mich. 682; *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *State v. Wilson*, 29

Ohio St. 848; Paine, Elections, § 126; Mechem, Pub. Off. §§ 9, 10; *Robertson v. State*, 109 Ind. 79; *Ogden v. Raymond*, 22 Conn. 879, 48 Am. Dec. 429.

The same reasoning that is adopted by the courts in respect to a constitutional office that is sought to be abolished or abridged by legislative enactment, applies with equal force to a charter office that is sought to be disturbed by a city ordinance.

Quinette v. St. Louis, 76 Mo. 402; *Carr v. St. Louis*, 9 Mo. 190; *Schott v. People*, 89 Ill. 197; *State v. Douglas*, *supra*; *Placerville v. Wilcox*, 35 Cal. 28; *Hoboken v. Harrison*, 80 N. J. L. 78; *State v. Brunst*, *supra*; *King v. Hunter*, 65 N. C. 608, 6 Am. Rep. 754; 2 Dill. Mun. Corp. p. 315; Mechem, Pub. Off. § 467; *Warner v. People*, 2 Denio, 280, 48 Am. Dec. 740; Cooley, Const. Lim. p. 235.

The attempted repeal really means nothing. The first two sections attempt to repeal, and the third section restores. There is no time when the office of chief of police ceased to exist. It is the same as if no law had been passed.

Fullerton v. Spring, 8 Wis. 667; *McMullen v. Guest*, 6 Tex. 275; *State v. Baldwin*, 45 Conn. 134; *Re Welsh*, 17 Ill. 162; *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 489.

This ordinance which preserves intact every power and duty of that office, and merely describes the incumbent of it as "captain of police," if it accomplishes the feat of legislating Rylands out and Pinkerman in, is an act of the appointing power which is exclusively vested in the board of police commissioners, and therefore in conflict with the charter.

United States v. Bassett, 2 Story, C. C. 404; *Merriam v. Clinch*, 6 Blatchf. 9; *People v. Hopkins*, 55 N. Y. 74; *Portland v. Denny*, 5 Or. 160.

Not one authority can be produced where it is held that the appointment of one to fill the unexpired term of his predecessor operates as an appointment for the full period of the term, upon such facts as are presented in this case.

State v. Stonestreet, 99 Mo. 875; *State v. Barlow*, 108 Ind. 567; *Jones v. State*, 112 Ind. 197; *Baker v. Kirk*, 38 Ind. 523; *French v. Cowan*, 79 Me. 426; *Opinion of the Judges*, 50 Me. 607; *Opinion of the Judges*, 61 Me. 601; *Wapello County v. Bigham*, 10 Iowa, 40, 74 Am. Dec. 370; *Farmater v. State*, 102 Ind. 98; *Parcel v. State*, 110 Ind. 123; *People v. McClave*, 99 N. Y. 90, *Bond v. Wilson*, 8 Kan. 229, 12 Am. Rep. 466; *Hagerty v. Arnold*, 18 Kan. 367, *Brodie v. Campbell*, 17 Cal. 20; *Holden v. People*, 90 Ill. 437; Paine, Elections, § 192; *Smith v. Halfacre*, 6 How. (Miss.) 604; *Hughes v. Buckingham*, 5 Smedes & M. 643; *Wright v. Adams*, 45 Tex. 140.

While we contend that the action of the board was perfectly regular whereby the nominations of Reynolds and Sperry were subsequently confirmed, yet, even if a municipal council—which itself is a miniature legislature—departs from parliamentary usage in respect to its proceedings, its action will be legal if such departure does not violate the provisions of the charter nor the general law.

Com. v. Lancaster, 5 Watts, 155; *People v. Rochester*, 5 Lana. 15; *Bennett v. New Bedford*, 110 Mass. 437; 1 Dill. Mun. Corp. p. 365; *McGraw v. Whitson*, 69 Iowa, 350; *Holt v. Som-*

erville, 127 Mass. 411; *Chandler v. Lawrence*, 128 Mass. 215.

Without regard to the special matters contained in the warning, when once convened, it was competent for the board to act upon any matter which they might act upon at any regular meeting.

City Ordinances, p. 140; *Whitney v. New Haven*, 58 Conn. 450.

Whether a meeting is illegally held on account of not being commenced at the time named in the warning, must depend upon the circumstances peculiar to the case under consideration.

South School District v. Blakeslee, 18 Conn. 234; *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517.

Even if a meeting is irregularly called in the case of a municipal council, but if all the members are in fact present and participate in the vote, it is held by the courts that their acts are valid.

State v. Smith, 22 Minn. 223; *Magenau v. Fremont*, 9 L. R. A. 791, 30 Neb. 843; *State v. Green*, 87 Ohio St. 234.

The mayor is clothed with the power, under the city charter, to give the casting vote, and no restrictions or limitations are placed upon the exercise of that right. The right may be exercised by him when the result shows a tie vote—whenever that condition arises—without regard to the character of the business that is being acted on.

Spalding v. Watson, 35 Kan. 89.

Among those voting in the negative, on the subject of confirming the nominations, was David Walsh, as a member of said board. We deny that he was lawfully entitled to cast his vote on the confirmation of his successor, inasmuch as it related to a matter in which he had a substantial interest.

The nominations were therefore confirmed by a majority of those entitled to vote, without the aid of the mayor's vote.

Stockwell v. White Lake Twp. Board, 22 Mich. 341.

When Reynolds and Sperry qualified by filing their oath of office, the right to exercise the office on the part of Walsh and Bogart, *ipso facto*, ceased, and Reynolds and Sperry became *de jure* members of said board.

State v. Kirk, 46 Conn. 395; *Holden v. People*, 90 Ill. 436; *Steinback v. State*, 33 Ind. 488; *State v. Fagan*, 42 Conn. 82; *State v. Harrison*, 118 Ind. 441.

Their claims to said offices and their exercise of the rights and privileges were open and notorious and known and recognized by the chief executive of the city and by the public generally.

They were, therefore, *de facto* commissioners as well as *de jure*, and it is a self-evident proposition that there cannot be a *de jure* officer and another *de facto* officer exercising the same office at the same time.

Hamlin v. Kassafar, 15 Or. 458; Mechem, Pub. Off. § 322; *Cohn v. Beal*, 61 Miss. 398; *Steinback v. State*, *supra*; *Boardman v. Halliday*, 10 Paige, 223, 4 L. ed. 953; *State v. Atlantic City*, 8 L. R. A. 697, 52 N. J. L. 337; *People v. Scrugham*, 20 Barb. 302; *State v. Carroll*, 38 Conn. 467, 9 Am. Rep. 409; *State v. Lane*, 16 R. I. 626; *Everroad v. Flatrock Twp.*

49 Ind. 451; *Wilcox v. Smith*, 5 Wend. 231, 21 Am. Dec. 213; *State v. Meehan*, 45 N. J. L. 192.

The non-user of the office, on the part of Bogart, is conclusive, as against Sperry.

People v. Hartwell, 67 Cal. 11; *People v. Hanifan*, 96 Ill. 420; Paine, Elections, § 240; *Rez v. Tate*, 4 East, 840; 1 Dill. Mun. Corp. § 228.

No business transacted by a board, as such, is legal when notice of the meeting at which the business is done is not given to a member thereof.

State v. Kirk, *supra*; *State v. Guiney*, 26 Minn. 313; *Middletown v. Berlin*, 18 Conn. 197; *Wilson v. Wallersville School Dist.* 46 Conn. 407; *Martin v. Lemon*, 26 Conn. 192; *Perry v. Tynen*, 22 Barb. 140; *Keeler v. Frost*, Id. 400; *People v. Bachelor*, 22 N. Y. 184; *Smith v. Darley*, 2 H. L. Cas. 789.

If the charter made the necessary length of the term two years, it was not competent for the mayor, by the language of his nomination, or for the board of aldermen by its confirmation of the nomination, to extend or abridge that term, or to confer office for any other than the term prescribed by law.

From the present charter it is made apparent that the intention of the lawmakers of the state had been to create and continue in the city of Bridgeport a police board to consist of four members, so chosen that two of them shall go out of office at the beginning of each municipal year, and their successors then be chosen. The alternating feature of the membership is made clearly apparent.

Courts preserve the contemplated composition of such board by holding that the provision for filling a vacancy referred to a vacancy for an unexpired term.

French v. Cowan, 79 Me. 435; *Opinion of the Judges*, 50 Me. 608; *State v. La Forte*, 28 Ind. 248; *Baker v. Kirk*, 23 Ind. 523; *State v. Barlow*, 103 Ind. 567; *People v. McClave*, 99 N. Y. 83; *Holden v. People*, *supra*; *Smith v. Halfacre*, 6 How. (Miss.) 604.

Acts of legislative or deliberative bodies in fact done and done in compliance with public law, are never invalidated, for the reason that there were irregular parliamentary proceedings in the course of their adoption.

Cooley, Const. Lim. p. 181; *Bennett v. New Bedford*, 110 Mass. 438; *Com. v. Lancaster*, 5 Watts, 156; *People v. Rochester*, 5 Lans. 15.

Where all the members of the board of directors of a private corporation, or of a public board of council, are present, a legal meeting exists, whether or not there has been a call or notice.

1 Morawetz, Priv. Corp. § 581; Ang. & A. Corp. § 495; Green's Brice, Ultra Vires, 439.

For the doctrine as applied to public government bodies, see—

1 Dill. Mun. Corp. § 288; *Magenau v. Fremont*, 9 L. R. A. 791, 30 Neb. 843; *State v. Smith*, 22 Minn. 223; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 Am. Dec. 208.

Baldwin, J., delivered the opinion of the court:

The plea in abatement which has been interposed by the state goes upon the ground that the further prosecution of this appeal

would simply invite the court to decide questions that are no longer of any practical importance, since the relator is now in full and undisturbed possession of the office which was the occasion of the action. It appears, however, that he has recovered such possession by reason of the removal of the defendant from his office of captain of police, and that this removal was made pending the appeal, and upon charges of insubordination preferred by the relator. The insubordination consisted of acts similar to those upon which the original quo warranto proceedings were based, and the decree of removal is also placed in part upon the ground that the prosecution of this appeal, and of an action of mandamus brought or promoted by the defendant to reinstate him in office, interferes with the harmonious working of the police force.

An appellee can maintain a plea in abatement of this kind only on the ground that the inquiry whether the judgment appealed from was right or wrong has become immaterial. But if the judgment of ouster was wrong, to dismiss the appeal, at the instance of the appellee, because the appellant has been removed from office for prosecuting the appeal, and the appellee reinstated, would be to allow the relator to take advantage, if not of his own wrong, at least of the error of the court, to defeat the remedy provided by law for the redress of such an error. The appellant did not voluntarily withdraw from the contest over the office claimed by the relator. He was forced out of it by a sentence of removal, procured by the relator, and based upon an assumption of the validity of the judgment appealed from, and the consequent misconduct of the appellant in endeavoring to obtain its reversal. The appellant's reply to the plea in abatement summarizes the appellee's contention, not unfairly, by the statement that "the defendant, Pinkerman, was dismissed on Rylands' charges because he appealed his case against Rylands to this court, and now Rylands asks that this appeal to this court be dismissed because Pinkerman has been dismissed from office because he took the appeal." It is true that the state is, in form, the appellee, and that the pleadings do not show that the state took any part in the proceedings which have resulted in the dismissal of the appellant from office. But in informations of this nature the relator is the substantial complainant, and conducts the cause. The only brief filed in this case for the appellee is entitled "brief for relator," and states that execution was issued "in favor of the relator," on the judgment of ouster rendered by the superior court. The state has no interest, except that the rightful incumbent of the office in controversy, if such an office exists, should exercise its functions, and we do not think the acts of either of the claimants should be allowed to prejudice the right of the other to a final determination of the question of title. The matter in difference is not a mere bill of costs in a contest over a position in a private corporation, as in *State v. Tudor*, 5 Day, 329, 5 Am. Dec. 162. The powers of one of our largest municipal corporations as to a

subject vitally affecting its peace and order are the subject of controversy, and in our opinion the appellant has a right to require us to review a judgment by an execution issued under which he was ousted from the exercise of the functions of chief of police before he was dismissed from the office of captain of police. These positions are of a class in which the state, and the whole people of the state, have a deep and immediate concern. Whoever holds one of them holds it as a trust from the state, resting, not on contract with the city, but on an appointment made by the city under a power conferred on it by the state. *Farrell v. Bridgeport*, 45 Conn. 191, 195. We think the reply to the plea in abatement and motion to dismiss is sufficient, and that they must be overruled.

The appeal presents two main questions,—that as to the validity of the removal of the relator from the office of chief of police in June, 1891, and that as to the effect of the ordinance of September, 1891, relating to the abolition of that office, which went into effect a month before the information was filed. The present charter of the city of Bridgeport was passed in 1887. 10 Priv. Laws, p. 510. It contains the following provisions as to the constitution and administration of the police department: "Sec. 50. There shall continue to be a board of police commissioners, of fire commissioners, and park commissioners, each of which shall consist of four electors of said city, and each commissioner shall hold his office for the term of two years, and until his successor is appointed and qualified, and on the expiration of the terms of office of each of the present commissioners their successors shall be appointed for the term of two years next succeeding, and until their successors shall be appointed and qualified. The mayor of said city shall, by and with the advice and consent of the board of aldermen of said city, appoint the members of the several boards of police commissioners, of fire commissioners and park commissioners, and the appointment of the members of the said several boards of commissioners as aforesaid shall be made in such manner as to divide the membership of each of said boards equally between the two leading political parties for the time being, and whenever any vacancy shall occur in any of said several boards of commissioners it shall be filled in the manner provided aforesaid for the appointment of members. The mayor of said city, by and with the advice and consent of two thirds of the members of the board of aldermen, may remove any member of either of said boards of commissioners for cause. The members of either of said boards of commissioners now in office shall retain their positions during the term for which they were elected, subject to removal in the manner hereinbefore set forth. The mayor of the city shall, *ex officio*, be a member of said several boards of commissioners, but shall have no vote in any of their proceedings except in case of a tie vote. He shall preside at all meetings of said boards at which he is present, and at all meetings of said boards three members, exclusive of the mayor, shall

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constitute a quorum, and the concurrence of three of them shall be necessary for the transaction of business. The commissioners of said several boards, before entering upon the discharge of their duties, shall be sworn to a faithful performance thereof. Each of said boards shall appoint a clerk, whose duty it shall be to keep, in books provided for that purpose, true records of the doings of said boards respectively." "Sec. 58. The police commissioners of said city of Bridgeport shall have the sole power of appointment and removal of officers and members of the police department of said city; and it shall be the duty of the said board of police commissioners to appoint suitable persons to fill the offices of said police department, and other suitable persons as members of said police department, and to suspend, remove or expel any officer or member from office or membership in said department whenever, in the judgment of said commissioners, such suspension, removal, or expulsion shall be for the best interests of the city; and whenever any person shall be appointed an officer or member of said police department, or whenever any officer or member of said police department shall be suspended, removed, or expelled from his office or membership in said department, it shall be the duty of the said board of police commissioners to give a written notice, within a reasonable time, to the city clerk of said city, of such appointment, suspension, removal, or expulsion. The present police force of said city shall hold their respective offices, unless previously suspended, removed, or expelled, until others are appointed in their stead; and every officer or member of said police department shall hold his office and membership in said department until removed or expelled by said board of police commissioners for cause, of which said board of police commissioners shall be the sole judges. Nothing contained in this section shall be so construed as to prevent the common council of said city of Bridgeport from increasing or reducing the members of the police force of said city or creating new offices in said police department; and in case the common council of said city shall vote to reduce the police force of said city, the board of police commissioners shall remove a sufficient number of the officers and members of said police force to conform to the vote of said common council. Sec. 59. The common council of said city shall have power to pass an ordinance or ordinances relative to the proper regulation of the police department, and relative to whatever further control of said department the said common council may deem proper to place in the hands of said board of police commissioners." By section 24 the common council was also authorized "to make, alter and repeal orders and ordinances, not inconsistent with the provisions of the charter, which shall be valid and operative within the limits of said city," relative to a number of specified matters, and among others "to the city police, . . . to the filling of vacancies which may occur in the common council, or in any office appertaining to said city for the unexpired term, not otherwise

provided for in this act;" and to the duties of all officers of the city "not expressly defined by the provisions of this act." General power was also given to make and repeal ordinances "relative to all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property, and lives of the citizens," and "to constitute and appoint all necessary and proper committees and officers, under such names and appellations as they may deem appropriate," and to "invest them with the power and authority necessary and proper to carry into full effect all the orders and ordinances of said common council." Section 62 provides that bail bonds and recognizances in the city court may be taken "by the chief of police or acting chief of police of said city," and that each member of the police department shall have "power, by the permission of the chief of said department, to pursue and arrest with process, in any part of this state, persons charged with any criminal act committed in said city." Section 63 provides that "the chief of said police department shall have power, subject to the control of the board of police commissioners of said city, to suppress all tumults," enter houses of ill fame, and raise the posse of the city to aid him in the exercise of his authority.

The common council adopted, before the present controversy arose, an ordinance relative to the police department. Section 1 of this ordinance declares that "the board of police commissioners shall have the general management and control of the police department," and may make rules for its government, consistent with the laws of the state and ordinances of the city. Section 6 provides that "the regular police force of this city shall consist of a chief of police, captain, lieutenant, first and second sergeant, and not less than ten nor more than twenty-eight patrolmen." Section 9 provides that "the chief of police, subject to the control of the mayor and police commissioners, shall have the control and management of the subordinate officers and members of the police department, and they shall obey his orders. He shall also have charge of the station houses and the custody of all persons committed to or confined therein. He shall also keep a record of the officers and members of the police force and of their doings. He shall also keep an accurate monthly pay-roll of the police force, in which he shall designate the date and period of service of each member of the force, and the several amounts due them respectively for that month, and when payment is made, shall take the receipt, on such pay roll, of each member for the amount paid him; and such pay roll thus kept and receipted shall thereupon be lodged by him with the city auditor to be kept on file. In the absence of the chief of police, or when from any cause he shall be unable to act, the captain shall take his place and perform his duties, and in the absence or inability to act of both the chief and captain, the lieutenant shall discharge the duties of chief of police." The relator was duly appointed and qualified as chief of police in January, 1890. In December, 1890, the four police commissioners severally resigned their positions, and shortly afterwards the vacancies were duly filled by the appointment of Messrs. Beardsley, Bogart, Grant, and Rishor. In February, 1891, the mayor appointed David Walsh to fill a vacancy occasioned by the death of Mr. Beardsley, to hold office for the unexpired term. The form in which this appointment was made raises an important question in the case, the defendant contending that, though purporting to be for the unexpired term, it was, in law, by force of the charter provisions above quoted, an appointment for a full term of two years. Underlying this question there is also obviously another, namely, what was the length of the term for which Mr. Beardsley was originally appointed? If it was for the unexpired portion of the term of his predecessor, Mr. Grant, it terminated in April, 1891; but, if it was for a full term of two years, it would not come to an end until December, 1892, and Mr. Walsh, even if his appointment were restricted to the limit placed upon it by the form of his nomination, would remain in office until that date, as would also the two others appointed in December, 1890.—Messrs. Bogart and Grant,—while Mr. Rishor, whose nomination was not sent in until January, 1891, would hold office until January, 1893.

The terms for which Messrs. Grant and Spencer, who had been replaced by Messrs. Beardsley and Bogart, were originally appointed expired in April, 1891, and the mayor then nominated M. L. Reynolds to succeed Mr. Walsh, and E. H. Sperry to succeed Mr. Bogart. When the nominations were presented, upon motion of Mr. Walsh, who was a member of the board of aldermen, the board voted to lay them upon the table until the last meeting in March, 1892. At the next meeting of the board the mayor sent in a message disapproving this action, and a motion "to sustain the veto" resulted in a tie vote. The mayor then voted for the motion, and declared it carried. By the city charter (section 7) he is empowered to "preside at the meetings of the board of aldermen, and shall have a casting vote only in case of a tie." It is sufficient to remark, with reference to the proceeding last mentioned, that as the charter only provides for the approval or disapproval by the mayor of measures which have passed both of the boards constituting, with him, the common council, his message of disapproval was without any legal effect.

The mayor, who had power to convene the common council at any time, subsequently called a meeting of the board of councilmen for May 18th, and a meeting of the board of aldermen at half past 7 o'clock on May 20, each call specifying the object of the meeting as follows: "For the purpose of electing a liquor and dog agent, also a public pound keeper, and transacting any other business proper to be done at said meeting." The city ordinances provided that the common council, at special meetings, might act upon any matter mentioned in the call, "and do any other business proper to be done at any regular meeting." By the charter (section 7) the board of aldermen and the board of

councilmen are "two separate bodies," holding (section 26) separate meetings. On May 20, at half past 7, the mayor and all the aldermen were at the city hall, six of the latter, including Mr. Walsh, being in the chamber where the meeting was to be held and the rest of the board, also numbering six, being in an adjoining room in conference with the mayor. Seven aldermen were necessary, under the charter, to constitute a quorum, and the six who were in the aldermanic chamber, and who had come there for the purpose of participating in the meeting, after waiting until 10 minutes past 8 without being joined by the others, agreed to leave the hall and the city, in order to prevent any action at the meeting with reference to the appointment of police commissioners. They then drove together to an adjoining town, and were thereafter in hiding, in various parts of the state, until noon on May 22. Five minutes after they had left the city hall, the mayor and the six aldermen who had been with him entered the aldermanic chamber, and the meeting was called to order. The charter (section 7) gave those present at any meeting of the board, if less than a quorum, power to require the mayor to issue a warrant to arrest and bring in the absent members. Such a warrant was thereupon issued, and from that time until noon of May 22 the mayor and the six remaining aldermen, or a majority of them, were continuously in or about the aldermanic chamber for the purpose of keeping the meeting alive. At noon on May 22 the six absentees voluntarily returned to the city, and, the warrant being read to them, entered the chamber with the officer, and took their seats. The mayor and the six other aldermen were present, and the meeting was called to order. After some miscellaneous business, in which all participated, the mayor presented in writing the nominations of Messrs. Reynolds and Sperry as police commissioners. Objection was made to their presentation, which resulted in a tie, whereupon the mayor gave a casting vote, and declared them in order. Votes confirming the appointments were then had and declared in the same manner, by the casting vote of the mayor. A dog and liquor agent was then elected, and a good deal of other business transacted, in which all present took part. Messrs. Reynolds and Sperry were soon afterwards sworn in and qualified as police commissioners, and Mr. Sperry's predecessor surrendered to him his badge of office, and made no further claim to the position. Mr. Walsh, however, as whose successor Mr. Reynolds had been nominated, refused to recognize him as such, and continued to claim to be a police commissioner, performing some of the acts properly appertaining to that position, while Mr. Reynolds performed others. Mr. Walsh was still recognized as a commissioner by Messrs. Grant and Rishor and by the clerk of the board. Mr. Reynolds was recognized as a commissioner by the mayor and the relator, as chief of police. Each also had recognition and support from friends and partisans in and out of the common council. The mayor called a meeting of the board of police commissioners

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for organization on May 30, 1891, at the city hall, on notice to Messrs. Grant, Rishor, Reynolds, and Sperry, but it was attended only by himself and Messrs. Reynolds and Sperry. No business could be transacted, under section 50 of the charter, without the concurrence of three commissioners. Meetings of the rival board were held at the house of one of its members, on notice to the mayor and Messrs. Grant, Rishor, Walsh, and Bogart, at which Messrs. Grant, Rishor, and Walsh attended, with the clerk, and business was transacted. At one of these meetings held on June 11, 1891, a vote was passed purporting to remove the relator, for cause, from the office of chief of police. He had been summoned to appear and answer the charges against him, and had paid no attention to the summons.

It is evident that he was not removed from office, unless Mr. Walsh can be counted as one of the three commissioners whose concurrence was necessary. If his appointment, in February, 1891, to fill the unexpired term of Mr. Beardsley, amounted in law to an appointment for a full term of two years, or if Mr. Beardsley's term was one of that length, he was rightfully a member of the board in June. But we are of opinion that complete effect can be given to the provisions of the charter only by construing it as confining appointments to fill vacancies to appointments for the residue of the unexpired term. The evident intent of section 50 is to secure to the city at all times, so far as possible, the services of commissioners, half of whom have had the benefit of at least a year's experience in office, and to divide the membership of each half equally between the leading political parties. *Farmater v. State*, 102 Ind. 90, 93. Such a board had existed in Bridgeport since 1868. The charter of that year provided for the election of two commissioners to serve for one year, and two for two years, and for the annual election thereafter of two to serve for two years, and secured a nonpartisan character to the board by allowing no one to vote for more than two out of the four, and requiring the election of deputy commissioners to replace each elected commissioner in case of a vacancy. From that time until the resignation of the entire board, in December, 1890, its membership had been annually renewed by the appointment of two commissioners for a term of two years, each belonging to a different political party from the other. Were the contention of the defendant well founded, the successors of the four commissioners who resigned in December, 1890, should have been, and in law were, appointed each for a two-years term, thus totally and forever frustrating the carefully devised scheme of alternating succession which had been followed for twenty years. It was therefore incumbent upon the mayor in April, 1891, to send in nominations for two commissioners to succeed Messrs. Walsh and Bogart. He did so, and we must next inquire whether they were properly confirmed by the board of aldermen.

In our opinion the meeting of that board on May 20 was legally convened, was called to order within a reasonable time from the

hour appointed, and was legally continued until May 22. *South School Dist. v. Blakeslee*, 18 Conn. 227. The provisions of the charter for bringing in absent members contemplated such a contingency as in fact occurred on that occasion, and it was unnecessary for the members in attendance to remain actually in their seats in the aldermanic chamber during the hours or days which elapsed before the absentees returned. The warrant of arrest issued by the mayor described the hour at which the meeting was originally called as 8 o'clock, which was, in fact, half past 7, but the error could mislead no one, and did not impair the validity of the instrument. It is immaterial whether the nominations for police commissioners were taken from the table at this meeting in a manner pursuant to the rules of the board, or whether they were entertained as new business. The board had power to suspend or disregard its rules of order by the vote of a majority; and to vote on the consideration of the nominations, in effect, suspended all rules inconsistent with such a vote. *Cushing*, Parl. Law, §§ 794, 1478; *Bennett v. New Bedford*, 110 Mass. 438, 439; *State v. Chapman*, 44 Conn. 595; *Hough v. Bridgeport*, 57 Conn. 290, 295.

Section 24 of the charter declares that "the mayor, board of aldermen, and board of councilmen of said city shall constitute and be a body known and denominated the common council of the city of Bridgeport." Section 7, as previously quoted, provides that the mayor shall preside at the meetings of the board of aldermen, "and shall have a casting vote only in case of a tie." There is no limitation of this casting vote to any particular kind or class of business. A tie is more likely to occur upon questions involving political considerations, and arises most often as to the creation of offices or appointments to office. This the legislature may be presumed to have had in mind when this section was adopted, and we see no reason for adopting a narrow construction of a provision plainly adapted to the prevention of "deadlocks," which are never more injurious to good government than when the result of a contest which keeps an office vacant that the public interests require to be filled, or prolongs an official term beyond the period contemplated by law. *Carroll v. Wall*, 35 Kan. 36. If the board of aldermen should be equally divided upon the passage of an ordinance recommended by the mayor in his annual message, it would not be doubted that he could break the tie. We perceive no greater reason for refusing him a casting vote when he has proposed, not a measure of legislation, but a candidate for office.

The tie was created by the vote of Ald. Walsh, which was cast against the confirmation of Mr. Reynolds as his successor in the office of police commissioner. By the rules of order of the board of aldermen, all differences of opinion in regard to modes of proceeding, not otherwise provided for, were to be "governed by parliamentary practice, as set forth in Cushing's Law and Practice of Legislative Assemblies." In that work it is stated (sections 1784, 1789, 1844) to be the

common parliamentary rule that no member of a legislative assembly shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest; but that an interest of the latter description only exists when it is immediate, particular, and distinct from the public interest; and that (section 1837) the reception of such a vote after the declaration of the result by the presiding officer can only be remedied by formal action of the house in passing a motion for its disallowance. The right of a member of a legislative body to vote on a question involving his right to the seat he holds in it is a very different one from that which arises on a question as to his tenure of some other office. This distinction was strongly emphasized in the discussions arising upon a motion made in the senate of the United States, in 1866, to disallow Senator Stockton's vote upon a resolution declaring him entitled to retain his seat. Senator Foster, then the president of the senate, a distinguished parliamentarian, and afterwards a member of this court, took the ground that the chair had no power to exclude the vote, but that the senate could. During the debate, Senator Sherman, of Ohio, while advocating the motion, in view of Mr. Stockton's peculiar relation to the subject of the resolution for which he had voted, stated that he had himself, on one occasion, as a representative, determined that should his vote, as such, be necessary to secure his own election to another position, for which he had been placed in nomination, his duty to his constituents would require him to give it; and similar views were expressed by Senators Trumbull, of Illinois, and Reverdy Johnson, of Maryland. Cong. Globe, 1st Sess. 39th Cong. 1602, 1636, 1643, 1647; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 235. It is our opinion that Ald. Walsh had the right to vote against the confirmation of Mr. Reynolds as his successor in the office of police commissioner, and that, even had it been otherwise, his vote, when once given and counted by the mayor in his declaration of the result, could only be rejected by the action of the board of aldermen.

In regard to the notice given of the objects of the meeting, it is enough to say that, with respect to such a body, the specification of certain objects does not exclude action upon any others which are within the range of its general powers. *Whitney v. New Haven*, 58 Conn. 450, 460.

It follows that Messrs. Walsh and Bogart ceased to be rightful police commissioners upon the qualification of their successors in May, 1891. The removal of the relator from office in June, 1891, by the so-called "board of police commissioners," constituted of Messrs. Grant, Rishor, and Walsh, was therefore a nullity, unless Mr. Walsh was a *de facto* commissioner. Against such a claim the finding of the superior court is decisive. It is that at no time between May 21 and September 23, 1891, did he have the reputation of being such a commissioner, nor were his acts and authority as a pretended commissioner generally recognized or acquiesced in, nor was he an incumbent of that office un-

der such apparent circumstances of reputation or color as would have led men to suppose that he was a legal commissioner, nor did he exercise the duties of that office under such circumstances of continuance, reputation, acquiescence, or otherwise, as reasonably to authorize the presumption that he was such a commissioner, or as were calculated to induce people, without inquiry, to submit to or invoke his action. The want of notice to either of the rightful commissioners appointed in May, of the meetings of the pretended board of commissioners, would also be a fatal objection to the validity of the sentence of removal, even had Mr. Walsh been a *de facto* commissioner. It follows that the relator continued to be chief of police until September, 1891.

Upon September 23, 1891, an ordinance was adopted by the common council, which reads as follows: "Be it ordained by the common council of the city of Bridgeport: Section 1. That the office of chief of police be and the same is hereby abolished. Sec. 2. That section 6 of chapter 17, being 'An ordinance relative to the police department,' be and the same is hereby amended by striking out the words 'chief of police' in the second line thereof. Sec. 3. That section 9 of said chapter 17, being 'An ordinance relative to the police department,' be and the same is hereby amended by adding thereto the following: 'If at any time the office of said chief of police be abolished or ceases to exist, then said captain of police shall be vested with all the powers and responsibilities, and shall perform all the duties, formerly exercised by or imposed upon said chief of police by the statutes of the state, the charter and ordinances of the city of Bridgeport, and the rules of the police department of said city.' Sec. 4. All ordinances and parts thereof now in force and inconsistent with any part of this ordinance are hereby repealed." It is obvious that this ordinance was inartificially drawn, but its general purpose is unmistakable. It was designed to abolish the office of chief of police, to amend certain of the ordinances in such a way as to secure the devolution of the functions of the office upon the captain of police, and to repeal all provisions of the ordinances which were inconsistent with the accomplishment of these objects. If this ordinance is to be construed as a mere attempt to remove the incumbent of an office, and appoint another to exercise its functions, it would be void. *Farrell v. Bridgeport*, 45 Conn. 191, 193. The removal of a chief of police is, by section 58 of the city charter, a matter within the sole jurisdiction of the board of police commissioners. But we are not to presume an improper motive. If the ordinance can be supported as a legitimate exercise by the common council of its authority to make and repeal ordinances with respect to the police, and to the proper regulation of the police department, it is our duty to give it such a construction as will make it operative, and consistent with the charter. *West School Dist. of Canton v. Merrills*, 12 Conn. 437, 439; *Bartlett v. Kinsley*, 15 Conn. 327, 331; *Beach, Pub. Corp.* §§ 516, 517. In the case of *State* 22 L. R. A.

v. Baldwin, 45 Conn. 184, we held that an act abolishing by one section the board of county commissioners of New Haven county, and by the next section creating a board of commissioners for New Haven county, with the same functions as those of the board which was abolished, was self-destructive, and that there was never a moment when the office of county commissioner for New Haven county was not in continued existence. But in the case before us, after the abolition of an office comes, not the creation of a similar one, but the devolution of its functions, or of some of them, on the incumbent of another office. An ordinance, above quoted, already existed, which provided (section 9) that when, from any cause, the chief of police should be unable to act, the captain should take his place and perform his duties. The framers of the new ordinance were apparently in doubt whether that section would cover the case of the abolition of the office of chief of police, and therefore sought to amend it by making an express provision for that contingency. It was a contingency no longer, for the first and second sections had completed the work of abolition, and their intent would have been better expressed had the amendment of section 9 thrown the powers and duties of the chief of police upon the captain of police, not if the office of the latter should be abolished, but as soon as the ordinance took effect by which it was abolished. That this was the purpose in view seems to us apparent upon a comparison of its different sections, and we think the language used justifies and requires such a construction as will give this purpose effect. *Whitlock v. West*, 26 Conn. 406, 414. The office of chief of police was one which had been created in 1874 by the ordinance, section 9 of which was thus amended. By section 6 of that ordinance it was provided that "the regular police force of said city shall consist of a chief of police, captain, lieutenant, first and second sergeant, and not less than ten nor more than twenty patrolmen." Out of this section the ordinance of 1891 struck the words "chief of police." This amendment was a return to the scheme of organization for the police force contained in an earlier ordinance adopted in 1872, in which the chief officer of the department was styled "captain of police." Prior to 1872 the officers of the department, under an ordinance adopted in 1869, had been a chief of police, a captain, and two sergeants. An office created by ordinance may be abolished by ordinance. *Butler v. Pennsylvania*, 51 U. S. 10 How. 402, 416, 13 L. ed. 472, 478; *State v. Douglas*, 26 Wis. 423, 7 Am. Rep. 87. Neither the city charter nor the general statutes of the state appears to us to contain any such mention of an office of chief of police as to amount to a declaration that an office by that name must necessarily exist in Bridgeport. General Statute, § 1646, after providing that incorrigible offenders, if released from the state's prison on parole, may be recommitted by order of the directors of the prison, makes it "the duty of all chiefs of police and marshals of cities and towns, and the sheriffs of counties, and of all police officers and con-

stables," to execute any such order. Section 2998 provides that "the chief of police of any city" may license junk shops in such city. Section 3000 contains a similar provision as to licensing pawnbrokers, and section 3001 gives power to examine the books and premises of pawnbrokers in any city to "the chief of police of said city or any person by him designated." Section 3106 gives authority to enter and inspect the premises of licensed liquor dealers to "the county commissioners, sheriff of the county, and any deputy sheriff by him specially authorized, the chief of police of any city, or any policeman by him specially authorized." Section 3007 empowers "selectmen in towns and the chief officer of police in cities" to license itinerant medical practitioners. We find nothing in any of these general laws which requires any particular city to maintain an officer known by the special designation of "chief of police." As well might it be contended that section 1646 requires our cities or towns to maintain officers of police to be known as "marshals." The general statutes undoubtedly contemplate the existence of some one official in each city who shall be the head of its police force, or in the language of section 3007, "the chief officer of police;" but as to whether he shall be called "inspector," or by any other name, is left to be determined by the municipal charter or ordinances under which the office may be created. *Opinion of the Justices*, 117 Mass. 603. The reference to "the chief of police" and "the chief of said police department" in sections 62 and 63 of the Bridgeport charter, already mentioned,

seems to us to impose no obligation on the common council to adopt either of these terms for the title of the chief officer of police. The state has dealt with his functions, not his name. An ordinance which deprived the police department of any head would be contrary to the intent of the charter. Had the ordinance now in question abolished, not only the office of chief of police, but also those of captain and lieutenant, and omitted to intrust the powers of chief to any other officer, it would have been void. Had it assumed to remove the incumbent of the office of chief of police while leaving the office itself still in existence, it would have been void. *Samis v. King*, 40 Conn. 298, 309. But whether the powers and duties properly belonging to the head of the department were by the ordinance, as adopted, transferred to the captain of police from motives of economy, or to terminate an unseemly and long-continued wrangle over official appointments, or to secure any other possible end in the interests of good government, it is enough that they were transferred, and that such transfer was within the jurisdiction of the common council.

There was error in sustaining the demurrer to the fourth paragraph of the amended plea, and for that cause *the judgment appealed from is reversed*, and the cause remanded for further proceedings in conformity to this opinion respecting the matters alleged in said paragraph.

Torrance, Fenn, and Robinson, JJ., concurred; **Carpenter, J.**, dissented.

MINNESOTA SUPREME COURT.

Jennie M. EVARTS, Admx., etc., of James Evarts, Deceased, *Resp.*,

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO., *Appt.*

(.....Minn.....)

*1. If a person volunteers to assist the servants of another, the master owes him

*Headnotes by MITCHELL, J.

NOTE.—Assumption by volunteer of the risks of service.

It seems to be agreed that a master owes a volunteer no higher duty than he owes other servants.

The volunteer can impose on the master no greater liability than he owes to a servant. *Ostborne v. Knox & L. R. Co.* 68 Me. 49, 28 Am. Rep. 16.

A volunteer stands in no better position than servants of the company with whom he associates himself. *Mayton v. Texas & P. R. Co.* 68 Tex. 77, 51 Am. Rep. 637.

The rule that the master is not responsible to one servant for injuries caused by the negligence of a fellow servant applies in the case of a volunteer assisting the servants. *Dega v. Midland R. Co.* 1 Hurlst. & N. 773, 26 L. J. Exch. 171, 8 Jur. N. S. 396; *Potter v. Faulkner*, 1 Best & S. 800, 31 L. J. Q. R. 30, 8 Jur. N. S. 259, 5 L. T. N. S. 455, 10 Week. Rep. 93.

There are expressions found in some of the cases 22 L. R. A.

no contract duty, and he assumes all the ordinary risks incident to the situation, and cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants.

2. But if after discovering that such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable.

3. This liability does not rest on any

which tend to place the volunteer on the same level with the servant so far as his right to recover from the master for injuries is concerned. But they are mere dicta and the decisions seem to place him on a level with a licensee or a trespasser.

One who is in fact a mere volunteer assumes the risk of his action. *Church v. Chicago, M. & St. P. R. Co.* 16 L. R. A. 361, 50 Minn. 218.

An adult volunteer has no right of action, unless wantonly injured. *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320.

One who enters a railroad company's property and voluntarily assists in its work does so at his peril. In case of injury he cannot recover, unless it was wantonly inflicted after his danger was discovered. The company is not required to use care to anticipate and discover the peril of such person, but only to use care after the peril is discovered. *Kentucky Cent. R. Co. v. Gastineau*, 88 Ky. 119.

Where, at the request of a brakeman, a traveler

contract obligation, but on the general duty not to inflict a wanton or willful injury on another. As respects this duty, a volunteer cannot occupy a less favorable position than a trespasser.

(January 5, 1894.)

APPEAL by defendant from an order of the District Court for Hennepin County overruling a motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. W. E. Dodge, for appellant.

Evarts was a mere volunteer and assumed all the risks incident to a skilled brakeman engaged in the performance of the same duties and in the same situation.

Church v. Chicago, M. & St. P. R. Co. 16 L. R. A. 861, 50 Minn. 218.

If Evarts who volunteered to sever the coupling between the dump cars and the first car of stone had been possessed of the knowledge and skill of an ordinary brakeman employed to do similar work, the signal of the conductor to

reverse the engine would have been perfectly proper, both with reference to the time when, the manner in which, and the circumstances under which it was given.

A volunteer can impose no greater duty on the master than the master's hired servants, employed and authorized to act in a similar capacity.

Everhart v. Terre Haute & I. R. Co. 78 Ind. 292, 41 Am. Rep. 567, 4 Am. & Eng. R. R. Cas. 599; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 13 Am. Rep. 356; *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *Redf. Railways*, 198; *M'Manus v. Crickett*, 1 East, 106; *Osborne v. Knox & L. R. Co.* 68 Me. 49, 28 Am. Rep. 16; *Church v. Chicago, M. & St. P. R. Co. supra*, and authorities cited therein.

If the servants of a railroad company who control the movements of a train have notice of the presence of any person, even a trespasser, on or around such train, such person being in a place of danger, the railway servants are bound to use reasonable care to avert such danger.

Heffel v. St. Paul, M. & M. R. Co. 49 Minn. 263.

On a highway undertook to brake a car and was injured, the court said the injured person was given no better condition legally than if he had been a mere intermeddler. The company owed him no duty either as an employé, passenger, or traveler on a highway crossed by the railroad. *Everhart v. Terre Haute & I. R. Co.* 78 Ind. 292, 41 Am. Rep. 567, 4 Am. & Eng. R. R. Cas. 599.

A passenger who, at the request of the conductor, goes upon the top of the car to help signal, when there is no real necessity for it, cannot recover if he is injured because of so doing. *Atchison, T. & S. F. R. Co. v. Lindley*, 6 L. R. A. 643, 42 Kan. 714.

A recovery was denied to a volunteer in *Sparks v. East Tennessee, V. & G. R. Co.*, 32 Ga. 156, but there were in that case other elements which may have contributed to defeat the recovery, such as a failure to show negligence on the part of the company and that the injury was the result of accident.

Liability to minor volunteer.

Liability of the master to a minor volunteer will depend on his discretion and ability to know his danger and avoid it. *Rhodes v. Georgia R. & Bkg. Co.* 84 Ga. 320.

If a child has discretion enough to know the dangers of his action and guard against it, the company is not bound to anticipate and provide against his peril in attempting to couple a train of cars. *Kentucky Cent. R. Co. v. Gastineau*, 38 Ky. 119.

A boy who, having attempted to steal a ride on a freight train, was discovered by a brakeman and compelled to assist in working the train, cannot recover if he is injured by the brakeman to readjust lumber which has become loose, during the performance of which he is injured by reason of his position and employment. *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. R. Cas. 589.

Where a boy was killed while attempting to assist a fireman in getting water for an engine, the court said the boy was voluntarily where he had no right to be and that he had no right to claim protection, and his parents were not permitted to recover from the company for his death, although the fireman requested the boy to perform the service. *Flower v. Pennsylvania R. Co.* 69 Pa. 210, 8 Am. Rep. 251.

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In *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 13 Am. Rep. 356, a boy fifteen years old went between moving cars for the purpose of coupling them claiming that he was compelled to do so by threats of the conductor. The court held that if he acted in obedience to threats, the conductor was acting outside the scope of his authority and the company was not liable for injuries received by the boy, and that if he acted voluntarily he was guilty of extraordinary rashness and folly which directly contributed to the injury and barred recovery.

Assisting by request of one in authority.

The question of liability frequently turns upon the authority of the servant to employ assistance, and recoveries have been permitted because such authority was found to exist and to have been exercised in the particular cause. *Georgia Pac. R. Co. v. Propst*, 33 Ala. 518.

If the assistance is with the permission of one who has the authority to employ help, the one rendering it acquires the rights of an employé. *Central Trust Co. v. Texas & St. L. R. Co.* 32 Fed. Rep. 443.

If one volunteers to perform work for a railroad company and an agent with authority assents to such actions, the volunteer will stand in the relation of a servant to the company and cannot recover for injuries caused by the negligence of fellow servants. *Barstow v. Old Colony R. Co.* 143 Mass. 535.

One who, at the request of the man in charge, temporarily assists in defendant's work, not expecting any pay, is for the time a servant of defendant and entitled to the same protection as any other servant. *Johnson v. Ashland Water Co.* 71 Wis. 558.

In *Pennsylvania Co. v. Gallagher*, 40 Ohio St. 637, 48 Am. Rep. 689, a car repairer directed his son to render some necessary assistance in his work of repairing a car. While he was so engaged he was injured by the negligence of another company using the same track. The court held that the father had authority to require the assistance and that the son was not a trespasser, but that he was rightfully on the track and could recover for injuries caused by defendant's negligence.

But if the plaintiff was merely a passenger on a

But if such person has volunteered to perform the duties of one of such servants and occupies a position and situation perfectly safe as to one skilled in the performance of such duties, then such servant having assumed all the risks incident to such service cannot recover if injured while so employed in its performance.

Church v. Chicago, M. & St. P. R. Co. supra.

Conceding that the negligence of Evarts in volunteering to do the work could not preclude a recovery, if, after he had so volunteered, defendant's servant was negligent with knowledge of Evarts' danger, it was certainly for the jury to say whether, after the signal was given, Evart's conduct in remaining where he was until the last moment and then stepping over onto the dump car from which he was thrown off, would not have been negligence in a brakeman skilled and possessing knowledge of the business.

Sherman v. Hannibal & St. J. R. Co. 73 Mo. 62, 37 Am. Rep. 423, 4 Am. & Eng. R. R. Cas. 589; New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356; Beach, Contrib. Neg. § 120, p. 347; Wood, Mast. & S. § 455.

train, the mere fact that the conductor requests him to assist in making a coupling will not render him a servant entitled to protection as such. *Georgia Pac. R. Co. v. Propst, 35 Ala. 203.*

Persons with interest.

A passenger on a street railroad who assists, at the request of the driver, in running the car on a siding, which is necessary for the continuance of the journey, may recover for injuries inflicted by the negligence of the company's servants. *McIntire Street R. Co. v. Bolton, 43 Ohio St. 224, 54 Am. Rep. 303.*

The employé of a shipper who, at the request and with the consent of the conductor of a train, undertakes to couple a car to the train for the purpose of having it moved to a place more convenient for loading is entitled to the same protection against negligence of the company's servants as though he was engaged wholly in his own business. *Eason v. S. & R. T. R. Co. 65 Tex. 577, 57 Am. Rep. 606.*

If a person goes to a railroad station for the purpose of getting his consignment, and to facilitate the delivery of the goods assists in shunting a car, he cannot be regarded as a volunteer within the rule which will prevent his recovering for injuries caused by the negligence of the company's servants. *Wright v. London & N. W. R. Co. L. R. 1 Q. B. Div. 253.*

In *Holmes v. North Eastern R. Co., L. R. 4 Exch. 254*, affirmed, *L. R. 6 Exch. 123, 40 L. J. Exch. 121, 24 L. T. N. S. 60*, a consignee of coal went to the defendant's station to assist in unloading it and was injured by a defect in the premises resorted to by consignees for that purpose. The question of volunteer was discussed to some extent, but the case seems to have been made to turn more on the question of whether or not plaintiff was a mere licensee. A recovery was permitted in that case.

Persons not volunteers.

The servants of one who has contracted to assist in the prosecution of certain work cannot be regarded as volunteers so as to take the risk of the negligence of the servants of the one carrying on the work. *Abraham v. Reynolds, 6 Jur. N. S. 53, 5 Hurlst. & N. 143, 8 Week. Rep. 181.*

A passerby in a highway who, in response to an

Messrs. Benton, Roberts & Brown also for appellant.

Messrs. Larrabee & Gammons, for respondent:

If the servants of a railway company who control the movements of a train, have notice of the presence of any person, even a trespasser on or around said train, such person being in a place of danger, the railway servants are bound to use reasonable care to avert such danger.

Hepfel v. St. Paul, M. & M. R. Co. 49 Minn. 263.

We have failed to find a single case in all the books creating an exception to the rule enunciated in the *Hepfel Case*, applied by the court in this case.

Beach, Contrib. Neg. 2d ed. § 54, and cases cited; *Erickson v. St. Paul & D. R. Co. 5 L. R. A. 786, 41 Minn. 500.*

Mitchell, J., delivered the opinion of the court:

This was an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. At the time of his death, the deceased was in the employment of the defendant as assistant

application from workmen laying gas pipes in a highway, informs them which of two pipes uncovered is the gas main, does not become a volunteer assistant so as to prevent a recovery for injuries caused by the negligent manner in which they did the work. *Cleveland v. Spier, 16 C. B. N. S. 399.*

Where plaintiff was employed by a machinist and defendant came with a truck to take away an engine, falsely representing to plaintiff that his employer had agreed to permit him to go to the station to help load the engine on the train, and plaintiff went and was injured by the negligence of defendant's servant, he was permitted to recover on the ground that he had been induced to believe that he was still doing his master's work. The question of voluntary service was not raised in the case, but it is evident that defendant would hardly be entitled to insist that plaintiff was a volunteer. *Kelly v. Johnson, 128 Mass. 530, 35 Am. Rep. 396.*

Servant volunteer.

An employé voluntarily undertaking to perform dangerous work outside of the scope of his employment cannot recover for injuries thereby received. *Mellor v. Merchants Mfg. Co. 150 Mass. 332.*

A servant volunteering to render services more hazardous than those for which he was employed cannot recover for resulting injuries. *Bradley v. Nashville, C. & St. L. Railroad, 14 Lea. 374.*

A conductor coupling cars is a volunteer except in case of pressing emergency and cannot recover for injuries. *Sears v. Central R. & Bkg. Co. 53 Ga. 630.*

A catcher in a stove factory volunteering to act as sawyer cannot recover for injuries received by reason of his change of employment. *Brown v. Byroads, 47 Ind. 425.*

A special conductor in charge of certain cars in a train who, at the request of the regular conductor, undertakes to uncouple and divide the train, takes upon himself the risk of the act he undertakes to perform; but if after he has performed it and reassumed his proper position relative to the train, the car on which he is standing is suddenly jerked forward by the negligence of the engineer, he may be entitled to recover for the injuries thereby caused to him. *Cumberland Valley R. Co. v. Myers, 55 Pa. 238.*

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timekeeper, his duties being to keep an account of the time of men at work upon, and to make measurements of materials used in construction work. It was no part of his duty to assist in the operation of trains, nor had any conductor of a train authority to direct or employ him to assist in any such work. Neither had he any experience, as brakeman or otherwise, in the operation of trains. On the day of the accident he was sent by his superior officer from the office to a yard about a mile distant, with an order to the conductor of a construction train to bring certain carloads of stone to a place where construction work was going on. Having delivered this message, he boarded the construction train for the purpose of riding back to the office. The train consisted of thirty-five cars, six flat cars loaded with stone, and twenty-nine empty dump cars. The train was moving easterly, and was made up as follows: At the west end was the engine, with the pilot facing east; then came the dump cars, and then the six cars loaded with stone; the engine facing the cars and pushing them, the stone being on the front end of the train as it moved east. The deceased was riding on the rear car of stone next to the dump cars. When the train approached the destination of the stone, the conductor in charge desired to put the six cars of stone upon one track, and the twenty-nine dump cars upon another parallel track, without bringing any portion of the train to a full stop. This was to be done after the cars had attained a sufficient rate of speed, by uncoupling the stone cars, and then reversing the engine, which would check the speed of the dump cars, while the stone cars would continue at the previous rate of speed, and pass the switch, onto the desired track, before the dump cars reached it. To accomplish this, the conductor signaled the engineer to "kick" the train, in obedience to which the latter pushed the train rapidly ahead at the rate of from seven to ten miles an hour. Immediately upon giving this order to the engineer, the conductor, as the jury found, ordered Evarts to pull the pin between the stone cars and the dump cars, and, in obedience to this order, Evarts stepped down between the stone car and the dump car next to it, and stooped down and pulled the pin. While the evidence is not entirely conclusive on the point, yet it would seem that Evarts, while pulling the pin in this stooping position, stood with one foot on each car. Meanwhile, the conductor had signaled the engineer to reverse his engine. The engineer promptly obeyed. This, of course, suddenly checked the speed of the dump cars with a jerk, as the slack between them was taken up. This jerk occurred while Evarts, still partially in a stooping position, was in the act of straightening himself up, holding the pin in one hand. The consequence was that he was thrown upon the ground, and run over by the cars and killed. The evidence is not very clear whether at this time Evarts still had one foot on each car, or, while in the act of straightening himself up, he had placed both feet on the end of the dump car. The defendant

claims that the evidence shows that the latter was the fact. As we view the case, the question is not one of importance; but we think the jury would have been at least justified by the evidence in finding that, so suddenly did the whole thing occur, Evarts was still substantially in the same position when thrown from the cars as when the conductor signaled the engineer to reverse his engine. The evidence was also ample to justify the jury in finding that the conductor knew Evarts' position when he gave the signal to reverse. In any event there is no assignment of error that raises the question of its sufficiency.

The negligence charged against defendant is the act of the conductor in signaling the engineer to reverse the engine when, as is claimed, he either knew, or ought to have known, that the result would be to endanger the life of Evarts. The theory of the law, and doubtless the correct one, upon which the case was submitted to the jury, was that, as to the acts he was then performing, Evarts was a mere volunteer, and that the defendant owed him no contractual duty as master. The learned trial judge, over and over again, in the most explicit manner, instructed the jury that plaintiff could not recover unless the conductor, at the time he gave the signal to reverse the engine, knew, or in the exercise of ordinary care ought to have known, that the giving of the signal "would result in jerking Evarts from the train," "would necessarily produce injury to Evarts," "would result in injury to Evarts." This was but another way of saying that plaintiff could not recover unless, with knowledge that Evarts was in a dangerous position, the conductor, who controlled the movements of the cars, failed to exercise reasonable care to avert the danger. This is the law, even as to trespassers. *Heffel v. St. Paul, M. & M. R. Co.* 49 Minn. 268. This duty rests on no contract obligation, but upon the bare obligation, founded upon the dictates of common humanity, to avoid inflicting a willful or wanton injury on another. Had Evarts been a mere trespasser, and the conductor had seen him in such a position of danger, it would have been the duty of the conductor to exercise reasonable care to avert it, and, if he failed to do so, the defendant would have been liable. We fail to see why a volunteer should have any less rights than a mere trespasser. Because a man is a trespasser or a volunteer, he is not therefore an outlaw, so as to permit others to willfully or recklessly do him an injury. It is no doubt the law, as repeatedly held, that, if a person volunteers to assist the servant of another, the master, as such, owes him no duty; that he assumes all the ordinary risks incident to the situation; and that he cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants. *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 218, 16 L. R. A. 861.

But it seems to us that this is not inconsistent with the further proposition that if, after discovering such volunteer has placed himself in a position of danger, even through

his own negligence the servants fail to exercise reasonable care to avert the danger, the master will be liable. Such must be the law unless, as already suggested, a volunteer occupies a less favorable position than a trespasser. There is nothing in the *Church Case* inconsistent with this; and, while we have found no case precisely in point, there is nothing inconsistent with it in any of the cases cited by counsel. It is sometimes given as a reason why a master is not liable to a volunteer for the negligence of a servant that a servant cannot, by his officious conduct, impose a greater duty on the master than that which the latter owes his servant, and that a master is not liable to a servant for the negligence of a fellow servant. If there is anything in this "fellow-servant" doctrine that has any bearing on the question, it is at least inapplicable in this state as to railway companies.

It strikes us that the very ingenious argument of counsel for the defendant is all based on one radical fallacy, to wit, that in all respects, and for all purposes, Evarts is to be considered as a skilled and experienced brakeman, and therefore, if he did or failed to do anything which an experienced brakeman, in the exercise of reasonable care, would have done or omitted to do, he was guilty of negligence which would prevent a recovery; also, that if the conductor of the train did nothing that would have been negligent had Evarts been an experienced brakeman, then he was not guilty of any negligence in this instance. To the first part of this proposition it is sufficient answer that the question of Evarts' negligence up to the time the conductor gave the signal to reverse the engine was wholly immaterial under the theory upon which the case was submitted to the jury, to wit, that a recovery could only be had in case the conductor, when he gave the signal, knew, or in the exercise of ordinary care had reason to believe, that Evarts would be imperiled thereby. The court correctly instructed the jury that "although it may be deemed an act of negligence on the part of Evarts to have gone there and performed this duty as a volunteer, because dangerous to any man unaccustomed to perform it, . . . yet if, after he assumed to do that act, even though he was negligent, and the conductor, as a matter of fact, saw him in that perilous position, and gave the order knowing that the effect of the order would be to throw him from the car, then his negligence would not prevent a recovery." To the matter of negligence on the part of Evarts after the conductor signaled the engineer we will refer hereafter. The second branch of the proposition, viz., that the conductor was not negligent if he did nothing but what would have been proper had Evarts been an experienced brakeman, is clearly incorrect. If he knew, as he did, that Evarts was inexperienced, and for that reason in greater peril, it was the conductor's duty to regulate his conduct with reference to that fact. A position might be perilous to a young boy that would not be so to a mature man; and for the same reason the conductor should reasonably have anticipated danger to an inexperienced man like

Evarts, when he might not have done so in the case of an experienced brakeman.

The court after charging the jury, as already stated, that, even if Evarts was negligent on account of his inexperience in attempting to perform so dangerous an act, this would not prevent a recovery if, as a matter of fact, the conductor saw him in a perilous position, and gave the order knowing that the effect of it would be to throw him from the car, added: "This, then, is the exception to the rule that the plaintiff cannot recover where he is guilty of contributory negligence; and I think I may say to you there is no evidence of contributory negligence in this case which you need consider." This forms the subject of the fourth assignment of error.

It is undoubtedly true that the action of the conductor is to be judged by the facts existing and known to him when he signaled the engineer, for he was not required to anticipate any subsequent and independent act of negligence on the part of Evarts. But it seems to us quite clear, from a perusal of the record, that the only negligence on the part of Evarts claimed on the trial was that of an inexperienced man attempting to perform an act essentially dangerous. This was evidently the understanding of the trial court, and, if defendant claimed any other and subsequent act of contributory negligence, the attention of the court ought to have been called to it specifically. But in any view of the case we fail to see any evidence of negligence on the part of Evarts other than that of attempting to do a perilous act as to which he was inexperienced,—a fact known to the conductor when he gave the signal.

The only other negligence which defendant claims is that he had placed his feet on the end of the dump car, when he ought, after drawing the pin, to have gotten back upon the stone car, where he would have been safer when the jerk came from letting out the slack. If this were so, it is only what might have been reasonably anticipated from an inexperienced man. But remembering that the burden of proof on this point was on the defendant, and that there is no evidence that Evarts knew, or had reason to suppose, that the signal to reverse the engine would be given so soon, and the further fact that the whole thing was done so quickly that he had not yet had time to regain an erect posture after stooping over to take out the pin, we do not think that the jury would have been justified in finding the specific act of negligence now claimed, even if the question had been submitted to them.

When the jury returned into court for further instructions the judge charged them that unless they could answer the third question intelligently they ought not to, and could not, give a general verdict, because the whole case depended on that question. The question referred to was: "Did the conductor know, or in the exercise of ordinary care have reason to believe, that Evarts would be imperiled by the signal to reverse the engine?" It is contended that this was erroneous, for the reason that it was an instruction that they could not render a verdict for the defendant

unless they could answer this question. Of course, the instruction is subject to this verbal criticism; but what the court evidently meant was that no verdict for the plaintiff could be rendered unless the jury could an-

swer the question in the affirmative, and it is impossible that they could have understood the instruction otherwise.

Order affirmed.

MISSOURI SUPREME COURT (Div. 2.).

Catharine SPENCER *et al.*, *Respts.*,
v.
METROPOLITAN STREET R. CO., *Appt.*

(.....Mo.....)

1. Permitting witnesses to give an opinion as to the amount of damage inflicted on abutting property by the construction of a viaduct in a street is not reversible error, where the jury is instructed that the damage will be the difference in the value of the property before such construction and immediately afterwards.
2. A street dedicated to the public for ordinary purposes cannot be appropriated for the construction of a viaduct which completely destroys its use for street purposes, without liability for damages to abutting owners.
3. In estimating the benefits which may be set off against a claim by the owner of lots abutting on a highway for damages resulting from the construction of a viaduct in the street only those can be considered which particularly affect the lots damaged, and not such as are shared in common with other lots not damaged.
4. The right to the use of the street in front of abutting lots is property within the protection of a constitutional provision against taking property without compensation.

(June 27, 1898.)

CERTIFICATION by the Kansas City Court of Appeals for the opinion of the Supreme Court of an appeal from a judgment of the Circuit Court for Jackson County in favor of plaintiffs in an action brought to recover damages for injuries to and depreciation in value of plaintiffs' real estate by reason of the erection by defendants of a viaduct in the street in front of the property. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Pratt, Ferry & Hagerman*, for appellant:

It is reversible error to permit the question to be asked calling for the opinion of the witness as to the amount of the damage.

Belch v. Missouri Pac. R. Co. 18 Mo. App. 80; *White v. Stoner*, 18 Mo. App. 540; *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255.

It is really erroneous to permit a witness to answer as to what caused the damage or whether the property is benefited.

Muff v. Wabash, St. L. & P. R. Co. 22 Mo. App. 584; *Daleell v. Davenport*, 12 Iowa, 437; *Church v. Milwaukee*, 81 Wis. 512.

The true measure of damages was the difference in the market value.

Taylor v. Kansas City Cable R. Co. 38 Mo. App. 668; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Montgomery v. Townsend*, 80 Ala. 489; *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 638, and cases cited in next subdivision.

If the true measure of damages be the difference in the market value, benefits, whether general or special, must be considered.

Taylor v. Kansas City Cable R. Co. supra; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611; *Meyer v. Burlington*, 52 Iowa, 560; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Chattanooga v. Geiler*, 13 Lea, 611; *Church v. Milwaukee*, 81 Wis. 512; *Stowell v. Milwaukee*, 81 Wis. 528; *Tyson v. Milwaukee*, 50 Wis. 78; *Re Brooklyn Elev. R. Co.* 55 Hun, 165; *Re Union Elev. R. Co.* 30 N. Y. S. R. 164.

This action is in reality for a change of grade or for the constitutional damage.

Dyer v. St. Louis, 11 Mo. App. 590; *Stickford v. St. Louis*, 7 Mo. App. 217, 75 Mo. 309; *Chouteau v. St. Louis, supra*.

Without a statute or a constitutional provision there can be no recovery.

Swenson v. Lexington, 69 Mo. 157; *Slatten v. Des Moines Valley R. Co.* 29 Iowa, 148, 4 Am. Rep. 205.

A witness, in this kind of a case, cannot give his opinion as to the amount of damages, but must confine himself to the question of values, leaving the jury to determine therefrom, in the light of the instructions, whether such difference in value constituted the damage.

Georgia:

Brunswick & A. R. Co. v. McLaren, 47 Ga. 546; *Gilbert v. Cherry*, 57 Ga. 128; *Central R. Co. v. Senn*, 73 Ga. 705.

Indiana:

Evansville, I. & C. S. L. R. Co. v. Fitzpatrick, 10 Ind. 120; *Hagaman v. Moore*, 84 Ind. 496; *Yost v. Conroy*, 93 Ind. 464, 47 Am. Rep. 156; *Pittsburg, C. & St. L. R. Co. v. Hizon*, 79 Ind. 111; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.

Iowa:

Prosser v. Wapello County, 18 Iowa, 327; *Cannon v. Iowa City*, 84 Iowa, 208; *Harrison v. Iowa Midland R. Co.* 86 Iowa, 323; *Hartley v. Keokuk & N. W. R. Co.* (Iowa) May 23, 1892.

Kansas:

Wichita & W. R. Co. v. Kuhn, 38 Kan. 675; *Ottawa, O. C. & C. G. R. Co. v. Adolph*, 41

NOTE.—For the prior authorities on the injury to easements of an abutting owner by a railroad in the street, see note to *Egerer v. New York Cent. & H. R. R. Co.* (N. Y.) 14 L. R. A. 381; 22 L. R. A.

also *Jones v. Erie & W. V. R. Co.* (Pa.) 17 L. R. A. 758; *Rauenstein v. New York, L. & W. R. Co.* (N. Y.) 18 L. R. A. 768; *White v. Northwestern N. C. R. Co.* (N. Y.) 22 L. R. A. 637.

Kan. 600; *Chicago, K. & W. R. Co. v. Woodward*, 48 Kan. 599.

Louisiana:

Wilcox v. Leake, 11 La. Ann. 178; *Bonner v. Copley*, 15 La. Ann. 504.

Michigan:

Hosell v. Medler, 41 Mich. 641; *Grand Rapids v. Grand Rapids & I. R. Co.* 58 Mich. 642.

Nebraska:

Fremont, E. & M. V. R. Co. v. Whalen, 11 Neb. 585; *Burlington & M. R. Co. v. Beebe*, 14 Neb. 463; *Burlington & M. R. Co. v. Schluntz*, Id. 421; *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138; *Omaha v. Kramer*, 25 Neb. 489.

New Mexico:

New Mexican R. Co. v. Hendricks (N. M.) Aug. 24. 1892.

New York:

McGean v. Manhattan R. Co. 117 N. Y. 219; *Roberts v. New York Elev. R. Co.* 13 L. R. A. 499, 128 N. Y. 455; *McGay v. Manhattan Elev. R. Co.* 40 N. Y. S. R. 668; *Delafield v. Manhattan R. Co.* Id. 670; *Avery v. New York Cent. & H. R. Co.* 121 N. Y. 81.

Ohio:

Atlantic & G. W. R. Co. v. Campbell, 4 Ohio, St. 538, 64 Am. Dec. 607; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Columbus, H. V. & T. R. Co. v. Gardner*, 45 Ohio St. 309.

Rhode Island:

Tingley v. Providence, 8 R. I. 498; *Brown v. Providence & S. R. Co.* 12 R. I. 238; 1 Sutherland, Damages, 794.

If a witness in arriving at his opinion of the damage could illegally consider in his own mind questions about which the parties were contesting, manifestly the question would be improper. Under the constitution the building of the street-car line was a proper street use (*Ransom v. Citizens R. Co.* 104 Mo. 375; *Henry Gauss & S. Mfg. Co. v. St. Louis, K. & N. W. R. Co.* 18 L. R. A. 839, 118 Mo. 808), and liability, to exist in this case, must rest upon the ground that a viaduct, or elevated structure was placed in the street thereby changing the surface.

Sheehy v. Kansas City Cable R. Co. 94 Mo. 574; *Pittsburg Junction R. Co. v. McCutcheon*, 18 W. N. C. 527; *Belt Line Street R. Co. v. Crabtree*, 2 Tex. App. Civ. Cas. 579.

The construction of the viaduct was substantially equivalent to a change of grade, so much so in fact that, had there been no constitutional provision there would have been a cause of action on a statute authorizing a recovery for change of grade.

Stickford v. St. Louis, 7 Mo. App. 217; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Dyer v. St. Louis*, 11 Mo. App. 590.

There is very high authority for saying that the benefit was special, even though it was common to all abutting property along the street.

Allen v. Charlestown, 109 Mass. 248; *Hilbourne v. Suffolk County*, 120 Mass. 398, 21 Am. Rep. 522; *Parks v. Hampden County*, 120 Mass. 895; *Donovan v. Springfield*, 125 Mass. 371.

The value inquired about in this class of cases is the market value which has a well defined meaning.

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Kansas City, W. & N. W. R. Co. v. Fisher, 49 Kan. 17.

The questions asked went further than merely asking for the witnesses' opinion as to the damage, and called for his opinion as to whether defendant's act caused such damage.

The questions were improper on this ground alone.

Dalsell v. Davenport, 12 Iowa, 487; *Muff v. Wabash, St. L. & P. R. Co.* 22 Mo. App. 584; *Birch v. Metropolitan Elev. R. Co.* 15 Daly, 453; *McGean v. Manhattan R. Co.* 117 N. Y. 219.

In the abutter's suit for damages for the building of an elevated railway in the street, general as well as special benefits were to be considered.

Bolm v. Metropolitan Elev. R. Co. 14 L. R. A. 344, 129 N. Y. 576; *Odell v. New York Elev. R. Co.* 180 N. Y. 690; *Burkam v. Ohio & M. R. Co.* 122 Ind. 344; *Parker v. Atchison*, 46 Kan. 14.

On petition for rehearing.

The present use is a strictly street use.

State v. Corrigan Consol. Street R. Co. 85 Mo. 268, 55 Am. Rep. 361; *Hinchman v. Paterson Horse R. Co.* 17 N. J. Eq. 75, 86 Am. Dec. 252; *Jersey City & B. R. Co. v. Jersey City & H. R. Co.* 20 N. J. Eq. 69; Booth, Street Railways, § 82, and cases cited.

While the doctrine just mentioned has been applied to horse railroads, it applies equally to cable roads. If the structure is a street railway the doctrine applies, no matter what the motive power may be.

Briggs v. Lewiston & A. Horse R. Co. 79 Me. 363; *Newell v. Minneapolis L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 803; *Taggart v. Newport Street R. Co.* 7 L. R. A. 205, 16 R. I. 668; *Williams v. City Electric Street R. Co.* 41 Fed. Rep. 556; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Pelton v. East Cleveland R. Co.* 22 Ohio L. J. 67; *Koch v. North Ave. R. Co.* 15 L. R. A. 377, 75 Md. 222.

The construction of a viaduct has been repeatedly held to be a change of grade under statutes giving a cause of action therefor.

Stickford v. St. Louis, 7 Mo. App. 217, 75 Mo. 809; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Dyer v. St. Louis*, 11 Mo. App. 590; *Dore v. Milwaukee*, 42 Wis. 108; *Wilkin v. St. Paul*, 33 Minn. 181.

For a change of grade in the absence of constitutional or statutory protection there could be no recovery.

St. Louis v. Gurno, 12 Mo. 417; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Foster v. St. Louis*, 71 Mo. 157; *Payne v. Kansas City, St. J. & C. B. R. Co.* 17 L. R. A. 628, 112 Mo. 6.

Precisely the same rule is applied where the city changed the grade by authorizing a railroad to construct its road above the surface of the street, because what the city can do without damage it can authorize others to likewise do.

Swenson v. Lexington, 69 Mo. 157; *Statten v. Des Moines Valley R. Co.* 29 Iowa, 148, 4 Am. Rep. 205.

The Constitution of 1875 provided that property should not be damaged for public use

without compensation. This, however, is held not to give a cause of action for every damage.

Julia Bldg. Asso. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Rude v. St. Louis*, 98 Mo. 408; *Fairchild v. St. Louis*, 97 Mo. 85; *Canman v. St. Louis*, Id. 92; *Ransom v. Citizens R. Co.* 104 Mo. 375; *Glasgow v. St. Louis*, 107 Mo. 198; *Van De Vere v. Kansas City*, Id. 83; *Chicago v. Union Bldg. Asso.* 102 Ill. 879, 40 Am. Rep. 598; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Peel v. Atlanta*, 8 L. R. A. 787, 85 Ga. 138; *Pennsylvania R. Co. v. Lippincott*, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541; *Pennsylvania S. V. R. Co. v. Walsh*, 124 Pa. 544; *Lockhart v. Craig Street R. Co.* 189 Pa. 419; *Texas & S. R. Co. v. Meadows*, 78 Tex. 32.

The true sense of the constitutional provision is that such reasonable and ordinary changes in the surface of the street as any property owner ought to expect when dedicating the street are not within the protection of the constitutional provision.

Julia Bldg. Asso. v. Bell Teleph. Co. *supra*; *Denver v. Vernia*, 8 Colo. 399; *Rigney v. Chicago*, 102 Ill. 64; *Montgomery v. Townsend*, 80 Ala. 489, 84 Ala. 478; *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190; *Texas & P. R. Co. v. Rosedale Street R. Co.* 64 Tex. 80; *Lockhart v. Craig Street R. Co.* and *Pennsylvania R. Co. v. Marchant*, *supra*; *Sterling's App.* 111 Pa. 85, 56 Am. Rep. 246.

The street having been put to a street use, the true question is whether, in ascertaining the damages provided for by article 2, section 21, of the Constitution of 1875, general as well as special benefits are to be considered in determining the difference in the market value of the property.

The measure of damages is simply the difference in market value.

Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Taylor v. Kansas City Cable R. Co.* 38 Mo. App. 668; *Atlanta v. Green*, 67 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611; *Meyer v. Burlington*, 52 Iowa, 560; *Lehigh Valley Coal Co. v. Chicago*, 26 Fed. Rep. 415; *Montgomery v. Townsend*, 80 Ala. 489; *Springer v. Chicago*, 12 L. R. A. 609, 135 Ill. 552; *Montgomery v. Maddox*, 89 Ala. 181; *Hempstead v. Des Moines*, 52 Iowa, 308; *Thompson v. Keokuk*, 61 Iowa, 187.

If the difference in market value is the measure of recovery it is plain that all advantages, where special or general, are to be taken into consideration. So the authorities with uniformity say.

Taylor v. Kansas City Cable R. Co. *supra*; *Bohn v. Metropolitan Elev. R. Co.* 14 L. R. A. 844, 129 N. Y. 576; *Odell v. New York Elev. R. Co.* 130 N. Y. 690; *Atlanta v. Green*, *Moore v. Atlanta*, *Lehigh Valley Coal Co. v. Chicago*, and *Springer v. Chicago*, *supra*; *Chattanooga v. Geiler*, 13 Lea, 611; *Church v. Milwaukee*, 81 Wis. 512; *Stovell v. Milwaukee*, Id. 523; *Tyson v. Milwaukee*, 50 Wis. 78; *Meyer v. Burlington*, 52 Iowa, 560; *Parker v. Atchison*, 46 Kan. 14; *Burkam v. Ohio & M. R. Co.* 122 Ind. 344.

These cases concisely state the distinction between such a case as this and where property is absolutely appropriated for public use,—as said in *Church v. Milwaukee*, *supra*.

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Here there is no offsetting of benefits, because no property is taken. The simple question is whether general benefits are to be considered in ascertaining the depreciation in value. Whatever the rule may be in cases where land is taken, there is a clear distinction under the facts of this case, and so nearly all the cases show.

Robbins v. Milwaukee & H. R. Co. 6 Wis. 636; *Chapman v. Oshkosh & M. R. Co.* 33 Wis. 629; *Church v. Milwaukee*, *Stovell v. Milwaukee*, and *Tyson v. Milwaukee*, *supra*; *Memphis v. Bolton*, 9 Helsk. 508; *Chattanooga v. Geiler*, *supra*; *Pottawatomie County Comrs. v. O'Sullivan*, 17 Kan. 58; *Parker v. Atchison*, and *Taylor v. Kansas City Cable R. Co.* *supra*; *Jones v. Wills Valley R. Co.* 80 Ga. 43; *Savannah v. Hartridge*, 37 Ga. 118; *Atlanta v. Central R. & Bkg. Co.* 53 Ga. 120; *Atlanta v. Green*, and *Moore v. Atlanta*, *supra*; *St. Louis, J. & S. R. Co. v. Kirby*, 104 Ill. 345; *McReynolds v. Burlington & O. R. Co.* 106 Ill. 152; *Lehigh Valley Coal Co. v. Chicago*, and *Springer v. Chicago*, *supra*; *Deaton v. Polk County*, 9 Iowa, 594; *Meyer v. Burlington*, and *Bohn v. Metropolitan Elev. R. Co.* *supra*.

Error is presumptively prejudicial and must cause a reversal unless the record shows beyond a doubt that there could have been no prejudice.

Bindbeutel v. Street R. Co. 48 Mo. App. 463; *Clark v. Fairley*, 30 Mo. App. 335; *Suttie v. Alos*, 39 Mo. App. 38; *Walton v. Kansas City, Ft. S. & M. R. Co.* 40 Mo. App. 544; *Potter v. Chicago, R. I. & P. R. Co.* 46 Iowa, 899; *Stafford v. Oskaloosa*, 57 Iowa, 748; *Reynolds v. Keokuk*, 72 Iowa, 371; *Deery v. Gray*, 72 U. S. 5 Wall. 807, 18 L. ed. 657; *Smith v. Shoemaker*, 84 U. S. 17 Wall. 630, 21 L. ed. 717; *Gilmer v. Higley*, 110 U. S. 47, 28 L. ed. 62; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 99, 30 L. ed. 299; *Hawes v. Kansas City Stock Yards Co.* 103 Mo. 60; *Dayharsh v. Hannibal & St. J. R. Co.* Id. 570; *McGowan v. St. Louis Ore & Steel Co.* 109 Mo. 518.

To permit a witness to give his opinion as to the benefit and cause thereof stands on precisely the same footing as opinion as to the damage.

Church v. Milwaukee, 81 Wis. 512.

The cases show that reversals have frequently been had for the admission of opinion evidence, even though the instructions correctly stated the measure of recovery.

Roberts v. New York Elev. R. Co. 13 L. R. A. 499, 128 N. Y. 455; *McGay v. Metropolitan Elev. R. Co.* 40 N. Y. S. R. 669; *Delafield v. Manhattan R. Co.* Id. 670; *Atlantic & G. W. R. Co. v. Campbell*, 4 Ohio St. 583, 64 Am. Dec. 607; *Cleveland & P. R. Co. v. Ball*, 5 Ohio St. 568; *Hartley v. Keokuk & N. W. R. Co.* (Iowa) May 23, 1892; *Wichita & W. R. Co. v. Kuhn*, 33 Kan. 104; *Gutridge v. Missouri Pac. R. Co.* 94 Mo. 468; *Eubank v. Edina*, 88 Mo. 650.

Messrs. K. M. De Weese and R. O. Boggess, for respondents:

Section 21, article 2, Constitution 1875, provides that private property shall neither be taken nor damaged without just compensation.

The right of the owner of a lot in a town to the use of the adjoining street is as much property as the lot itself.

Lackland v. North Missouri R. Co. 81 Mo. 181; *Williams v. Natural Bridge Pl. Road Co.* 21 Mo. 580; *Cape Girardeau & B. M. & G. Road Co. v. Renfro*, 58 Mo. 265; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149; *Stanley v. Davenport*, 54 Iowa, 468; *Denver v. Bayer*, 7 Colo. 118; *Householder v. City of Kansas*, 83 Mo. 488, and the Illinois cases therein cited; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 638, and citations.

The city of Kansas had no power to destroy the street contiguous to plaintiffs' property, and could not confer such authority on the defendant.

Glasgow v. St. Louis, 87 Mo. 678; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 898; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 488; *Cummings v. St. Louis*, 90 Mo. 259; *Householder v. City of Kansas*, and *Sheehy v. Kansas City Cable R. Co. supra*; *Werth v. Springfield*, 78 Mo. 107; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo. 318.

The law of this state justifies such opinions, — such evidence as was given by the witnesses.

Tate v. Missouri, K. & T. R. Co. 64 Mo. 149; *Thomas v. Mallinorodt*, 43 Mo. 58; *Springfield & S. R. Co. v. Calkins*, 90 Mo. 588; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 303; *Lewis, Em. Dom.* § 486, p. 554; *Rochester & S. R. Co. v. Budlong*, 10 How. Pr. 289.

Witnesses were properly allowed to give their opinions as to value of lots and damages thereto, rather than market value simply, before and after the wrong complained of.

The only means of getting at value to any extent was by taking the opinions of witnesses who knew the property; real estate dealers who knew the estimated value of the lots, and the effect the destruction of said street had thereon.

Lund v. Tyngsborough, 9 Cush. 86; *Carpenter v. Wait*, 11 Cush. 257; *Vandine v. Burpee*, 18 Met. 288, 46 Am. Dec. 788; *Miller v. Smith*, 112 Mass. 475; *Bayley v. Eastern R. Co.* 125 Mass. 62; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 331; *Moulton v. McQueen*, 103 Mass. 587; *Howard v. Great Western Ins. Co.* 109 Mass. 384; *Beecher v. Denniston*, 18 Gray, 354; *Fitchburg R. Co. v. Freeman*, 12 Gray, 401, 74 Am. Dec. 600; *Bierce v. Stocking*, 11 Gray, 174; *Shaw v. Charlestown*, 2 Gray, 107; *Brady v. Brady*, 8 Allen, 101; *Boston & W. R. Corp. v. Old Colony & F. R. R. Co.* 3 Allen, 143; *Whitman v. Boston & M. R. Co.* 7 Allen, 813; *Gulf, C. & S. F. R. Co. v. Nocco* (Tex.) March 24, 1891; *Martin v. Chicago, S. F. & O. R. Co.* 47 Mo. App. 452; *Mills, Em. Dom.* §§ 65-200; *Kansas City v. Hill*, 80 Mo. 523; *Nevada & M. R. Co. v. De Lissa*, 103 Mo. 125; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 232.

Real estate once lawfully dedicated or condemned to one public use, cannot be lawfully appropriated to another distinct and inconsistent public use.

Belcher Sugar Ref. Co. v. St. Louis Grain Elev. Co. 82 Mo. 121; *Lee v. Tebo & N. R. Co.* 53 Mo. 178; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 303; *Combs v. Smith*, 78 Mo. 32; *Chicago, S. F. & C. R. Co. v. McGrew, supra*.

On petition for rehearing.

The city of Kansas had no power to destroy 22 L. R. A.

the street contiguous to plaintiff's property, and could not confer any such authority on the defendant.

Glasgow v. St. Louis, 87 Mo. 678; *Julia Bldg. Assn. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 898; *Dubach v. Hannibal & St. J. R. Co.* 89 Mo. 488; *Cummings v. St. Louis*, 90 Mo. 259; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Werth v. Springfield*, 78 Mo. 107; *Cross v. St. Louis, K. C. & N. R. Co.* 77 Mo. 318; *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.* 97 Mo. 457; *St. Louis Transfer R. Co. v. St. Louis Merchants B. T. R. Co.* 111 Mo. 606.

Municipal corporations have no power to alien or dispose of their public streets for any purpose inconsistent with their use as highways.

Wood, Nuisance, 1st ed. § 778.

Authority to occupy a street whether obtained directly from the legislature or from a local municipality only protects the company to the extent of the public right or easement in the street and leaves the company to deal with private rights as in other cases.

Gray v. St. Paul & P. R. Co. First Div. 18 Minn. 315; *Cape Girardeau & B. M. & G. Road Co. v. Renfro*, 58 Mo. 265; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 63 N. Y. 591; *Re New York Elev. R. Co.* 70 N. Y. 327.

The act complained of in this case amounts to a total destruction of the street.

2 Dill. Mun. Corp. 8d ed. § 660.

Tate v. Missouri, K. & T. R. Co. 64 Mo. 149; *Glasgow v. St. Louis*, 87 Mo. 678; *Sheehy v. Union Press Brick Works*, 25 Mo. App. 527.

If a nuisance results in a permanent injury to the realty the measure of damages is "the diminution in market value of the land."

Van Hoozier v. Hannibal & St. J. R. Co. 70 Mo. 145; *Dickson v. Chicago, R. I. & P. R. Co.* 71 Mo. 575; *Givens v. Van Studdsford*, 86 Mo. 149, 56 Am. Rep. 421; *Wood, Nuisance*, 2d ed. p. 1004, § 869; *Sedgw. Damages*, 8th ed. § 947, p. 63.

In an action for a nuisance, actual benefits to the plaintiff's estate therefrom cannot be considered either in defense or in mitigation of damages.

Kimel v. Kimel, 49 N. C. 121; *Francis v. Schoellkopf*, 53 N. Y. 152; *Sedgw. Damages*, 8th ed. § 65, p. 87.

The general rule is that witnesses must state facts and not their individual opinions; but there are exceptions to the rule as well established as the rule itself.

Egberman v. Sheehan, 52 Mo. 221.

When the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof the opinion of witnesses is admissible.

Belch v. Missouri Pac. R. Co. 18 Mo. App. 80; *White v. Stoner*, Id. 540; *Chouteau v. St. Louis*, 8 Mo. App. 51; *St. Louis, V. & T. H. R. Co. v. Haller*, 82 Ill. 208; *McReynolds v. Kansas City, C. & S. R. Co.* 110 Mo. 484; *St. Louis & S. F. R. Co. v. Bradley*, 54 Fed. Rep. 630; *Leavenworth, T. & S. W. R. Co. v. Paul*, 28 Kan. 816; *Sedgw. Damages*, 8th ed. § 1293.

Burgess, J., delivered the opinion of the court:

This was an action for damages to an abut-

ting lotowner for building the Twelfth Street Viaduct & Cable Railway Line. There was a trial by jury, and a verdict in favor of plaintiffs for \$800. After an unsuccessful motion for new trial, the case was appealed to the Kansas City court of appeals, and from that court certified to this court upon the ground that a constitutional question is involved.

Catharine Spencer was the owner of lots 5 and 6, in block 57, Turner & Co's addition to Kansas City. The lots were in what were known as "short blocks," being bounded on the north by Eleventh street, and on the south by Twelfth street. The lots are each 24 feet in width and 35 feet in depth. The defendant was authorized by the city to build a viaduct, and lay its street-car line along Twelfth street. This viaduct was the approach to the Twelfth street incline, by which the cable line runs from the low ground in the bottom to the bluff. The contention of plaintiffs is that this structure was a change of grade, within the meaning of article 2, § 21, Const. 1875, which provides that private property shall not be taken or damaged for public use without just compensation. The claim of plaintiffs is, that, in the construction of that part of the Twelfth Street Cable Railway, that part of said street on which plaintiffs' property abuts southward was totally destroyed, so that it could not be used by plaintiffs in connection with said lots. Some of the witnesses testified as to the value of the lots before the construction of the viaduct, and also afterwards; and some of them, who were introduced on the part of plaintiffs, testified, over the objections and exceptions of defendant, as to the amount of damages plaintiffs sustained, how they were damaged, and what caused such damage. To allow a witness to give his opinion as to the amount of damages sustained in any given case is, as a general rule, usurping the province of the jury, and determining for them a question of which they are peculiarly the judges, and for which purpose they are selected in all cases sounding in damages, and where there is a trial by jury. This is the rule announced by this court in the case of *Hurt v. St. Louis, I. M. & S. R. Co.* 94 Mo. 255; *Belch v. Missouri Pac. R. Co.* 18 Mo. App. 80; *White v. Stoner*, Id. 540. And especially is this true when the inquiry is in reference to future damages. *Hurt v. St. Louis, I. M. & S. R. Co.*, *supra*, and authorities cited. In the cases of *Springfield & S. R. Co. v. Calkins*, 90 Mo. 538, and *Nevada & M. R. Co. v. DeLissa*, 103 Mo. 125, witnesses were allowed to give their opinions as to values, after having stated their knowledge of the property, and it was held not to be error. The better rule seems to be that they should only state facts, and to leave entirely to the jury the question of damages. This however, was not reversible error in this case, as the measure of damages was fixed by instruction No. 4, given on behalf of defendant, which states the damages to be the difference

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in the value of the lots before the construction of the viaduct, and immediately afterwards. The same may be said with reference to the evidence of the witnesses as to what caused the damage, or whether or not the property was benefited. It was not reversible error, under the facts in this case. This is not a proceeding to condemn private property for public use by the exercise of the power of the right of eminent domain, but is simply an action *ex delicto*, and is not like the laying of a railroad track on the surface of a street, thereby imposing an additional servitude, or making a new and improved public use thereof. It amounts to a total destruction of the street. The street, having been dedicated to public use for ordinary purposes, could not be lawfully appropriated to another distinct and inconsistent public use. *Belcher Sugar Ref. Co. v. St. Louis Grain Elev. Co.* 82 Mo. 121, and authorities cited.

While contrary opinions have been maintained with great ability in courts of other states, and by elementary writers of much distinction, the rule in this state is well established that in cases of this kind, in estimating benefits, the jury should be restricted, in estimating such benefits, to peculiar and direct benefits, or increase of value, as result to the lots in controversy, in which other lots in the same locality do not participate. The advantages to be considered by the jury are such as particularly affect the lots of plaintiffs, and are not advantages of a general nature, which the plaintiffs, in common with their neighbors, whose lots are not damaged, derive from the construction of the viaduct. *Lee v. Tebo & N. R. Co.* 53 Mo. 178; *Hosher v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 308; *Combs v. Smith*, 78 Mo. 32; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, and authorities cited.

The right of the plaintiffs to the use of the street adjoining their lots is as much property as the lots themselves. *Lackland v. North Missouri R. Co.* 31 Mo. 180; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Chicago v. Taylor*, 125 U. S. 165, 31 L. ed. 640; *Tate v. Missouri, K. & T. R. Co.* 64 Mo. 149.

We are unable to see even a plausible reason for complaint by defendant of the instructions of the court in this case, as the only instructions given as to the measure of damages were given at its request, and by the court of its own motion, which were in harmony with each other, and with the views herein expressed. There was no error in refusing instructions asked by defendant, as those given presented the case to the jury manifestly fair, and remarkably favorable to defendant, and the plaintiffs are not complaining.

The judgment is affirmed.

All concur.

Rehearing denied.

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(.....**Mass.**.....)

(October 27, 1898.)

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the period of ten years next ensuing after the date of this agreement." Crane had been a manufacturer of fire alarm and police telegraph apparatus from the year 1856 to 1886, when the contract was entered into which is the subject of this suit. From the year 1879 to January, 1891, he was a director of the plaintiff company. In 1881 he, or the firm of which he was a member, entered into a contract with the plaintiff company to do all of its manufacturing. He testified that the company "was to have the use of patents of mine for the term of ten years, and to give all its manufacturing to Moses C. Crane or Crane & Co., and they agreed not to compete with the Gamewell Company during that time." This is the contract which was annulled by the contract in suit. By the contract in suit Crane sold and conveyed to the company all his machinery, tools, draw cases, and other property used in or connected with his business of manufacturing for said company, including "stock supplies partly manufactured, and raw material of every kind in any way pertaining" to said business of manufacturing in his factory at Newton Highlands, in Massachusetts, and he agreed to transfer to said company exclusive rights under and control of all letters patent for fire alarm and police apparatus only, owned or

controlled wholly or in part by him, together with exclusive rights under and control of all improvements in said fire alarm and police apparatus only, made by him up to the date of the contract, and he gave to said company the "first option to purchase or obtain exclusive control for fire alarm and police purposes only, under any and all letters patent, improvements applicable to such apparatus which may be made by said Crane during the term of ten years next ensuing after the date of this agreement," etc. The consideration to be paid was \$30,000 in cash and notes, and such unwrought stock, machinery, etc., as was on hand at the date of the transfer, and was not included in the schedule attached to the contract, was also to be paid for at the "cost price, to be fixed by appraisal." Crane also agreed to let his factory to the company at a reasonable rent if the company desired to hire it. The company actually paid Crane about \$47,000 as the consideration of the contract and the property conveyed.

The plaintiff contends that the agreement "not to engage in the business of manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with said Gamewell Company, either directly or indirectly, for the period

stricted to locality, will be void. *Callahan v. Donnelly*, 45 Cal. 152, 13 Am. Rep. 172; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Bishop v. Palmer*, 146 Mass. 469.

And in *Saratoga County Bank v. King*, 44 N. Y. 87, it was conceded by both parties and stated by the court that a contract of sale, restraining the vendor from engaging in the same business for thirty years, and not restricted as to place was void.

Where the trade was world wide and an agent contracted not to enter like business for three years after retirement, nor to give information, this was held under the circumstances to be reasonable,—the court putting it on the ground, "You, the plaintiff, shall have a breathing time during which we will abstain from using the knowledge we have acquired." *Badische Anilin und Soda Fabrik v. Schott* [1892] W. N. 183, [1892] 3 Ch. 447. See *Hinde v. Gray*, 1 Mann. & G. 195, 1 Scott, N. R. 123, 4 Jur. 302.

Publications.

The sale of the interest of an author or publisher in a journal, magazine, paper, or literary work with an agreement not to publish a similar work, will be protected and the contract upheld. *Brooke v. Chitty*, 2 Coop. 1, *Cottenham*, 216; *Ingram v. Stiff*, 5 Jur. N. S. 947, 33 L. T. 196; *Ainsworth v. Bentley*, 14 Week. Rep. 530; *Presbury v. Fisher*, 18 Mo. 50.

So where the author sold a copyright and contracted not to publish any other work to prejudice of it, the contract will be valid even if there is no piracy. *Barfield v. Nicholson*, 2 Sim. & Stu. 1, 2 L. J. Ch. 90.

Secrets of trade, compounds, and medicine.

A contract of sale of secret processes of manufacture or composition of matter or machinery used in trade, which restrains the vendor from using the same or imparting his knowledge to others or selling the same articles, will be generally upheld as a reasonable contract. *Hagg v. Darley*, 47 L. J. Ch. N. S. 587, 38 L. T. N. S. 812; *Bryson v. Whitehead*, 1 Sim. & Stu. 74, 1 L. J. Ch. 42; *Alcock v. Gilbertson*, 5 Duer. 76; *Jarvis v. Peck*, Hoffm. Ch. 479, 6 L. ed. 1215, 10 Paige, 118, 4 L. ed. 910; *Underwood v. Smith*, 46 N. Y. S. R. 654; *Hard v. Seeley*, 22 T. R. A.

47 Barb. 423; *Tode v. Gross*, 13 L. R. A. 652, 127 N. Y. 430; *Vickery v. Welch*, 19 Pick. 526; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 845, 39 L. J. Ch. 86, 21 L. T. N. S. 661, 18 Week. Rep. 572.

And where the vendor sold the exclusive right to make a compound with the trade-mark and agreed not to use the name of the vendor on any similar preparation, the use of his name by him on sale of similar drugs will be restrained. *Brewer v. Lamar*, 69 Ga. 655, 47 Am. Rep. 766; *Gillis v. Hall*, 2 Brewst. 342, 7 Phila. 423.

But specific performance will not be enforced in favor of vendee on a sale of medicine compounded by secret process where the vendee obtains the sole and exclusive right to purchase, but does not bind himself to purchase any definite quantity. *Barnes v. McAllister*, 18 How. Pr. 584.

And an injunction against disclosure of secret process by vendor was refused where other remedy was provided by the contract. *Nessle v. Reese*, 20 How. Pr. 382.

And an injunction against the disclosure of secret process of making a compound was refused where the vendee had failed to keep his part of the contract. *New York Chemical Co. v. Halleck*, 15 N. Y. Supp. 517.

And an agreement not to manufacture or sell "said liquid extract, Enothera," will not prevent the manufacture and sale of other preparations from the same herb, made in a different manner and possessing different qualities which all druggists could make. *Garrison v. Nuts*, 37 Ill. 215.

And in *Williams v. Williams*, 8 Meriv. 157, an injunction to prevent a partner from disclosing a secret medicine for the eye was refused, but no question as to restraint of trade was discussed and the court held that no secret was involved. See also *Badische Anilin und Soda Fabrik v. Schott* [1892] W. N. 183, [1892] 3 Exch. 447.

Patented articles.

This subdivision is not intended to include matters as to the patent laws, or rights acquired under letters patent, but only contracts of sale in which the question of monopoly or restraint of trade arises out of the contract itself as in the main case.

of ten years," etc., is not void as being in restraint of trade—First, because it is an agreement pertaining to "property and business protected by patents;" secondly, because the restraint is coextensive only with the business sold, and is necessary to enable the company to enjoy fully what it has bought and paid for; and, thirdly, because it relates to a single commodity, not of prime necessity, and not a staple of commerce. See *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 513; *Gloucester Ironglass & Glue Co. v. Russia Cement Co.* 154 Mass. 92, 12 L. R. A. 563. There seems to be no reason why the defendant Crane should not assign the patents and inventions which he agreed to assign, if there are any, and no serious objection has been raised by the defendant on this part of the case. The defendant contends that he has a right to assist in forming a corporation, and to act as one of its officers, the business of which is to manufacture and sell fire alarm and police telegraph machines which are not made under any patents owned by the plaintiff, or under any patents which he has agreed to assign to the plaintiff, or which the plaintiff has elected to purchase, under the option given in the contract, even although by so doing he enters into competition with the plaintiff

in its business. He, in effect, concedes that, so far as the business is protected by patents which he has assigned or agreed to assign, the restraint is valid. It appears that there are "a dozen or fifteen concerns in the United States engaged in a somewhat similar business." The defendant testified that he looked up the number of patents pertaining to this branch of the art in 1881, and that there were then about 500. The defendant contends that he ought to be able to use his own patents for subsequent improvements applicable to such apparatus if the plaintiff does not elect to purchase them; that he was previously a manufacturer of fire alarm and police telegraph apparatus, and not a seller thereof; that the good will which attached to his business was that of a manufacturer who did not sell his manufactures in the market; and that it is against public policy that he should be restrained from exercising his peculiar skill anywhere in the United States or in the world for the period of ten years. The apparatus as the defendant contends, which he has a right to manufacture and sell is not secret machinery, and is not protected by any patents which the plaintiff owns or has a right to control, but is apparatus either not protected by patents at all, or by patents of his own, or of some other persons who may choose to employ the defendant. The only ground,

A sale of business of manufacturing patented machinery, whereby vendor contracted not "to manufacture, sell, or cause to be sold any sand-papery machines of any description" unless with consent of vendor, is void, as it is unlimited as to time, place, or circumstances and does not relate to business secrets, trade-marks, or patents. *Berlin Mach. Works v. Perry*, 71 Wis. 486.

This case is in harmony with the main case and quite similar except that it is not limited as to time.

But a contract not to make any other machines, during the life of a patent, except such as are covered by the same, which is assigned to the vendee, will be sustained. *Jones v. Lees*, 1 Hurlst. & N. 189, 26 L. J. Exch. 9, 2 Jur. N. S. 645.

And a sale of business and patents where the vendors agreed not to engage in business in opposition will be valid, and an advertising gift of similar articles will be a fraud on the rights of the vendee. *Mackinnon Pen Co. v. Fountain Ink Co.* 16 Jones & S. 442.

So a contract by the vendor not to do any act which may injure the vendee in his business will be upheld, where the plaintiff was to have the right to purchase all future improvements in machinery made by vendor. *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73, 4 Am. Rep. 512.

So where the vendor of business and patents for making guns and ammunition, covenanted for twenty-five years not to engage in trade or business of manufacture of guns, gunmountings, gunpowder, ammunition, or competing business, provided that the restriction should not apply to other explosives than gunpowder or other business and vendee to have the benefit of the defendant's inventions, it was held to be a reasonable and valid contract. *Maxim-Nordenfeldt Guns & A. Co. v. Nordenfeldt* [1893] 1 Ch. 630.

And a compromise of a suit for infringement of a patent whereby a party for a license for a certain time agreed not to manufacture "cemented hams of any kind without your consent during the existence of your patent" was valid and was consistent

with the meaning of "similar cemented hams." *Billings v. Ames*, 32 Mo. 265.

The joint owner of a patent may stipulate that one alone shall conduct the business. *Kinsman v. Parkhurst*, 60 U. S. 18 How. 299, 15 L. ed. 335.

Contracts of purchase.

A contract by which the vendor is to control the market or trade at that place is invalid. *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190, reversing 2 Hun. 501; *Crawford v. Wick*, 18 Ohio St. 190, 98 Am. Dec. 103; *Pacific Factor Co. v. Adler*, 90 Cal. 1110.

But a contract by a mining company with merchants to furnish them the trade of their miners for a proportion of the sales, is not void as it is restricted to that place and is violated by opening a rival store. *George v. East Tennessee Coal Co.* 15 Lea, 455, 54 Am. Rep. 425.

And a contract of sale by which the vendor limits the manner by fixing the prices at which he may buy and sell a certain article is not a restriction on trade and is valid if based on a sufficient consideration. *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355.

So a contract binding the vendee to use exclusively articles of vendor's manufacture is not void. *Brown v. Rounsavell*, 78 Ill. 599; *Ebling v. Bauer*, 17 N. Y. Week. Dig. 497; *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97.

But a contract to handle only the beer of the vendor's make will not be enforced unless good beer is provided. *Holcombe v. Hewson*, 2 Campb 301; *Thornton v. Sherratt*, 8 Taunt. 529.

And a contract to take beer of A. only is avoided when A. sells his brewery to C. who removes it some two miles farther distant. *Doe v. Reid*, 10 Barn. & C. 849.

This note is intended to include matters about sales only, and cases of "contracts for employment;" "covenants running with the land;" "sale of good will;" or "monopoly associations,"—are not included.

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then, on which this restriction can be maintained is that it is reasonably necessary for the beneficial enjoyment by the plaintiff of the property it bought of the defendant, or, if this is not so, that the law in modern times does not regard such an agreement as against public policy. So far as we are aware, in every modern case in this commonwealth, except one, where a contract in restraint of trade has been held valid, the restriction has been limited as to space.

In *Taylor v. Blanchard*, 18 Allen, 370, 90 Am. Dec. 203, the parties entered into a partnership for carrying on "the trade or business of manufacturing shoe cutters," and it was provided that "at whatever time the said copartnership shall be determined and ended" the defendant "shall not, nor will at any time or times hereafter, either alone or jointly with or as agent for any person or persons whomsoever, set up, exercise, or carry on the said trade or business of manufacturing and selling shoe cutters at any place within the aforesaid commonwealth of Massachusetts, and shall not, nor will set up, make, or encourage any opposition to the said trade or business hereafter to be carried on" by the plaintiff. The manufacture of shoe cutters was an art, which could be carried on only by persons instructed in it, and the business was confined to the plaintiff and three other persons; but the court held the agreement void.

In *Bishop v. Palmer*, 146 Mass. 469, the plaintiff, being engaged in the manufacturing and selling of bedquilts and comfortable, conveyed to the defendant his "entire business plant and enterprise as a manufacturer of and dealer in bedquilts and comfortable," together with the good will of the business, and all the machinery, implements, and utensils used by him in said business, and agreed "that for and during the period of five years from the date hereof he will not, either directly or indirectly, in his own name or in the name of any other person or persons, continue in, carry on, or engage in the business of manufacturing or dealing in bedquilts or comfortable, or of any business of which that may form any part." It was held that this was clearly illegal and void as being in restraint of trade, because not limited as to space. See also *Alger v. Thacher*, 19 Pick. 51, 31 Am. Dec. 119; *Pierce v. Fuller*, 8 Mass. 223, 226, 5 Am. Dec. 102; *Perkins v. Lyman*, 9 Mass. 522; *Stearns v. Barrett*, 1 Pick. 443, 11 Am. Dec. 223; *Palmer v. Stebbins*, 3 Pick. 188, 15 Am. Dec. 204; *Gilman v. Dwight*, 13 Gray, 356, 74 Am. Dec. 634; *Angier v. Webber*, 14 Allen, 211, 93 Am. Dec. 748; *Dean v. Emerson*, 102 Mass. 480; *Dwight v. Hamilton*, 113 Mass. 175; *Boutelle v. Smith*, 116 Mass. 111; *Ropes v. Upton*, 125 Mass. 258; *Handforth v. Jackson*, 150 Mass. 149.

The case of *Morse Twist Drill & Mach. Co. v. Morse*, *supra*, is the case referred to as an exception. The question arose upon demurrer. The agreement of the defendant was not only to transfer his patents, machinery, etc., and all improvements and inventions, but "that he will use his best efforts for the perfecting of improvements in the business and manufacture, and for such alter-

ations and combinations as may tend to insure the success of the same and of the company," and that he "will do no act that may injure the company or its business, and that he will at no time aid, assist, or encourage in any manner any competition against the same." He also agreed "to serve as the superintendent of the company for three years," etc. The plaintiff company was formed by the defendant and others, and the defendant's business was transferred to it. He was a stockholder, and was made superintendent. The plaintiff agreed to employ the defendant for three years, and he was actually employed as superintendent up to the time he entered upon a competing business. The case seems to have been decided on the ground that the defendant had agreed to give to the plaintiff his exclusive services with reference to his mechanical skill and ingenuity in all improvements, alterations, and combinations which would tend to insure the success of the plaintiff in manufacturing twist drills and collets. The court says that "the same principle that enables a partner to bind himself to do nothing in competition with the business of the firm ought to apply to him." The opinion proceeds to consider the English cases where the restriction was held not to extend beyond the good will of the business which was the subject of the sale, or was not greater than the interests of the vendee required, and was not unreasonable in view of all the circumstances. This doctrine, in England, has been carried very far. See *Davies v. Davies*, L. R. 36 Ch. Div. 359.

In this country the courts generally have not gone so far, but the old law has been a good deal modified in some jurisdictions in view of modern methods of doing business. See *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Fowle v. Park*, 131 U. S. 88, 33 L. ed. 67; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217; *Western Wooden-Ware Assn. v. Starkey*, 84 Mich. 76, 11 L. R. A. 503; *Matthews v. Associated Press of State of N. Y.* 136 N. Y. 333; *Oliver v. Gilmore*, 53 Fed. Rep. 562; *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Whitney v. Slayton*, 40 Me. 224.

In the present case the plaintiff did not buy the good will of a mercantile business, and the defendant Crane had no customers for fire alarm and police telegraph machines and apparatus. The plaintiff gets everything it bought if it gets the tangible property and the letters patent and the improvements which the defendant Crane agreed to convey. The stipulation that Crane will not for ten years manufacture or sell fire alarm or police telegraph machines and apparatus, although under patents, in which case it has refused to buy, or under no patent at all, will tend to give the plaintiff a monopoly of the business. To exclude a person from manufacturing or selling anywhere in the United States or in the world machinery designed for certain purposes, in which that person has acquired great skill, may operate to impair his means of earning a living. The stipulation seems to us to be something more than is reasonably necessary to protect the plaintiff in

the enjoyment of the property it bought, even if that should be adopted as the test, upon which we express no opinion. The principal object of the stipulation was, we think, to prevent the manufacture or sale by the defendant of any instruments which would serve the same purpose as those made and sold by the plaintiff, and thus to enable the plaintiff more completely to control the market. Large cities and towns cannot well do without some kind of fire alarm and police telegraph apparatus, and it is an article of necessity for such municipalities. We are of the opinion that under our decisions the stipulation must be pronounced void as against public policy. If there is to be a change in the law, as heretofore many times

declared by this court, we think it is for the legislature to make it. See *Pacific Factor Co. v. Adler*, 90 Cal. 110; *Taylor v. Saurman*, 110 Pa. 8; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457; *Herreshoff v. Boutineau*, 17 R. I. 3, 8 L. R. A. 469; *Strait v. National Harrow Co.* 18 N. Y. Supp. 224; *Anderson v. Jett*, 89 Ky. 375, 6 L. R. A. 390; *Urmston v. Whitelegg Bros.* 63 L. T. N. S. 455; *Perla v. Saalfeld* [1892] 3 Ch. 149.

For these reasons a majority of the court are of opinion that the decree against *Crane* should be substantially affirmed as to the assignment of patents and inventions and as to costs, and should be reversed as to the rest. The decree in favor of *Cole* should be affirmed.

So ordered.

NORTH CAROLINA SUPREME COURT.

Dennis SIMMONS

NORFOLK & BALTIMORE STEAMBOAT CO., *Appt.*

(118 N. C. 147.)

1. It is sufficient ground for the dissolution of a corporation that it has removed its principal place of business and all of its agencies from the state of its creation, in contravention of the policy of the state as evinced by its general system of legislation.

2. A proceeding for the dissolution of a corporation in which the summons is improperly made returnable in term before the court may properly be remanded for the purpose of amending the summons so as to make it returnable before the clerk on a day certain.

(October 24, 1898.)

A PPEAL by defendant from an order of the Superior Court for Martin County appointing a receiver with a view to its dissolution. *Affirmed.*

The facts are stated in the opinion.

Mr. James E. Moore for appellant.

Mr. Don Gilliam for appellee.

Shepherd, Ch. J., delivered the opinion of the court:

This proceeding is brought for the purpose of obtaining a decree of dissolution against the defendant company, and the most important question to be considered is whether the complaint sets forth facts sufficient to entitle the plaintiff to the relief prayed for. The defendant was incorporated under the general act for the formation of corporations (Code, chap. 16), and it is therein provided, among other things, that all corporations so created may be dissolved by "special proceedings" instituted by any corporator "for any abuse of its powers to the injury of the plaintiff or of the corporators, or of its creditors or debtors." Section 694. The articles of incorporation provide that the business of the defendant shall be the "transportation of produce and merchandise and all other kinds of freight and passengers to and from the various

landings on the Roanoke river in North Carolina to and from the cities of Norfolk, in Virginia, and Baltimore, in Maryland, and to and from said cities to the said landings, and to and from all other points intermediate between said river and said cities; and its principal place of business shall be at Williamston," in this state. The plaintiff, who is one of the corporators, alleges that in 1887 the control and management of the defendant corporation passed into the hands of nonresident stockholders, "since which time the original aim and purpose of said corporation has been departed from, the value of the company's property greatly depreciated, the business fallen away, and its general affairs gradually, but steadily, grown worse." It is further alleged "that for more than a year now past the defendant company has altogether ceased to operate said ports, or any of them, within this state; that no single agency or place of business has been maintained within this state, and that the town of Williamston has been absolutely discontinued as the principal place of business of said company, as required by said article of incorporation." "It is a tacit condition of a grant to a corporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as for condition broken, or for breach of trust. The duties assigned by an act of incorporation are conditions annexed to the grant of the franchises conferred (Ang. & A. Corp. § 776), and duties implied are equally obligatory with duties expressed, and their breach is visited by the same consequences." *Atty-Gen. v. Petersburg & R. R. Co.* 28 N. C. 456; *Field, Priv. Corp.* 456, note.

It has been held, without reference to any express provision of law or specific requirement of the charter, that it is the duty of a corporation to keep its principal place of business, its books and records, and its principal officers, within the state which incorporated it, to an extent necessary to the fullest jurisdiction and visitatorial power of the state and its courts, and the efficient exercise thereof in all proper cases which concern said corporation. *State v. Milwaukee, L. S. & W.*

NOTE.—There seems to be little direct authority on the point above decided, and this is reviewed in the opinion of the court.

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R. Co. 45 Wis. 579. In commenting upon this decision, Mr. Morawetz (Priv. Corp. 361) says: "This doctrine is correct only provided the legislature has expressed the policy of the state by some special enactment, or by a general system of legislation regarding incorporated companies. There is no such rule at common law. It is always implied in the grant of a charter of incorporation, where there is no indication to the contrary, that the company shall have its central office or place of management in the state under whose laws it was organized. This however, is merely a rule applicable to the construction of charters in determining the intention of the corporators and of the state, and is not an arbitrary rule of law." Accepting the principle as thus modified, and applying it to a corporation doing business, like the defendant, exclusively under a charter granted in this state, it would seem very clear that by the policy of our laws, as indicated by "general system of legislation," the duty referred to is imposed upon the defendant. We have many statutes which plainly contemplate that such a corporation shall keep its principal place of business—certainly some of its agencies—within the limits of the state. Of such are sections 362 and 363 of the Code, relating to the attachment of shares of stock in corporations, and the interests and profits thereon, and authorizing the service of a certified copy of the warrant of attachment on "the president or other head of the association or corporation, or with the secretary, cashier, or managing agent thereof." Of such also are the provisions of section 694, *Id.*, authorizing the dissolution of the corporation upon the return of an execution unsatisfied upon a judgment docketed in the superior court of the county "where it has its only or principal place of business." Reference may also be had to the visitatorial powers conferred upon the board of railroad commissioners, which, together with other provisions of the law, clearly show that a corporation of this character cannot entirely withdraw all of its officers and agencies from the state. The decision in *State v. Milwaukee, L. S. & W. R. Co.*, *supra*, was based to some extent upon similar statutory provisions, and the general principle of that case has been here discussed for the purpose of showing that the express provision of the charter of the defendant, requiring its principal place of business to be at Williamston, in this state, may well be sustained by the general policy of our laws. The case is also direct authority that such a violation by a corporation of its charter is "an abuse and misuser of its corporate powers," and is within the spirit and meaning of our statute upon the subject. Without considering, then, the other causes assigned in the complaint, we are of the opinion that the persistent violation of the charter in withdrawing, as alleged, the principal place of business from Williamston, and all of its agencies from the state, would authorize the court to decree a dissolution of the defendant corporation. *Atty-Gen. v. Petersburg & R. R. Co. supra.*

The summons in this proceeding was improperly made returnable to the superior 22 L. R. A.

court in term, and his honor remanded the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. This order, together with the other directions to the clerk, is fully sustained by the principle laid down in *Epps v. Flowers*, 101 N. C. 153. *The judgment must be affirmed.*

STATE of North Carolina

Thomas JONES *et al.*

(118 N. C. 669.)

1. **The burden of showing that a person is illegally detained**, when held under a regular mittimus, is upon the prisoner, as the mittimus is sufficient, *prima facie*, to show legal detention.
2. **The presumption of innocence does not apply** on an application for a writ of habeas corpus by one held under a commitment.

(November 23, 1893.)

NOTE.—*Presumption of innocence in habeas corpus proceedings.*

In those jurisdictions in which the question of the innocence of a prisoner is not open to consideration in a habeas corpus proceeding there is evidently no room for any presumption as to innocence.

Thus in *People v. Bulloff*, 5 Park. Crim. Rep. 77, it is held that the question of innocence is not open in a habeas corpus proceeding.

In this class of cases if there can be said to be any presumption at all on the question the indictment is held for the purpose of the proceeding, to raise a conclusive presumption of guilt.

So in *People v. Dixon*, 4 Park. Crim. Rep. 651, it is said there is no presumption of innocence after an indictment in a habeas corpus proceeding, and that this presumption, so far as the application is concerned, "has ceased, if not given place to the presumption of guilt."

And where an indictment for murder was held to create a presumption of guilt sufficient to preclude any inquiry into the merits of the case on habeas corpus, it was expressly held that the presumption of innocence was in no sense trenching upon. *State v. Brewster*, 35 La. Ann. 605.

Although nothing is said about the presumption of innocence or burden of proof in *Lynch v. People*, 38 Ill. 494, it is implied that there is no presumption of innocence in a habeas corpus proceeding to obtain bail after indictment for murder, as the court says that in view of such an indictment courts and judges "should proceed with great caution in their examination of the facts that a prisoner may not be improperly admitted to bail, and only in case he is clearly entitled to such relief."

Where the question of innocence is permitted to be raised the doctrine has become established by all the cases on the subject that an applicant for habeas corpus to procure bail, when held under an indictment, has the burden of showing that he is entitled to bail, and a *prima facie* case against him is made by an indictment for a capital offense, such as murder. *Ex parte Johnson*, 30 Tex. App. 279; *Ex parte Scoggin*, 6 Tex. App. 546; *Ex parte Smith*, 23 Tex. App. 100; *Ex parte Rhear*, 77 Ala. 92; *Ex parte Vaughan*, 44 Ala. 417; *Ex parte Goans*, 39 Mo. 193; *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77; *Ex parte Hammock*, 78 Ala. 414; *State v. Herndon*, 107 N. C. 934; *High v. United States*, Morris (Iowa) 407, 43 Am. Dec. 111; *Street v. State*, 43 Miss. 1; *Ex parte Bridewell*, 57 Miss. 39; *Ex parte Heffren*, 27 Ind. 87; *Ex parte Jones*, 55 Ind. 176; *Ex parte Kendall*, 100 Ind. 599.

CERTIORARI to review a decision of Bryan, J., refusing to discharge petitioners from custody upon a writ of habeas corpus. *Dismissed.*

Petitioners were arrested and brought before a justice of the peace upon an affidavit and warrant for unlawfully disposing of mortgaged property under Code, § 1089. They were bound over to the superior court in the sum of \$200. For failure to give bond, they were sent to jail under a regular mittimus. The petitioners applied to the judge of the superior court for a writ of habeas corpus, alleging that there was no evidence before the justice that any crime had been committed in his county, and that the committal was made through his ignorance and malpractice. Upon the return the sheriff relied on the mittimus as the cause of detention. The case was continued over night that the solicitor might have time to ex-

amine into the matter. The burden was placed on petitioners to show that they were illegally restrained of their liberty, and they refusing to proceed with their evidence, the court refused to discharge them and they were permitted to go upon the bond already given.

Further facts appear in the opinion.

Messrs. George M. Lindsay and E. C. Smith for petitioners.

Mr. Frank L. Osborne, Atty. Gen., for the State.

Clark, J., delivered the opinion of the court:

The learned counsel for the petitioners properly and frankly admitted that this was a case of "novel impression." The continuance of the hearing till the next morning was not subject to exception. It is difficult to see how it injured the petitioners, who

The same rule applies after an indictment for rape, where the offense is punishable by death. *Ex parte Dusenberry, 97 Mo. 504.*

So one under indictment for assault to murder is subject to the same presumption on application for bail. *Ex parte Ryan, 44 Cal. 555.*

The statement in the main case that it is one of "novel impression" is evidently to be taken as referring to a situation in which the prisoner applying for habeas corpus is held under a commitment by a magistrate instead of being held under an indictment, as the cases above cited show that the question of presumption of innocence has been decided by several courts on application by a person held under indictment. But even in respect to persons held under a magistrate's commitment the question is not entirely new.

In *Ex parte Scoggin, supra*, although that was a case of indictment, the court says that the same rule applies to a person held by warrant of commitment from an examining court for a capital offense as if he were held under an indictment.

And in *Ex parte McGlawn, 75 Ala. 33*, a person held under commitment by a magistrate for hog stealing was considered subject to the presumption, and the commitment was regarded as making a prima facie case for his detention, when he applied for a habeas corpus.

So on habeas corpus to obtain release when held under alleged excessive bail, under indictment for felonies, such as forgery, grand larceny, and embezzlement, the accused will be assumed guilty for the purpose of the proceeding. *Ex parte Duncan, 53 Cal. 410, 54 Cal. 75.*

And on application for bail by one indicted for murder, he will be presumed guilty of the highest degree of the crime, and must overcome that presumption by proof. *Ex parte Vaughan, supra.*

Under a constitutional provision allowing bail except in capital cases, where the proof is evident or the presumption great, an indictment for murder is sufficient to create this great presumption. *Ex parte Smith, Hight v. United States, People v. Tinder, Ex parte Kendall, Ex parte Heffren, and Ex parte Jones, supra.*

The same is true on indictment for rape, punishable with death. *Ex parte Dusenberry, supra.*

The general doctrine is fairly stated in the early case of *Hight v. United States, supra*, declaring that there is "no presumption of guilt against a prisoner when he is upon his trial, but so far as regards all intermediate proceedings between indictment and trial it furnishes the very strongest possible presumption of guilt."

The same doctrine is declared, although not in a habeas corpus case, in a decision excluding as a witness a codefendant of the accused. The court 23 L. R. A.

says "after a bill found, a defendant is presumed to be guilty to most if not to all purposes except that of a fair and impartial trial before a petit jury." *State v. Mills, 13 N. C. 420.*

The same doctrine in almost the same words is declared in proceedings for bail in *People v. Tinder, 19 Cal. 539, 81 Am. Dec. 77; Ex parte Ryan, 44 Cal. 555.*

So in *State v. Herndon, 107 N. C. 934*, it is said "while the indictment is no presumption of guilt on the trial before the petit jury, it is otherwise in the application for bail."

The generality of the expressions last quoted does not entirely agree with the statement in *Re Peoples, 47 Mich. 626*, that a person is not presumed to be guilty because he is under arrest, but that the presumption is the other way. But this language was not used in respect to a habeas corpus proceeding, or to any application of the prisoner for bail, but with respect to the protection of his rights against unnecessary delay for the mere convenience or personal accommodation of officers.

While the presumption of innocence does not exist for the purpose of a habeas corpus proceeding and the burden is on the applicant to overcome the prima facie case made by a commitment or indictment, the question after proof has been introduced is whether or not on the whole testimony there is reasonable doubt of guilt. *Ex parte Bridewell, 57 Miss. 39.*

It is said in *Ex parte Hammock, 78 Ala. 414*, that exculpatory evidence must be weighed "together with the presumption" raised by an indictment and the decision pronounced on the entire case as thus presented.

But on the other hand, in *Ex parte Randon, 13 Tex. App. 145*, it is said that when the evidence is gone into the question is to be determined without reference to whether or not the evidence was introduced by the applicant or by the state, and without reference to the prima facie case which would, in the absence of proof, be made by the production of a capias and a valid indictment.

These cases which are the only ones found which touch the point do not agree as to the right to consider the effect of an indictment as creating a presumption against the defendant, where evidence has been introduced by him to meet the prima facie case made by the indictment, but the cases all seem to agree that the whole evidence must satisfy the court that the proof of guilt is evident in order to justify a denial of bail, and perhaps the courts would not in practice be much affected by any difference in theory as to the effect of the presumption raised by the indictment after the question of innocence had been opened up on evidence.

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were admitted to bail, or how, if injurious, this could be remedied by an appeal. It is *res acta*, and cannot be undone. Besides, the delay was to give the solicitor opportunity to examine into the case, and was expressly authorized by Code, § 1635*.

Upon the return of the sheriff, it appeared that the petitioners were in custody upon a mittimus (which, indeed, was also set out in the application for habeas corpus), regular in every way, from a justice of the peace, for failure to give bond for their appearance at the next term of the superior court to answer a criminal charge of which that court had jurisdiction. Nothing else appearing, the detention was clearly legal. The court thereupon called upon the petitioners to show wherein it was illegal. They declined to furnish him any evidence, but contended that the burden was upon the state to show that they were lawfully in custody. The state had already done so. It was not called upon to go further till testimony to the contrary was offered. The sheriff knew probably nothing whatever of the detention except the mittimus. He was not called upon to bring up the witnesses, to show what they testified to, or to prove that the petitioners were guilty of the charge. That fact will be inquired into by a grand jury, and afterwards by a petit jury, if a jury should be found, at the next term of the court. The presumption of innocence applies only upon such trial, and does not avail to furnish a presumption that the detention of a party upon regular process, when the committing officer has jurisdiction, is illegal, and to call upon the state in a proceeding like this to show that the defendant is guilty in order to justify the detention. The detention is to give opportunity for a jury to pass upon the question of the defendant's guilt. In *State v. Herndon*, 107 N. C. 934, the judge refused to hear any evidence, deeming the commitment (there, upon

*When it appears from the return to a writ of habeas corpus that the party named therein is detained on any criminal accusation, the court may, if he think proper, make no order for the discharge of such party until sufficient notice of the time and place at which the writ shall have been returned, or shall be made returnable, be given to the district solicitor of the county in which the person prosecuting the writ is detained.

a true bill found by a grand jury) conclusive of probable cause. The court held that the strong presumption was in favor of the correctness of the action of the grand jury, but that it was not conclusive, since there might be other evidence, not before them; hence that it was error to refuse to hear evidence, but that in no event, after indictment found, could the court discharge the prisoner. It might, in a proper case, admit to bail. But here the court did not refuse to hear evidence. It asked for it. The production of the mittimus was sufficient *prima facie* to show a legal detention. The petitioners had upon them the burden of showing evidence to rebut this, and the court made all the inquiry it was called upon to make (Code, § 1644) when it told them to proceed with their evidence, which they refused to do. If the petitioners had shown that there was no evidence at all before the justice, the judge could examine into the case *de novo*, unless they had waived the examination before the committing officer (9 Am. & Eng. Encyclop. Law, 197), and bind over or discharge them; or, if the facts proved did not constitute a crime, he might discharge them, or, if the bail was excessive in amount, reduce it. There may arise cases where the court, *ex mero motu*, as it has power to do, may issue the writ (Code, § 1632); and of course it may in all cases summon witnesses, and investigate whether the *prima facie* case of legal detention is not rebutted. But the present case does not raise a question of the power to do this. The petitioners are in court. There is nothing that indicates that they are weak, helpless, or ignorant of their rights. Indeed, they are represented by counsel. The judge does not refuse to hear testimony. He calls upon the state to show the cause of the detention. This it does satisfactorily by the sheriff's return. The court then asks the petitioners for their evidence. They refuse to give any. The court could do no otherwise than to refuse to discharge them. Code, § 1645. It seems, indeed, that the petitioners in fact are not even in custody, but are now out on bail. They have no ground to complain in any particular.

Petition dismissed.

WISCONSIN SUPREME COURT.

Hans JENSON, *Resp't.*,
v.

CHICAGO, ST. PAUL, MINNEAPOLIS,
& OMAHA R. CO., *Appt.*

(.....Wis.....)

1. The crossing of a highway and railroad at different elevations, one passing under the other, is not within the provisions of the statute as to the rate of speed of trains or as to ringing the bell or blowing the whistle at a highway crossing.

2. Failure to ring the bell or sound the whistle of a train on approaching a highway which passes under the railroad cannot be regarded as negligence which will make the railroad company liable for frightening a horse by the passing of the train, if the noise of the bell or whistle would under the circumstances have merely increased the noise of the train and tended to frighten the horse still more.

3. Compensatory damages cannot include an allowance for "inconvenience" as well as injuries.

(December 22, 1893.)

NOTE.—In view of the wide-spread agitation to abolish railroad grade crossings and the already numerous overhead crossings the above decision is 22 L. R. A.

especially important as to the difference between these modes of crossing in respect to the necessary caution and signals.

A PPEAL by defendant from a judgment of the Circuit Court for St. Croix County in favor of plaintiff in an action brought to recover damages for injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Solon L. Perrin, for appellant:

If the view of a traveler on a highway approaching a railway crossing is so obstructed that he cannot see an approaching train in time to stop his team before injury, and if he is unable to hear an approaching train when his team is in motion, ordinary care requires him to stop and listen.

Seefeld v. Chicago, M. & St. P. R. Co. 70 Wis. 216.

Plaintiff apprehended danger, or, as he himself says, was "wondering if I would get caught." It was at a place where he could not come in collision with the train; he was in possession of all his faculties, with nothing to distract his attention. He took all the chances attendant upon the undertaking.

Schmoles v. Chicago, M. & St. P. R. Co. 88 Wis. 659; *O'Donnell v. Missouri Pac. R. Co.* 7 Mo. App. 190.

The plaintiff testifies that he did not stop and listen for the train. Under all the authorities he was guilty of contributory negligence.

Butterfield v. Western R. Co. 10 Allen, 532, 87 Am. Dec. 678; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Favor v. Boston & L. R. Corp.* 114 Mass. 350, 19 Am. Rep. 364; *Rheiner v. Chicago, St. P. M. & O. R. Co.* 86 Minn. 170.

Messrs. Thomas Wilson and Humphrey & Arnuist also for appellant.

Mr. A. J. Kinney, for respondent:

The conditions surrounding this crossing make it an extremely dangerous one. Hence the law requires that the defendant's servants in charge of its trains, "should approach this crossing at a less rate of speed and use increased diligence in giving warning of their approach."

Continental Imp. Co. v. Stead, 95 U. S. 161, 24 L. ed. 403; *Winstanley v. Chicago, M. & St. P. R. Co.* 72 Wis. 375; 1 Thomp. Neg. § 5, p. 422; *Roberts v. Chicago & N. W. R. Co.* 85 Wis. 679; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150; *Voak v. Northern Cent. R. Co.* 75 N. Y. 320; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247.

Although the statute does not require a whistle to be blown for this crossing, yet the jury had a right to find, in view of the character of the crossing and the liability of an accident happening there, it was negligence on the part of the defendant to omit such a signal.

Cordell v. New York Cent. & H. R. R. Co. 70 N. Y. 119, 26 Am. Rep. 550; 1 Thomp. Neg. § 4, p. 419; *Winstanley v. Chicago, M. & St. P. R. Co.* supra; *Eilert v. Green Bay & M. R. Co.* 48 Wis. 606; *Rorer, Railroads*, 1012-1014.

The doctrine that the statute concerning the giving of signals does not require the whistle to be blown, except where the highway was crossed at grade, was considered and thoroughly exploded by the Kentucky court of appeals in *Rupard v. Chesapeake & O. R. Co.* 7 L. R. A. 316, 10 Ky. L. Rep. 1023.

See also *Pennsylvania R. Co. v. Barnett*, 59 22 L. R. A.

Pa. 259, 98 Am. Dec. 346; *Wakefield v. Connecticut & P. R. R. Co.* 87 Vt. 330, 86 Am. Dec. 711.

In *Ransom v. Chicago, St. P. M. & O. R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, it is held that our statute "was intended to guard against the danger of injury from the frightening of teams driving upon the highway near the crossing as well as the danger of actual collision at the crossing."

See also 1 Thomp. Neg. § 15, p. 352.

There is no juridical distinction between an injury happening through the traveler's horse taking fright at the object, and an injury through his coming into direct collision with it.

1 Thomp. Neg. § 14, p. 349; *Norton v. Eastern R. Co.* 113 Mass. 366.

It was proper to submit to the jury the question whether, under the circumstances, the running of the train at the rate shown was negligence.

Winstanley v. Chicago, M. & St. P. R. Co. 72 Wis. 375; *Guggenheim v. Lake Shore & M. S. R. Co.* 66 Mich. 150; 1 Thomp. Neg. § 3, p. 418; *Linfield v. Old Colony R. Corp.* 10 Cush. 562, 57 Am. Dec. 124; *Richardson v. New York Cent. R. Co.* 45 N. Y. 846.

Appellant insists that the plaintiff was negligent in not stopping his horse entirely and listening for the train; but there is nothing in the evidence that furnishes even a suggestion that he could have heard the train any better if he had stopped.

What is reasonable care in any case depends upon the particular circumstances of that case. Precautions which would be reasonable in one case may not be deemed so in another case. It is impossible for the law to define the acts which would or would not amount to reasonable care.

Rorer, Railroads, 1023; *Cottrill v. Chicago, M. & St. P. R. Co.* 47 Wis. 634, 32 Am. Rep. 796; *McKeigue v. Janesville*, 68 Wis. 50; *Phillips v. Chicago, M. & St. P. R. Co.* 64 Wis. 475; *Hoye v. Chicago & N. W. R. Co.* 62 Wis. 666; *Eilert v. Green Bay & M. R. Co.* 48 Wis. 606; *Duffy v. Chicago & N. W. R. Co.* 83 Wis. 269; *Roberts v. Chicago & N. W. R. Co.* 85 Wis. 679; *Beanstrom v. Northern Pac. R. Co.* 46 Minn. 193; *Kelly v. St. Paul, M. & M. R. Co.* 29 Minn. 1; *Davis v. New York Cent. & H. R. R. Co.* 47 N. Y. 400; *Ernst v. Hudson River R. Co.* 85 N. Y. 9, 90 Am. Dec. 761; *Mackay v. New York Cent. R. Co.* 35 N. Y. 75.

If for any reason the approach of a train cannot be perceived by passengers on this highway in the vicinity of this crossing, and the usual signals are not sufficient to give warning of its approach, then the defendant is bound to employ some other means of giving such warning.

Roberts v. Chicago & N. W. R. Co. 35 Wis. 679.

Orton, J., delivered the opinion of the court:

The facts of this case are substantially as follows: In the city of Hudson, and near the northeastern limits thereof, there is a highway or wagon road (the name of which is not given) that starts at the intersection of St. Croix and Eleventh streets, and runs in a northeasterly direction, in a descending grade, and through a deep cut, until it passes

under the railroad, or railroad bridge over the same, of the defendant, and then passes on, and constitutes the main highway from the city to the North Wisconsin Junction. After it has passed under the railroad bridge, and about 72 feet from it, there had been a washout that tore out an old culvert, and made a gorge or gully about 20 feet deep in a part of the road, which left the track quite narrow. There was a fence along the edge of this gorge. On the 1st day of October, 1892, the plaintiff was traveling along this road from said junction towards the railroad bridge, with his wife, in a single carriage. When he was passing, or had just passed, under said bridge, a freight train of the defendant passed over said bridge, and the noise frightened the plaintiff's horse and he became unmanageable, and ran, and jumped over said fence into the said gorge, and, of course, turned over the carriage, and threw the plaintiff and his wife out, but, strange to say, with but slight injury to the plaintiff and no injury to his wife. It is difficult to say from the evidence whether the plaintiff was under the bridge when the train passed over it, or had passed beyond the bridge when the train passed over, for the plaintiff testified that he was going down the bank when he saw the engine, and that was over 70 feet from the bridge. It does not appear that this road was one of the streets of the city. It would appear to be a country highway, leading to the city, for it seems to have no name or number. The train was running about fifteen miles per hour. There was no proof that the bell was rung or the whistle blown before passing over the bridge. The learned judge instructed the jury that the statute required the bell to be rung at and before crossing, and that they should take into consideration the rate of speed that the train was running, and that it was negligence not to have rung the bell or blown the whistle. The jury must have found the defendant guilty of negligence in one or more of these particulars. The verdict for the plaintiff was \$100. The court instructed the jury "that they could only allow the plaintiff a reasonable compensation for the inconvenience and injury he suffered from the causes named," and this was excepted to by the defendant's counsel. It is a little remarkable that this case was tried both by the court and counsel precisely as if the accident had occurred at an ordinary railway crossing at grade with and intersecting a highway. The very best reason for constructing a railroad over or under a highway is to avoid the danger and hazards of such an ordinary grade crossing. Our statute (§ 1837, Rev. Stat. and section 1299c, Sanborn & Berryman, Anno. Stat. p. 806) provides for constructing railways over bridges or arched culverts above highways. This bridge is presumed to have been constructed according to law. Such crossings are to be encouraged in order to secure the safety and security of the public, as crossings at grade are always dangerous. 19 Am. & Eng. Encyclop. Law, 868, 869; *Pittsburg & C. R. Co. v. Southwest Penn. R. Co.* 77 Pa. 173. All the statutory regulations and liabilities on the subject of

railroad crossings apply only to such as are constructed at even grade with the highway, and none of them are applicable to a crossing constructed above or below the highway. 4 Am. & Eng. Encyclop. Law, 907; *People v. New York Cent. & H. R. R. Co.* 74 N. Y. 302; *New York & N. E. R. Co. v. Waterbury*, 55 Conn. 19; *Central Vermont R. Co. v. Roy-alton*, 58 Vt. 234; *Clauston v. Chicago & G. S. R. Co.* 95 Ind. 152; *Whitcher v. Somerville*, 188 Mass. 454; *Pennsylvania R. Co.'s App.* 116 Pa. 84.

Common reason teaches that this crossing is very different from the common railroad crossing at the grade of the highway, not only in fact, but in all its incidents and relations to the traveling public. There is no danger at such a crossing of any collision of railroad trains or cars with man, beast, or vehicle on the highway. It cannot be the direct cause of any physical injury to any person or thing on the highway. The train passing over this bridge can cause no injury to persons or property on the highway other than, or different from, their injury while passing on a highway parallel to the railroad.

The only possible injury a railroad train can inflict upon persons or property in the highway is by frightening horses while drawing vehicles or being ridden, and causing them to run away, and do damage, as in this case. Only horses unused to such a place would be frightened, and only horses hard to hold, or not well subdued, would run away or get beyond the control of the driver; so that it is not common that any injury would happen, even from this cause. It is certainly no wrong for the train to be run over such bridges in the usual and ordinary way, and even in this way some horses going under the bridge, or being near it at the same time, might be frightened by it. The trains must necessarily make considerable noise going over the bridge. They cannot be run without it. It is not by any means certain that a train would make less noise going over slowly than faster. What degree of noise must it make to frighten horses? A horse liable to be frightened would be by the train passing over the bridge at any rate of speed. There are too many contingencies, conditions, and uncertainties about it to make it a rule of law that a high rate of speed would be the proximate cause of an injury caused by a horse running away through fright from the noise of the train. To be a rule of law, the injury from such a cause must not only be proximate, but usual or common, and to be expected, or that could be anticipated. There were probably a great many instances when horses passing under or near the bridge when a train was going over it were not caused to run away, or, if frightened at all by it, to such an extent. How could the company or its servants anticipate just when a horse would be frightened to such an extent, under such circumstances? This, so far as I know, is a new question, and I have said enough by the way of common reasoning, in the absence of authorities, to show that it would be an unsafe rule for the court to instruct the jury that they might consider

the speed of the train, and find that its running at the rate of fifteen miles per hour was the proximate cause of the injury in this case. We have seen that the statute as to the rate of speed of the train and as to ringing the bell or blowing the whistle has no application to such a crossing. All such regulations apply only to crossings on an even grade with the highway, and the rules of law established by the decisions of the courts are with reference only to such crossings. The danger from such bridges of frightening horses is no greater in fact, and no more common, than from the railroad running near and parallel to a highway. It would seem to be no more reasonable to establish a rate of speed for the trains in passing such places in one case than in the other. This bridging over highways should be encouraged, not only for the safety of the public, but for the benefit of railroad companies themselves, and for their protection also. They should be no longer burdened, obstructed, or inconvenienced by the regulations and precautions applicable to grade crossings. If they are required to lessen their speed, to ring the bell and blow the whistle, and use all the precautions applicable to grade crossings, such expensive constructions in the interest of the public will be gratuitous, and they will not be encouraged to incur such an expense. As to ringing the bell and blowing the whistle, they are only required, if at all, in order to avoid frightening horses, and with that view to warn the traveler on the highway to stop. Where should he stop, and how near the bridge? If near the bridge, and his horse is liable to be frightened and run away, he will be in a much more dangerous condition than if he should drive on, and take his chances; for the horse, facing the train rushing over the bridge, would turn suddenly around to escape danger, and upset the carriage. If he is to stop at a place further off, to look or listen for the train, then such a precaution would be useless, for the train is then so far off as to be out of sight or hearing. The sound of the bell or the whistle is only heard when the train is near a grade crossing, and it may well warn the traveler to stop near the track of the crossing, and be out of danger. Take this case as an illustration. The plaintiff was driving in a deep cut with high embankments. If, when he entered it, he had looked or listened, he could not have seen or heard anything of the train, for it was too far off. If he had stopped nearer the bridge, he could not have seen the train or the trainmen seen him. He could only expect the bell to be rung or the whistle blown when he was very near the bridge. Then the noise of either would only have increased the noise of the train, and frightened the horse still more, and his only safe way would have been to drive on. The negligence of the company, to be culpable, must have caused

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or contributed to produce the injury. When was there any such negligence in this case? We cannot find from the evidence that there was any.

The jury followed the instructions of the court, and ignored the fact that this was not a grade crossing to which the statutory regulations applied, and found negligence only appropriate to such a crossing. It was clearly a mistrial, by the trial of issues not in the case. A railroad bridge crossing was made to bear all the legal tests of a grade crossing that intersects the highway. I am unable to suggest what regulations, if any, ought to be provided for such a crossing by the legislature. It is so much like a highway near and parallel to the railroad, on which horses may be frightened by the noise and seeing the train pass by, that I am unable to suggest any regulations which ought not to apply to one as well as the other. This plaintiff knew when he entered the deep cut leading to the bridge that he had a horse liable to be frightened and run away if he should be caught near or under the bridge when the train passed over it, and yet he drove on, thinking, as he said, that he might be there when the train passed. He knew when he entered the deep cut that the train was then too far away to be seen or heard, for he says he looked for a train, and did not hear or see any; and yet he drove on, more and more out of sight of an approaching train and when he could have heard the bell or whistle it was too late. His horse had jumped over the fence when he first saw the locomotive. He did not wait or stop to look or listen, but took his chances, and drove on. I am not sure but that the company might make itself liable for blowing the whistle and ringing the bell so near such a bridge crossing as to frighten teams passing under it on the highway. But that is not this case.

It is not very important to notice one erroneous word in the instructions of the court, where the whole general charge was so clearly erroneous. The court instructed the jury that they might allow a reasonable compensation to the plaintiff for the inconvenience as well as for the injury he suffered. The court might as well have told the jury to make the plaintiff's verdict large enough to compensate him for any disquiet, uneasiness, annoyance, or trouble he suffered, for these are inconveniences according to Webster; and they are not the subjects of compensation, although they might be of exemplary damages. The misuse of this word may have swelled the damages for this trifling injury to \$100. It was, therefore, an error.

This case is not important in amount, but it certainly is important in the legal principles involved. Cases like this are not common, and it is at least doubtful whether there ought to be any like it.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

MONTANA SUPREME COURT.

MONTANA CATHOLIC MISSION, S. J.,
Appt.,
v.
 LEWIS AND CLARKE COUNTY *et al.*,
Resp'ts.

(.....Mont.....)

1. **Property owned by a charitable institution is not exempt from taxation** if not used by the institution. Under Const., art. 12, § 2, exempting property "used exclusively for" certain specified purposes including "institutions of public charity."
2. **The intention to use property by a charitable institution is not equivalent to the use of it within a provision as to exemption from taxation.**

(December 20, 1898.)

A PPEAL by complainant from a judgment of the District Court for Lewis and Clarke County in favor of defendants in a suit brought to enjoin the collection of certain taxes which had been assessed against property held by plaintiffs. *Affirmed.*

Statement by **DeWitt, J.:**

This action was brought by the plaintiff against the county of Lewis and Clarke and the treasurer thereof praying for a judgment that the assessment of general taxes against certain real estate of plaintiff, and the levy of said taxes, be adjudged to be void, and that the said treasurer be enjoined from selling said property for said taxes. The plaintiff set up in its complaint that it was an institution of purely public charity, and that it was the owner of certain lands in Lewis and Clarke county, describing them. It is not set up in the complaint that this land is now being used by the plaintiff in any manner. It is alleged in the complaint that the lands are held for the purpose of erecting buildings for certain purely charitable purposes, unsectarian in character. Upon these lands, the general taxes were assessed and levied by the county of Lewis and Clarke for the year 1892. The plaintiff claimed, before the board of equalization, that it was exempt from this taxation, but the board refused to allow said claim, except as to twenty acres of the tract above described, upon which is being built an asylum for orphans. A general demurrer to the complaint was sustained, and judgment thereon entered for defendants. The plaintiff appealed.

The appeal brings up for a construction the following provisions of the constitution and laws: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural

societies, for educational purposes, places for actual religious worship, hospitals and places of burial, not used or held for private or corporate profit, and institutions of purely public charity, may be exempt from taxation." Const. § 2, art. 12. In pursuance to this provision of the constitution, the legislature enacted as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, and such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places for actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, are exempt from taxation; provided, no more land than is necessary for said purposes shall be exempt." Section 2 of "An Act Concerning Revenue" (p. 73, 2d Sess. 1891).

Mr. T. J. Walsh, for appellant:

The word "institution" in the statute and in the constitution is used in its largest and most comprehensive sense to signify, as expressed by Webster, "an established or organized society or corporation . . . as a literary institution, a charitable institution," as well as in the sense of "a building or the buildings used by such organization, as the Smithsonian Institution."

The latter seems to be a derivative sense of recent origin.

Nobles County v. Hamline University, 46 Minn. 316.

Any "reasonable doubt must be solved in favor of the legislative action and the act be sustained."

Cooley, Const. Lim. 182; Sedgw. Stat. & Const. L. 409; Endlich, Interpretation of Statutes, 526.

This expression, "institutions of purely public charity," is found in similar provisions of the constitutions of Ohio and Pennsylvania, and in both of these states has been construed to refer to the corporation or association and not alone to the building occupied by such.

Gerke v. Purcell, 25 Ohio St. 229; *Donohugh's App.* 86 Pa. 306.

The use of the word in the sense contended for by the plaintiff in similar statutes is common and much more frequent than in the restricted sense.

McLain's Stat. 1277; *San Francisco Ladies Prot. & Relief Soc. v. Story*, 82 Cal. 65; Pub. Stat. chap. 2, § 5, cl. 3; *Massachusetts Soc. for Prevention of Cruelty to Animals v. Boston*, 142 Mass. 24; Starr & C. Anno. Stat. p. 2027; *Morris v. Lone Star Chapter No. 6, Royal Arch Masons*, 68 Tex. 698.

If the institution is devoted to charity by the very fundamental law of its existence and is free from the elements of private or corporate profit it is an institution of purely public charity and the fact that tuition fees may be required to make up part of the expense of maintaining the college or school does not deprive it of that character.

Philadelphia v. Women's Christian Assn. 125

NOTE.—See note to Book Agents of Methodist Episcopal Church South v. Hinton (Tenn.) 19 L. R. A. 290, on the effect of secular use upon exemption of property of religious institutions from taxation. 22 L. R. A.

Pa. 572; *Humphries v. Little Sisters of the Poor*, 39 Ohio St. 201; *Hennepin County v. Brotherhood of the Church of Gethsemane*, 27 Minn. 480, 38 Am. Rep. 298.

The fear which might be entertained in some quarters of the accumulation of the plaintiff and other similar societies of inordinate amounts of property by reason of its immunity from taxation is shown by the court in *Washington University v. Rouse*, 75 U. S. 8 Wall. 439, 19 L. ed. 498, to be without much foundation, since such a course would be at the risk of the forfeiture of their corporate franchises.

Messrs. Henri J. Haskell, Atty. Gen., and C. B. Noland, for respondent:

It is the use, and not the ownership, that would entitle the property to exemption. The intention to exempt property from taxation must be expressed in clear, unambiguous terms; taxation is the rule and exemption is the exception.

Cooley, Taxn. p. 146, and authorities cited in note 1; Desty, Taxation, pp. 110, 118.

Courts invariably hold that some actual appropriation of the land for the purposes intended must be shown in order to exempt it from taxation, and the intent to so appropriate it at some indefinite time in the future is not sufficient.

Ramsey County v. Church of the Good Shepherd, 11 L.R. A. 175, 45 Minn. 229; *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587; *People v. O'Brien*, 53 Hun, 580; *Mullen v. Erie County Comrs.* 85 Pa. 288, 27 Am. Rep. 650; *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa, 717; *Northwestern University v. People*, 80 Ill. 358, 22 Am. Rep. 187; *The Vermont*, 6 Ben. 116; *Boston Soc. of Redemptorist Fathers v. Boston*, 129 Mass. 182; *Morris v. Lone Star Chapter No. 6, Royal Arch Masons*, 68 Tex. 698; *Richmond County Academy v. Bohler*, 80 Ga. 159; *Washburn College v. Shawnee County Comrs.* 8 Kan. 344.

DeWitt, J., delivered the opinion of the court:

The contention of appellant is that section 2, art. 12, of the Constitution, and section 2 of the Revenue Act of 1891, exempt from taxation the real estate described in its complaint. It is fully conceded by the complaint that the real estate is not used by the plaintiff exclusively, or at all, for an institution of purely public charity. It is alleged that it is intended to be so used. For the purposes of this decision, it may be considered that the plaintiff is an institution of purely public charity. It is observed that the section of the constitution cited describes two classes of property. We will notice the distinction as to these two classes: First, it names the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries. It is not left to the legislature to say whether or not the property of these institutions shall be exempt. The constitution, in itself, settles that it shall be. Nor is the test of exclusive use mentioned. The constitution says, simply, "the property" of these institutions shall be exempt. Then the section of the constitution advances to another class of property, and

describes it as "property as may be used exclusively for" certain purposes, and defines the purposes, and, among them, names "institutions of purely public charity." This class of property is not exempt from taxation under the constitution, but may be made so by the legislature. The legislature has acted. Revenue Act 1891, § 2. It has therein declared to be exempt, such property as is used exclusively for the purposes mentioned in the section of the constitution, *supra*; and re-describes those purposes in the exact language of the constitution, making only the appropriate changes in the mood of the verbs. So, with the constitution and the law together, we have this condition: Property of certain entities, as the state, cities, etc., is exempt, and property exclusively used for certain purposes is exempt. The property in question falls within the second class, as the plaintiff is not one of the institutions mentioned in the first class, as the state or a city, etc., but is an "institution of purely public charity." And we find from the complaint that the property is not used exclusively, or at all, by such "institution of purely public charity." The most that the complaint alleges is that the property is intended to be so used. Such intention is not sufficient to constitute the use contemplated by the constitution and the law. *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587.

In Pennsylvania, the court went further than we do, or need to, and held that the exemption would not apply to premises on which a church was in process of erection. *Mullen v. Erie County Comrs.*, 85 Pa. 288, 27 Am. Rep. 650. How much stronger against the appellant is the fact that in this case there is not even a commencement of the alleged intended use. See also *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa, 717; *Boston Soc. of Redemptorist Fathers v. Boston*, 129 Mass. 178; *Washburn College v. Shawnee County Comrs.* 8 Kan. 344. We are therefore clearly of opinion that, as the property in question is not at all used for an "institution of purely public charity," it is not exempt from taxation.

This must be held unless a construction of the constitution and the law which appellant urges, and which we will now examine, is to be adopted. It contends that the language does not mean that the property used by such institution shall be exempt, but rather that the institution, as such an association or corporation, shall be exempt from paying taxes on its property. The conclusion would be that such institution is exempt from paying taxes upon any of its property. Appellant contends that the word "institution," used in the statute, means the association, the corporation, or the concern, whatever it may be. Concede that such is the meaning, still we are of opinion that the section is describing property that is or may be exempt, and not the institution which is the owner of property. The whole sense of the section is that it describes property,—the property of the United States; the property of the state, of cities, etc.; property used exclusively for—For what? For the following purposes (then setting forth the purposes). The word "for"

is not repeated before each described purpose, nor does grammatical construction or perspicuity require it. Its sense is carried over to each mentioned purpose. The intention is just as clear that the section means "used exclusively for institutions of purely public charity," as it is that it means "used exclusively for agricultural societies." We adhere to the view that the language intends to describe the property used, and not the concern using it, as being exempt. This view is in accord with the grammatical construction of the language, with the context of the section, and the general intent expressed therein. To adopt appellant's construction would be to hold, if an institution were simply of the character described in the constitution and law, that, as far as the revenue laws are concerned, it might hold exempt from taxation all property of any character, and of any amount in value, whether it used such property exclusively, or at all, for purely public charity. Against this view are the decided cases (*supra*), reason, the context of section 2, art. 12, and the spirit of the constitution on the subject of taxation. That instrument provides: "All property shall be assessed in the manner prescribed by law except as otherwise provided in this constitution." Article 12, § 16. So, appellant seeks to bring itself within an exception to the constitutional rule that "all property shall be assessed." Upon this subject, *Mr. Justice Brewer*, as a member of the supreme court of Kansas, appropriately remarked: "All property receives protection from the state. Every man is secured in the enjoyment of his own, no matter to what use he devotes it. This security and protection carry with them the corresponding obligation to support. It is an obligation which rests equally upon all. It may require military service in time of war, or civil service in time of peace. It always requires pecuniary support. This is taxation. The obligation to pay taxes is coextensive with the protection received. An exemption from taxation is a release from this obligation. It is the receiving of protection without contributing to the support

of the authority which protects. It is an exception to a rule, and is justified and upheld upon the theory of peculiar benefits received by the state from the property exempted. Nevertheless, it is an exception; and they who claim under an exception must show themselves within its terms." *Washburn College v. Shawnee County Comrs.* 8 Kan. 344.

Appellant herein seeks to bring itself within the exception by a strained and unnatural construction of the constitution, as above shown. The district court held against it, in which that court was correct.

Its judgment is therefore affirmed.

Pemberton, Ch. J., concurs.

Harwood, J., concurring:

I concur in the foregoing conclusion, on the ground that the legislature, in exercising the power delegated to it by the constitution, of providing, among other things, exemption from taxation of property "used exclusively" for "institutions of purely public charity," has especially provided, as to exemption of land, that "no more land than is necessary for said purpose shall be exempt." The contention involved in this case relates entirely to the question of exempting land, and it seems clear to me, under the provisions of the law, that land, although held by such institutions, but not in use for the purposes of such charity, cannot claim exemption from taxation. It will be noticed that the legislature made the clause above quoted relate specifically to land, and the observations in the treatment of this case must be confined to the question of exemption of that character of property; and broader implications, as governing the construction of the provisions respecting other classes of property, should not be indulged to determine future cases, involving the question of exemption of other classes of property held by such institutions, dedicated irrevocably to the use upon which the exemption is declared, although not actually converted into active use at the moment it was sought to be taxed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

EXCHANGE NATIONAL BANK OF
SPOKANE FALLS, *Plff. in Err.*,

v.

BANK OF LITTLE ROCK.

(68 Fed. Rep. 140.)

1. A drawer of a draft or note complete in itself but in such form as to be easily altered

without attracting attention is not liable for the amount to which it is afterwards fraudulently raised by a third person without his knowledge or authority, even to an innocent purchaser, since it is not his negligence but the crime of the forger that is the proximate cause of the loss.

2. A bank which issues to a confidential clerk and employs a draft upon another bank upon such clerk's repre-

NOTE.—*Liability of maker or drawer on raised negotiable paper.*

There is some conflict of authority as to the liability of obligors on commercial paper in the hands of bona fide holders for value where such paper was altered after delivery by increasing the amount—some cases holding with the main case that such material alteration renders the paper void even if it was issued in such a form as to be easily altered without exciting suspicion. *Burrows v. Klunk*, 322 L. R. A.

L. R. A. 576, 70 Md. 451; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 193, 25 Am. Rep. 67; *Knoxville Nat. Bank v. Clark*, 61 Iowa, 264, 33 Am. Rep. 122; *Flannagan v. National Bank of Dover*, N. J. 13 N. Y. S. R. 826; *Wade v. Withington*, 1 Allen, 561.

In these cases the doctrine announced in *Young v. Grote*, *infra*, has been denied, criticised, or held to be inapplicable.

Other cases hold that the obligor on commercial paper is released where the same has been altered

sentation that he desires it for the purpose of making a remittance is not liable to a bona fide holder of such draft who takes it after it has been raised by such clerk to a larger amount for the increased amount, since such clerk does not in raising it act for the bank or in his capacity as clerk.

(October 16, 1893.)

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment in favor of defendant in an action brought to recover the amount of a New York draft drawn by defendant and raised by a third person after it had been issued. *Affirmed.*

Statement by Sanborn, Circuit Judge:

The Exchange National Bank of Spokane, Wash., plaintiff in error, brings this writ of error to reverse a judgment of dismissal of an action brought by it against the Bank of Little Rock, Ark., the defendant in error, to recover the amount of a draft for \$2,500 which had been raised from \$25 after the defendant issued it, and before the plaintiff bought it. One D. C. Jordan, an employé of the defendant, whose business it was to prepare the exchange for the cashier to sign, drew a draft of the defendant on a New York bank, payable to his own order, for \$25, for the cashier to sign, under the pretense that he wished to make a remit-

tance to his brother. He so wrote the words "twenty-five" that there was room in the blank just after it to insert the word "hundred." He so punched the figures "\$25" that there was room just after them to insert with the punch two ciphers and a star in the usual manner, and he so wrote the figures "\$25" that there was room immediately after them to insert two ciphers. In this condition he presented the draft to the cashier, who examined it, saw the way in which it was written and punched, and then signed it, and delivered it to Jordan. The latter then made the insertions of the words and figures he had left room for, and the paper became a fair draft for \$2,500, without any erasure, interlineation, or other mark to excite suspicion of the alteration. This is a copy of the altered draft:

(Punched.)
~~\$2500~~ \$ BANK OF LITTLE ROCK. \$2500.00
 LITTLE ROCK, ARK., Mar. 8, 1893.
 Duplicate Unpaid.
 Pay to the order of D. C. JORDAN, No. 3589.
 Twenty-five Hundred.....Dollars.
 Original.
 TO CHEMICAL NATIONAL BANK, C. T. WALKER,
 New York City. Cashier.

After making the alterations, he indorsed this draft to a fictitious person, indorsed the

by increasing the amount to be paid, after such paper has been delivered, and the question of negligence in issuing the paper so that it could be easily altered is not discussed. *Ruby v. Talbott* (N. M.) 3 L. R. A. 724; *Goodman v. Eastman*, 4 N. H. 456; *Evans v. Deming*, 20 N. Y. Week. Dig. 71; *Mills v. Starr*, 2 Bail. L. 359.

And in *Burwell v. Orr*, 84 Ill. 465, it was held that where a note was raised it will be presumed to have been altered by payee and it could not be collected by a subsequent bona fide indorsee, and that the whole was void; but no cases were cited, and the question of negligence was not discussed. See *Yocum v. Smith*, *infra*.

And the same was held in *Fordyce v. Kosminski*, 49 Ark. 40, on the ground that the alteration was not made by one standing in confidential relation.

And an accommodation indorser not consenting is released where the drawer of a bill raised the amount by the consent of the holder. *Bachelder v. White*, 80 Va. 108.

And where the amount of a check was expunged and skillfully raised after it was issued, the depositor was only liable to the bank paying the same to the amount originally inserted. *Hall v. Fuller*, 5 Barn. & C. 750, 8 Dowl. & R. 464.

And *Trapp v. Spearman*, 3 Esp. 37, holds that the alteration of a note by raising the amount renders it void as against the maker, but this was not the question involved in the case.

But the case of *Young v. Grote*, 4 Bing. 253, 12 Moore, 454, holds that the drawer of a check who signed the same in blank and left it with his wife is liable thereon, where his clerk fraudulently altered the same by raising the amount after he had filled it out as directed by the wife. This was the leading case on alteration of instruments, but it has been questioned and its authority denied in *Baxendale v. Bennett*, L. R. 3, Q. B. Div. 525, 47 L. J. C. P. 624, 28 Week. Rep. 899, 19 Alb. L. J. 372, which was a case where a signed blank bill of exchange was negligently left in a drawer and stolen, and the drawer's name filled in.

In accord with *Young v. Grote*, *supra*, a drawer 22 L. R. A.

of a check, which was negligently issued so as to be easily raised, will lose where it is paid by the bank. *Halifax Union v. Wheelwright*, 44 L. J. Exch. 121, L. R. 10 Exch. 153, 32 L. T. N. S. 802, 28 Week. Rep. 704.

So trustees under a 'paving act, who negligently sign checks so that they can be easily raised, cannot hold the clerk who drafted them liable. *Whitmore v. Wilks*, 2 Car. & P. 364.

Worrall v. Gheen, 39 Pa. 383, and *Garrard v. Hadden*, 67 Pa. 32, 5 Am. Rep. 412, while doubting *Young v. Grote*, *supra*, held that the obligor was only liable to the original amount as shown by the paper when executed.

So the maker of a note will be liable to a bona fide holder where he issued it so that it was easily altered and raised in amount, and delayed after knowledge of the alteration to inform the holder, who was prejudiced thereby. *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120. See *Burwell v. Orr*, *supra*.

The Louisiana cases follow the civil law and hold that the obligor is still liable where he was negligent in issuing commercial papers so that the amount was raised without exciting suspicion. *Inard v. Torres*, 10 La. Ann. 108; *Helwege v. Hibernia Nat. Bank*, 23 La. Ann. 520.

And the same was held where one joint maker raised a note without the knowledge of the other makers after all had signed it. *Scottland County Nat. Bank v. O'Connell*, 23 Mo. App. 165.

This case holds that an alteration by raising the amount avoids a note, but under the facts in this case a delivery by one maker of negotiable paper to another maker to issue the same, in a condition to allow it to be easily raised renders the obligors liable.

A drawer has no cause of action against a party who has bona fide received from his drawee and paid out the proceeds of a raised draft. The remedy is between the drawer and drawee, and between the drawee and the bona fide purchaser. *National Bank of Commerce v. Manufacturers & T. Bank*, 123 N. Y. 367, 15 N. Y. S. R. 630. L. T.

name of the fictitious person upon it, and delivered it to a third person, who was identified at the bank of the plaintiff, and at whose request the plaintiff discounted the draft in good faith, for value, and without notice or suspicion of any alteration in it. The court below held that the draft was a forgery, and imposed no liability on the defendant, and this is the supposed error complained of.

Before Sanborn, *Circuit Judge*, and Thayer, *District Judge*.

Messrs. S. R. Cockrill and George H. Sanders, for plaintiff in error:

The maker or drawer of a raised bill or note is liable to a bona fide holder without notice, for the raised amount, where the maker or drawer has drawn the instrument in such a form as to afford the holder the opportunity to insert in spaces negligently left in the instrument, additional words and figures raising the amount in such manner as to prevent detection.

Dan. Neg. Inst. § 1405; Tiedeman, Com. Paper, § 397; Byles, Bills, 328; Benjamin's Chalmers's Dig. Bills & Notes, art. 287; 1 Edwards, Bills, § 264; *Garrard v. Hadden*, 67 Pa. 82, 5 Am. Rep. 412; *Leas v. Walls*, 101 Pa. 57, 47 Am. Rep. 699; *Blakey v. Johnson*, 18 Bush, 197, 26 Am. Rep. 254; *Iron Mountain Bank of St. Louis v. Murdock*, 62 Mo. 70; *Capital Bank v. Armstrong*, Id. 59; *Scotland County Nat. Bank v. O'Connell*, 23 Mo. App. 165; *Johnston Harvester Co. v. McLean*, 57 Wis. 258; *Seibel v. Vaughan*, 69 Ill. 287; *Harvey v. Smith*, 55 Ill. 224; *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520; *Kulb v. United States*, 18 Ct. Cl. 560; *Coles v. Bank of England*, 10 Ad. & El. 184; *Ingram v. Primrose*, 7 C. B. N. S. 82; *Young v. Grote*, 4 Bing. 253.

In *Crawford v. West Side Bank*, 100 N. Y. 50, 58 Am. Rep. 152, the reasonable rule to govern such cases is stated with its proper qualifications as follows: "The theory that a party who makes and issues commercial paper, properly and carefully drawn, to express the liability which he intends to assume, is chargeable with negligence on account of the criminal act of another in altering it after its issue, would render him a warrantor against such acts and is repugnant to justice and reason." The qualification is, that in order to entitle the maker to the protection indicated, the paper must be properly and carefully drawn.

When the maker put the note in circulation, it was an invitation to the public to purchase it from the holder, with apparent title. The alteration could not be detected, and the maker is estopped from urging his defense.

Yocum v. Smith, 68 Ill. 321, 14 Am. Rep. 120.

The principle which lies at the foundation of these actions I think, is, that the maker, who, by putting his paper in circulation, has invited the public to receive it of any one having it in possession with apparent title is estopped to urge the actual defect of title against a bona fide holder.

Van Duser v. Howe, 21 N. Y. 531.

Justice as well as the public policy, which lies at the foundation of the laws as to commercial paper, requires that the loss shall fall

upon the maker rather than on the innocent holder.

Redlich v. Doll, 54 N. Y. 236, 13 Am. Rep. 578.

In *Zimmerman v. Rote*, 75 Pa. 188, the court says: "It is the duty of the maker of a note to guard not only himself but the public against frauds and alterations, by refusing to sign negotiable paper made in such a form as to admit of fraudulent practices upon them with ease and without ready detection."

See also *Halifax Union v. Wheelwright*, L. R. 10 Exch. 192; *Espy v. First Nat. Bank of Cincinnati*, 85 U. S. 18 Wall. 604, 21 L. ed. 947.

The fact that the alteration amounts to a felony is not material.

Redlich v. Doll, *supra*.

Jordan, who raised the draft in this case, was the clerk of the drawer.

None of the cases avoids the altered paper in the hands of a bona fide holder where such an alteration as we have in this case was made by the maker's clerk. Their harsh doctrine stops at the line "where the alteration is made by an agent, clerk, or confidential party."

Garrard v. Hadden, *supra*; *McSparren v. Neeley*, 91 Pa. 26; *Halifax Union v. Wheelwright*, *supra*.

The paper being fair on its face, the burden of proof was on the defendant, to show affirmatively that the alteration was made after its execution and delivery.

Gist v. Gans, 30 Ark. 285; *Ohlem v. Toomer*, 27 Ark. 108; *Feig v. Meyers*, 103 Pa. 10; *Coz v. Palmer*, 1 McCrary, 481; *Hagan v. Merchants & Bankers Ins. Co.* 61 Iowa, 321; *Huntington v. Finch*, 8 Ohio St. 449; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

Messrs. Dan W. Jones and W. S. McCain, for defendant in error:

If promissory notes were only given by first-class business men who are skillful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people such a standard would be altogether too high, and would tend to encourage forgery by the protection it would give to forged paper.

Holmes v. Trumper, 23 Mich. 427, 7 Am. Rep. 661.

The courts have accepted and adopted the simple and sensible rule of *caveat emptor*. No man must purchase a piece of negotiable paper unless he knows that the holder is the lawful owner, or unless it is payable or indorsed to bearer.

Fordyce v. Kosminski, 49 Ark. 40; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; 1 Randolph, Com. Paper, § 187; *Burwell v. Orr*, 84 Ill. 465; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129; *Holmes v. Trumper*, *supra*; *Bruce v. Westcott*, 3 Barb. 374; *Goodman v. Eastman*, 4 N. H. 455; *Cronkhite v. Nebeker*, 81 Ind. 319, 42 Am. Rep. 127; *Simmons v. Atkinson & Lampton Co.* 69 Miss. 862; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808; *Burrows v. Klunk*, 3 L. R. A. 576, 70 Md. 451; Bigelow, Leading Cases on Notes & Bills, note 3, p. 573.

In *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 340, 23 L. ed. 559, the court says: "Where blanks exist in negotiable securities, delivered to another for use, the custody of the paper, under such circumstances, gives the custodian the right to fill the blanks; but it does not confer authority to make any addition to the terms of the note; and if any such of a material character, are made by such a party from whom the paper was received, it will avoid the note, even in the hands of an innocent holder."

Espy v. First Nat. Bank of Cincinnati, 85 U. S. 18 Wall. 604, 21 L. ed. 947.

When an agent undertakes to make a deal in his own name and on his own account with his principal, that moment, and for that transaction, he ceases to be an agent and becomes a mere stranger.

West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557, 24 L. ed. 490; *Morawetz, Priv. Corp.* § 525; *Washington Bank v. Lewis*, 22 Pick. 24.

It makes no difference that the forgery was committed by a confidential clerk of the depositor, who by his position had unusual facilities for perpetrating the fraud and imposing the forged paper upon the bank.

Frank v. Chemical Nat. Bank, 84 N. Y. 218, 38 Am. Rep. 501; *Belknap v. National Bank of North America*, 100 Mass. 876, 97 Am. Dec. 105; *Shipman v. Bank of State of New York*, 12 L. R. A. 791, 126 N. Y. 318; *Bank of Ireland v. Evans Charities*, 5 H. L. 389; *Young v. Grote*, 4 Bing. 253.

The check was made payable to Jordan, who indorsed it to one Frank H. Lathrop, a fictitious person, and the indorsement of Lathrop, through which plaintiff claims, was forged. If this forged indorsement be struck out, plaintiff has no title. There is no difference between the forgery of a fictitious person's name and that of a real person.

State v. Gibbs, 5 Ala. 759; *Shipman v. Bank of State of New York*, *supra*; *Armstrong v. Pomeroy Nat. Bank*, 6 L. R. A. 625, 46 Ohio St. 512.

Sanborn, Circuit Judge, delivered the opinion of the court:

There is a decided conflict of authorities over the question whether the maker of commercial paper or the innocent purchaser of it should bear the loss resulting from a fraudulent and unauthorized alteration in its terms or amount after its issuance and before its purchase, where the drawer or maker writes it so carelessly that the alteration may be made without exciting any suspicion of the forgery.

It is said that the drawer should suffer the loss, because his carelessness invites the forgery, on the principle that where one of two innocent parties must suffer from the fault of a third he shall sustain the loss who put it in the power of a third to occasion it. It is said that he should bear the loss, because when he issues the paper he represents to the commercial world that the draft or note is genuine, and because confidence in negotiable paper will be lessened if makers are allowed to repudiate alterations which they have invited. These are but some of the reasons assigned for charging the maker of the paper with the loss. They are good reasons for holding the maker of ne-

gotiable paper liable for any loss of which his carelessness is the proximate cause. If he carelessly intrusts checks or notes having blanks therein that were evidently intended to be filled, to a third party, who subsequently fills up and sells them, or if he intrusts to a confidential clerk the duty of filling the blanks in notes or drafts he has assigned or indorsed, and the clerk inserts excessive amounts, he cannot defend against such paper in the hands of an innocent purchaser, and the reasons referred to above fairly apply. In such cases the loss is the natural and probable consequence of his own negligence, a loss that he might have and ought to have foreseen, a loss the risk of which he fairly assumes by his own acts. But when the drawer has issued a draft or note complete in itself, but in such a form as to be easily altered without attracting attention, and it is afterwards fraudulently raised by a third person, without his knowledge or authority, and then bought by an innocent purchaser, it is not his negligence, but the crime of the forger, that is the proximate cause of the loss. Forgery and consequent loss cannot be said to be the natural or probable consequence of issuing a draft inartificially drawn. The presumption is that dealers in commercial paper are honest men, and not forgers, and that such paper will not be changed. It will not do to say that every one whose negligence invites another to commit a crime is liable to a third party for the loss the latter sustains thereby. One who, by carelessly leaving a pile of shavings near his house, invites another to commit the crime of arson that results in the burning of his neighbor's buildings, is not liable to his neighbor for that loss. The farmer who negligently turns his horse into the highway, and thereby invites a thief to steal it, does not thereby lose title to his horse when an innocent purchaser has bought him of the thief. Nor is there, in our opinion, any sound reason why the liability of the maker of a promissory note or bill of exchange, complete in itself when issued, but subsequently fraudulently raised without his knowledge or authority, should be measured by the facility with which a third person has committed the crime of forgery upon it, or why he should be held liable for the loss resulting from such a forgery. The altered contract is not his contract. His representation was not that the forged contract was his, but that the original contract was his, and the rule *caveat emptor* makes it the duty of the purchaser when he buys it, and not of the maker, to then see that it is genuine. To cite and attempt to distinguish the decisions upon this question would be a work of supererogation. The authorities have all been carefully reviewed, and the conclusion to which we have arrived has been reached in *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661, by *Mr. Justice Christianity*, with whom *Chief Justice Campbell* and *Justices Graves* and *Cooley* concurred; in *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67, by *Chief Justice Gray*, without dissent from any member of the supreme judicial court of Massachusetts; in *Burrows v. Klunk*, 70 Md. 451, 3 L. R. A. 576, in *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129; in *Forde v. Kosminski*, 49 Ark. 40; and in *Goodman*

v. Eastman, 4 N. H. 455; while the decisions in *Simmons v. Atkinson & Lampton Co.* 69 Miss. 862; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808, and *Angle v. Northwestern L. Ins. Co.* 92 U. S. 380, 340, 23 L. ed. 556, 559—are to the same effect. This question has been much discussed, and the authorities differ, but we think the better reasons, the most forcible and convincing opinions, and the marked trend of the later decisions support the view of the court below.

But it is said that this case is an exception to the decisions and the reasoning to which we have referred because this draft was raised by the confidential clerk and employé of the bank. The answer is that this was a transaction

between the bank on one side and Jordan, the clerk, as a purchaser of the draft, on the other. Whatever may have been their relations in other matters, in this they dealt at arm's length as vendor and purchaser. Moreover, it was not until after the draft had become a perfect instrument, had been signed by the cashier, and completely delivered to the purchaser, that it was raised. Certainly Jordan was not then acting for the bank, or in his capacity as its clerk. The bank did not employ or confide in him to remit or dispose of this draft after he had purchased it. He was then acting in his own behalf, and using his own property.

The judgment below is affirmed, with costs.

MARYLAND COURT OF APPEALS.

BALTIMORE BASE BALL & EXHIBITION CO. of Baltimore City, Appt.,

v.

John T. PICKETT.

(.....Md.....)

- 1. The ordinary skill, knowledge, and efficiency of base ball players is all that is required of a player under a contract of hiring for a definite time, which is silent as to the degree of skill to be possessed.**
- 2. A usage to affect a contract must be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform.**
- 3. A usage or custom for base-ball clubs to discharge a player on ten days' notice, if he is deficient in playing, cannot modify a special contract for a definite time,—especially when the player has no reciprocal right to cancel the contract.**
- 4. The amount to be recovered for unlawful discharge of an employee is the contract price less what may have been paid him, and also what he has earned or by due diligence might have earned during the time covered by the contract.**

(January 12, 1894.)

APPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiff in an action brought to recover damages for alleged breach of contract to pay plaintiff for playing ball for defendant during the season of 1892. *Affirmed.*

The facts are stated in the opinion.

Messrs. Rich & Bryan, for appellants:

That the usage and custom was proved by one witness only has been held by the highest authority to be no objection to its admissibility.

Robinson v. United States, 80 U. S. 18 Wall. 363, 20 L. ed. 653.

Where the usage of a particular trade or business is well established, it is as obligatory on the objects of its operation as a general law.

Patterson v. Crowther, 70 Md. 124.

The object of proving a general custom is not to contradict or change the contract made between the parties, but to interpret it to the court and jury as it was understood by the parties at the time it was made.

Hewitt v. John Week Lumber Co. 77 Wis. 556.

In *Metzner v. Bolton*, 9 Exch. 518, a salesman was employed for a year, and there was a usage of the trade to dismiss on three months' notice. The usage was held to modify the contract.

See also *Given v. Charron*, 15 Md. 502; *Lyon v. George*, 44 Md. 300; *Patterson v. Crowther*, *supra*; *Williams v. Woods*, 16 Md. 255; *Williams v. Gilman*, 3 Me. 276; *Smith v. Wilson*, 3 Barn. & Ad. 728; *Hewitt v. John Week Lumber Co.* *supra*.

As the custom was general, had been in existence as long as there had been such a thing as professional base-ball, and was observed by all professional base-ball clubs, it was not necessary to prove that the plaintiff had any knowledge of it. That knowledge will, if the jury find the custom to have been of such general and universal prevalence, be presumed in law.

Lyon v. George, 44 Md. 301; *Bank of Columbia v. Fitzhugh*, 1 Harr. & G. 248.

If it were necessary for the jury to find actual knowledge of this custom on the part of the plaintiff, they could infer such knowledge from the fact that he himself testified that he had been a professional base-ball player for eight or nine years, and had, among other clubs, played in the Philadelphia League Club in 1890.

Whenever any one accepts employment which requires the exercise of special skill or knowledge, he impliedly holds himself out as possessing and as agreeing to use that degree of skill which the employment demands.

Wood, Mast. & S. § 157; *Leatherberry v. Odell*, 7 Fed. Rep. 641; *Waugh v. Shunk*, 20 Pa. 130; *Jones, Bailm.* 91; 2 Kent. Com. 458; *Story, Bailm.* 231; *Parker v. Platt*, 74

NOTE.—On the effect of usage upon a contract, see, in connection with the above case, *notes to Newhall v. Appleton* (N. Y.) 3 L. R. A. 366; *Smith v. 22 L. R. A.*

Clews (N. Y.) 4 L. R. A. 393; *Mac Cusky v. Klosterman* (Or.) 10 L. R. A. 785; *Conestoga Cigar Co. v. Finke* (Pa.) 13 L. R. A. 434.

Ill. 430; *Lyon v. Pollard*, 87 U. S. 20 Wall. 403, 22 L. ed. 361.

On petition for reargument.

While it is clear that no custom can be proved which contradicts the express terms of a written contract, it is equally clear that evidence may be introduced "to add incidents" to a written contract, and to explain its meaning.

Humfrey v. Dale, 7 El. & Bl. 274.

To fall within the exception of repugnancy, the incident must be such as, if expressed in the written contract, would make it insensible or inconsistent.

Patterson v. Crouther, 70 Md. 180.

A custom, not only like the one at bar, to discharge for cause (*i. e.*, not being, in the opinion of the club's manager, efficient, where if the manager did not in good faith exercise that judgment the discharge would be wrongful, *Baltimore & O. R. Co. v. Brydon*, 65 Md. 198, 67 Am. Rep. 318), but even to discharge at will, would be admissible where the contract is for a year or other fixed period.

Smith, Mast. & S. *192; 1 *Addison*, Cont. 8th ed. *438; *Nicoll v. Greaves*, 33 L. J. C. P. 259; *Metzner v. Bolton*, 9 Exch. 517; *Parker v. Ibbetson*, 4 C. B. N. S. 346; *Bardwell v. Ziegler*, 3 Wash. 84; *Bank of Columbia v. Fitzhugh*, 1 Harr. & G. 239; *Halsey v. Brown*, 3 Day, 346; *Williams v. Woods*, 16 Md. 253; *Destrehan v. Louisiana Cypress Lumber Co.* 45 La. Ann. —.

Mr. John M. Gallagher for appellee.

Briscoe, J., delivered the opinion of the court:

This suit was brought for the alleged breach of a special contract of hiring. The contract was made and entered into by and between the Baltimore base ball club of the city of Baltimore, party of the first part and John T. Pickett of the city of Chicago party of the second part, and is in these words: That "the said party of the second part agrees to play ball for the party of the first part for the season of 1892, for the sum of three thousand (\$3,000) dollars, with five hundred dollars advanced on the contract; said sum of five hundred dollars (\$500), to be considered part of the said three thousand (\$3,000) dollars above stated. Salary payable first and fifteenth of each month; services to commence on the 26th of March, 1892, and end on October 31, 1892."

The appellee, the plaintiff below, entered upon the services and performed them until the 1st day of June, 1892, when he was discharged or released. He was paid five hundred dollars (\$500) advance money and also four payments on account of his salary. The grounds set up for his discharge were want of skill and ability. The judgment was for the plaintiff and the defendant has appealed.

At the trial there were ten exceptions reserved to the rejection by the court of evidence offered by the defendant, the third, ninth and tenth of which were abandoned at the hearing. There were also exceptions to the granting of the first, fourth, and fifth

prayers of the plaintiff and to the rejection of the first, third, sixth, and eighth prayers of the defendant, and to the instruction on the part of the court. These exceptions form the basis of this appeal and we will pass upon them in their regular order. There were two defenses relied upon by the appellant:

First, that the plaintiff did not exercise that degree of skill and efficiency required of professional base-ball players playing in the league or association to which defendant belonged, and was discharged for inefficiency.

Secondly, that there was a universal and well-known custom observed by all professional base-ball clubs, that the club shall have the right, on ten days' notice, to release any player who does not come up to the requirements of his position and play satisfactorily; that the defendant received the ten days' notice and was discharged.

It will be observed that the contract in this case was a special one, for a precise period, definite in its terms, and is simply an ordinary hiring under a special contract. It is entirely silent as to the degree of skill the plaintiff should possess in the business for which he was employed. In the words of the contract, "he was to play ball for the Baltimore base ball club, the party of the first part for the season of 1892." Now, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which they are employed. And as the contract provided for no higher degree of skill than this, none could be required. The supreme court of Pennsylvania lays down the doctrine to be, "where skill, as well as care, is required in performing the undertaking, if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, to perform it in a workmanlike manner. In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. Ordinary skill means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only of extraordinary endowments and capacities. *Waugh v. Shunk*, 20 Pa. 133; also, *Harmer v. Cornelius*, 5 C. B. N. S. 236; *Parker v. Platt*, 74 Ill. 432. This doctrine was fairly submitted to the jury by the first prayer of the plaintiff and the fourth prayer of the defendant, by which they were in substance told that if they found that the plaintiff did not possess and exercise the skill, knowledge, and efficiency possessed and exercised by other professional base-ball players of ordinary skill, knowledge, and efficiency, and that he was discharged for such reasons, then their verdict must be for the defendant. A large number of witnesses, who had been professional base-ball players for six or ten years, and who had played with the plaintiff, testified that they considered him a good player,

and that he played an average good game of ball.

We pass now to the second question in the case. The contention on the part of the appellant is that the contract was made subject to a usage or custom that the club had a right to cancel the contract and discharge the player on giving ten days' notice when the player is deficient in his playing. The contract is entirely silent upon this subject, and it is not admitted that the player had the reciprocal right to abandon the club, or to cancel the contract when he deemed it proper or right to do so. We have carefully examined the testimony and find a failure of proof to establish any usage. The evidence was manifestly too vague and unmeaning to warrant upon any principles the submission of any proposition based upon it. The plaintiff testified "that he had been playing professional base-ball for the past nine years; is familiar with the rules of the game, and had signed contracts for professional clubs; that he had never signed a contract with the ten days' clause; that he never even saw one, and knew of no custom by which a player could be discharged that way; that nothing was said about it when he signed. The authorities all hold that a usage to be admissible must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. *Foley v. Mason*, 6 Md. 51; *Second Nat. Bank of Baltimore v. Western Nat. Bank of Baltimore*, 51 Md. 128, 34 Am. Rep. 800; *Citizens Bank of Baltimore v. Grafflin*, 81 Md. 520, 1 Am. Rep. 66; *Patterson v. Crowther*, 70 Md. 125. But conceding that there was sufficient evidence of the custom and usage contended for by the appellant, we are clearly of the opinion that it was not admissible to vary the terms of this special contract. The contract, as we have said, is one for a definite term of service and binding on both parties. To admit the usage would not only destroy its mutuality, but vary its terms. The supreme court of Rhode Island, in a similar case to the one now under consideration, held that a "local usage cannot be considered a part of a contract when it contradicts that contract."

Justices Durfee and Halle, in delivering the opinion of the court, say, the contract and usage cannot stand together. Either the contract must prevail and make void the usage, or the usage must prevail and make void the contract. The contract described in this declaration is not a contract made with reference to the usage, but against it. The contract described is to labor for a year, but the usage terminates it at will. The contract is, by the very fact of its existence, a protest against the usage, for it ceases to be a special contract the moment that the usage is made part of it. A usage which annuls such a contract cannot be given in evidence, without subverting the well-settled rule, that usages inconsistent with a contract cannot be given in evidence to affect it. *Sweet v. Jenkins*, 1 R. I. 147, 36 Am. Dec. 242. And to the same effect is the case of *Peters v.*

22 L. R. A.

Staveley, court of queen's bench, where Chief Justice Cockburn holds that the contract being for one week certain, the custom, even if proved, could not control it. 15 L. T. N. S. 275; also *Smith v. Sheridan*, 32 N. Y. S. R. 23. The same rule has been established by this court in a number of cases. *Foley v. Mason*, and *Citizens Bank of Baltimore v. Grafflin*, *supra*; *Susquehanna Fertilizer Co. v. White*, 66 Md. 452, 59 Am. Rep. 186; *Patterson v. Crowther*, *supra*; *First Nat. Bank of Baltimore v. Taliaferro*, 72 Md. 165.

It follows then from this view of the case, that there was no error by the court in granting the plaintiff's fourth and fifth prayers, which were to the effect that there was no evidence of any usage by which the plaintiff could be discharged before the end of the contract period without sufficient cause, and the exclusion from the jury of all evidence offered to show the existence of such a usage. The first prayer of the defendant, relative to the existence of the usage, was properly rejected. The third, sixth, and eighth prayers of the defendant were properly rejected, for the reasons we have heretofore given. The first prayer granted on the part of the plaintiff was correct, and contained the law upon that branch of the case. We have examined all the exceptions, and discover no error of which the appellant has a right to complain.

The first, second, fifth, sixth, and seventh exceptions to the admission of evidence are substantially the same and present the question as to the degree of skill required of the plaintiff in the performance of his duty. The evidence was properly rejected because it tended to exact or to establish a higher degree of skill than that contemplated by the contract. The appellant was not a member of the national league at the time the contract was entered into on November 14, 1891, it did not become such until January, 1892. This testimony was, therefore, immaterial and irrelevant. The fourth exception was to the refusal of the court to allow the following question to be answered: "Can you tell whether or not there was any public complaint by the patrons of the manner in which Mr. Picket filled his position." It is unnecessary to pass upon the exception, as the witness afterwards substantially answered the question proposed, and the benefit of his answer. The remaining exception was to the instruction of the court as to the measure of damages. This prayer instructed the jury that if they found for the plaintiff he was entitled to recover the contract price, less such sums as may have been paid to him, and also less such sums as he earned or by the exercise of due diligence might have earned in the line of his business, during the remainder of the period covered by the contract. We think this was unexceptionable, and is the law laid down by this court in *Cumberland & P. R. Co. v. Slack*, 45 Md. 161. Finding no error and the whole case having been fairly submitted to the jury the judgment will be affirmed.

Judgment affirmed.

Rehearing denied.

MICHIGAN SUPREME COURT.

Gates L. ROSENTHAL, Relator,
v.
MUSKUGON CIRCUIT JUDGE.

(.....Mich.)

1. Credits shown by books of account and trial balances are not tangible property which can be made subject to levy under attachment by seizure of the books and papers, since these are not so intimately connected with the demands charged therein that their seizure is equivalent to the seizure of such demands.
2. Attorneys who have abused the process of the court by causing a writ of attachment known to them to be utterly void to issue for the purpose of obtaining custody of the books and private papers of the defendant for the purpose of founding subsequent proceedings upon them and for inquisitorial purposes, will be compelled to surrender such books and any copies containing evidence taken from such books and papers and to make proof that they have surrendered the whole so that it may not be used by them or any one else.
3. Mandamus will lie to compel a judge to set aside an order denying a motion to compel attorneys to surrender books and papers and copies made therefrom, obtained under an abuse of a writ of attachment, by its use as a search warrant for evidence.

(December 23, 1893.)

PETITION for a writ of mandamus to compel respondent to set aside an order denying relator's motion to compel the attorneys for plaintiff in the case of *Chett v. Rosenthal* to surrender copies of papers which they were alleged to have procured by an abuse of the process of court. *Granted.*

The facts sufficiently appear in the opinion.

Messrs. Bunker & Carpenter, for relator:

The books of account, trial balances and private papers of Rosenthal Bros. were not attachable under the laws of this state.

Thompson v. Thomas, 11 Mich. 376.

One who begins by attachment begins only an ordinary suit. It is a means designed to secure the creditor by the sequestration or holding of property to await the judgment, and out of the property so held the judgment is to be satisfied. In other respects a suit in attachment does not differ in any regard from any other suit. Any property subject to execution may be attached.

King v. Hubbell, 42 Mich. 602.

Books of account, trial balances and the private papers of individuals are not subject to levy on execution or attachment.

Drake, Attachm. 4th ed. § 249; *Freem. Executions*, §§ 110, 112; *Perry v. Big Rap-*

ids, 67 Mich. 146; *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544; *Bradford v. Gillespie*, 8 Dana, 67; *Oystead v. Shed*, 12 Mass. 506.

The plaintiffs could not have been benefited by attaching the books. There was no value in them *per se*. They could not be seized on attachment or sold on execution.

Stevens v. Gladding, 58 U. S. 17 How. 451, 15 L. ed. 156; *Stephens v. Cady*, 55 U. S. 14 How. 531, 14 L. ed. 529; *Banker v. Caldwell*, 8 Minn. 94; *People v. Wayne County Auditors*, 5 Mich. 233.

Such proceedings as we complain of here have been under the ban of the English common law since the days of the Stuarts.

Cooley, Const. Lim. 364-373.

Search warrants were never recognized by the common law as process which might be availed of by individuals in the course of civil proceedings or for the maintenance of any mere private right but their use was confined to the case of public transactions instituted and pursued for the suppression of crime and the detection and punishment of criminals.

Cooley, Const. Lim. p. 372, note 1; *Robinson v. Richardson*, 18 Gray, 456.

The creditor is entitled to seizure only in satisfaction of his debt. To that end he is not entitled to rummage through the books and private papers of the debtor in order to make evidence for himself or others.

Entick v. Carrington, 2 Wils. 275; *Boyd v. United States*, 116 U. S. 616-641, 29 L. ed. 746-754; *DeLafoile v. State*, 16 L. R. A. 500, 54 N. J. L. 881; *Hergman v. Dettlebach*, 11 How. Pr. 46.

Messrs. Brown & Lovelace for respondent.

Long, J., delivered the opinion of the court:

Relator is garnishee defendant in a cause pending in the Muskegon circuit court, in which Sam Rosenwald, Julius Rosenwald, and Julius Weil are plaintiffs, and Sol Rosenthal and Sam Rosenthal are the principal defendants. The principal cause was commenced by writ of attachment issued out of the circuit court, and the garnishee proceedings are based thereon. After the writ of garnishment was served, Bunker & Carpenter, as attorneys for the garnishee defendant, entered a motion in the cause for an order requiring Norris J. Brown and George S. Lovelace, attorneys for the plaintiffs in the original suit, to deliver up to defendant's counsel all copies taken by them, or either of them, of the books of account, trial balances, and private papers of the firm of Rosenthal Bros., composed of Sol and Sam Rosenthal, the principal defendants, and severally to make oath that, at the time of such delivery, such copies

NOTE.—The above decision strikingly shows the power of a court to prevent any advantage being taken of a party by wrongful use of process. While a precedent for the decision is cited the case is sufficiently novel to attract attention and we know of no mention of the subject in any law text-book or

treatise. Quite similar to it in many respects is the case of *Simmons Hardware Co. v. Walbel* (S. Dak.) 11 L. R. A. 267, in which a surrender of copies wrongfully obtained was ordered although in that case the copies had been obtained by collusion with an agent and not by use of process.

embraced all that said Brown & Lovelace, or either of them, believed existed, and that said Brown & Lovelace be severally restrained from using in any way the books and papers attached in the principal proceeding, or from disclosing their contents, or contents of the copies taken from them, for the purposes of this case, or for any other purpose whatever for the reasons: (1) Because the books of account, trial balances, and private papers are not attachable, under the laws of this state; (2) because said Brown & Lovelace who examined the attached books, trial balances, and papers, and true copies thereof were, and each of them was, guilty of an abuse of their powers and duties as officers of the court, and of the process of the court; (3) because said Brown & Lovelace used the process of the court for an unlawful purpose; (4) because the sheriff of the county exceeded his authority, and was guilty of an abuse of his powers and duties, in permitting said Brown & Lovelace to make an examination of the books and papers so attached, and to take copies therefrom; (5) because said examination was made, and said copies were taken, while said books, trial balances, and papers were in the possession of the sheriff of said county, who then held them under an authorized seizure by virtue of a writ of attachment then in his hands. This motion is based upon the testimony of Mr. Lovelace and of the sheriff, given in the case of *George B. Cluett et al. v. Gates L. Rosenthal*, garnishee of Sol and Sam Rosenthal, an abstract of which is filed in the cause, and upon an exhibit introduced in evidence in said last-named case, the same being a circular letter written by said Brown & Lovelace to the creditors of the firm of Rosenthal, Bros., and upon certain affidavits filed, and files and records in this cause. The motion was heard in the court below, and denied. Mandamus is asked to compel the court to set aside the order denying the motion, and to grant the order asked.

It appears that, prior to the issuing of any writ of attachment against Rosenthal Bros., they had executed a chattel mortgage to Gates L. Rosenthal, the garnishee defendant here. Proceedings were taken to foreclose that mortgage; and the stock of goods and other property which it covered, amounting to about \$30,000, were bid in by Gates L. Rosenthal who claimed, at the time attachment proceedings were commenced, to be in possession. Brown & Lovelace, having a claim in their hands not yet due, sued out a writ of attachment on said claim, placing it in the hands of the sheriff of the county, who entered the store where the properties were situate, and which Gates L. Rosenthal claimed to be in possession of, and seized and took into his possession certain moneys, books of account, paid and canceled checks, trial balances, and other books and papers. He took these books to the county jail, and there permitted Brown & Lovelace, who were plaintiffs' attorneys in the writ, to examine them, and to take copies from them. After this was done, the property so attached was returned to the store and the attachment proceedings discontinued. It is admitted by

Brown & Lovelace that they knew that this writ of attachment could not be sustained if a motion was made for its dissolution, as the action was brought upon a debt not yet due, and no sufficient showing had been made in the affidavit to sustain such a writ. Brown & Lovelace, having obtained certain facts from the examination of the books and papers of Rosenthal Bros., sued out a second writ of attachment in the circuit court for Muskegon county in favor of George B. Cluett against Rosenthal Bros., and caused a writ of garnishment to issue against Gates L. Rosenthal. That cause was heard in the circuit court, and is now pending in this court upon appeal. In that case, in order to establish the plaintiff's claim that Rosenthal Bros. had made a fraudulent mortgage, and to show that Gates L. Rosenthal had properties and effects in his hands belonging to the principal defendants, Mr. Lovelace was called as a witness, and was permitted to testify to certain facts which he found by an examination of these books and papers. Upon his cross-examination in that case, it appears that he took copies of such books and papers, including trial balances. It is for the surrender of such papers and copies so taken that this application was made to the court below.

In the *Cluett Case*, Mr. Lovelace testified fully as to what examination he made, and that after such examination he was in a position to make an affidavit under the law for the issuing of a writ of attachment. From Mr. Lovelace's testimony, it is quite apparent that Brown & Lovelace knew the first writ of attachment could not be sustained under the affidavit upon which it was based, and that the first writ was used for the purpose of getting evidence upon which to ground subsequent writs. No return was ever made to this first writ, but on the contrary the suit was discontinued, and the writ withheld, as soon as the evidence was obtained. It is true that Brown & Lovelace deny that the writ was issued for the purpose of getting this information, but, whether it was issued for that purpose or not, it was so used. In the order to show cause, the circuit judge makes a return in which he says that upon the trial of the *Cluett Case* an objection was made to the introduction in evidence of the contents of the books of Rosenthal Bros., but that such evidence was allowed, and that the jury in that cause found adversely to the relator; that in the present case the writ of attachment was sued out by Thomas C. Clark, as attorney for plaintiffs, and that Brown & Lovelace were thereafter substituted in his stead. It is further returned that it appears, upon a hearing of the motion, that the books and papers claimed to have been inspected were mortgaged by Sol and Sam Rosenthal to relator, as trustee for himself and other creditors, before said attachment, and which mortgage, if valid, was in force at the time said property was attached, and that relator had no rights or interests in the books and papers, except such as he obtained by said mortgage, and that such books and papers were the property of Sol and Sam Rosenthal, and constituted a part of a large amount of

property attached. The return further sets forth that, upon the hearing of the motion, relator made no showing that plaintiffs would use or attempt to use the evidence as to the contents of these books and papers upon the trial of said cause, wherein relator was interested, and that it did not appear that relator was entitled to the copies of the books and papers taken by Brown & Lovelace. From all the evidence the court determined that the writ of attachment was issued in good faith, and executed in good faith, and that there was no abuse of the process of the court, and that Brown & Lovelace ought not to be compelled to surrender such copies, or to make the oath asked.

The return nowhere denies that the mortgage had been foreclosed, and the property bid in by Gates L. Rosenthal. This fact appears from the testimony of Mr. Lovelace, and is nowhere contradicted. But it is assumed, not only that the mortgage is void, but that the sale was also void, and therefore relator had no right to possession, such assumption being based upon the facts obtained by the use of the first writ of attachment. We think there is conclusive evidence that the facts obtained by Brown & Lovelace are a part of the case, and the foundation of the case in hand. The only question involved is, Has there been an abuse of the process of the court? Can parties be permitted to take a writ of attachment, knowing it to be invalid and issued upon an affidavit confessedly defective, and attach property under it which is not subject to levy, and gain information or evidence upon which to base a proper writ, and sustain that writ by such means? It is said by counsel for plaintiffs in the writ, who appear here to defend the action, that it is an effort to have this evidence adjudged incompetent, and for this reason restrain its use, and thus anticipate a ruling of the court below thereon in advance of a trial, and without any showing that it will be offered. This is not the point in issue here, and does not reach the question involved. The claim is that the process of the court has been abused, in that a writ of attachment utterly void, and known to be void by the attorneys causing its issue, and who are officers of the court, has been used to obtain evidence for the purpose of founding subsequent proceedings upon, and for inquisitorial purposes; that, this being so, the evidence thus obtained is not competent for any purpose, and the parties having possession of any copies containing such evidence are bound to surrender them, and make proof that they have surrendered the whole thereof, so that it may not be used by them, or any one else; and that they have no right to the possession of such evidence. In this we think counsel for relator is correct. These books of account and trial balances are not property of such tangible character that they can be made subject to such levies. They may be evidences of debt, but their seizure is not the attaching or seizure of the debt itself. They are not so intimately connected with the demands charged therein that the seizure of the books is equivalent to the seizure of the demand, and there is no means by

which these demands can be transferred by a direct levy and sale. Freeman, Executions, § 112; *Com. v. Abell*, 6 J. J. Marsh. 476; *Thomas v. Thomas*, 2 A. K. Marsh. 430; *Wier v. Davis*, 4 Ala. 442; *Carlos v. Ansel*, 8 Ala. 900; *Horton v. Smith*, Id. 73, 42 Am. Dec. 628. In *Dart v. Woodhouse*, 40 Mich. 399, 29 Am. Rep. 544, it was held that a set of manuscript abstract books were not subject to levy and sale on execution. In *Perry v. Big Rapids*, 67 Mich. 146, it was held that "such abstract books have no intrinsic value, and are not taxable." In Drake on Attachment (4th ed. § 249), it is said: "Where property is of such a nature that an attachment of it would produce a sacrifice and great injury to the defendant, without benefiting the plaintiff, it is not attachable. Such is the rule in relation to defendant's private papers, or his books in which his accounts are kept. Much less would an attachment be considered to create a lien on the accounts contained in the books;" citing *Bradford v. Gillespie*, 8 Dana, 67. In *Dart v. Woodhouse*, *supra*, Mr. Justice Campbell said: "It would be very absurd to hold that books could be seized and sold on execution, which after the sale the purchaser could not use." It is conceded that these books and papers seized were not of any value, in themselves. Mr. Lovelace says they were not of much value, except as evidence. In *People v. Wayne County Auditors*, 5 Mich. 223, it was held that a levy on a warrant drawn by the board of auditors is not subject to levy on execution. In *Bradford v. Gillespie*, *supra*, it was held that a return on an attachment of, "Levied upon an account book, the property of defendant," will not authorize a judgment. As before stated, the real gist of the complaint here is not that property was levied upon which was not subject to levy, but the use which was made of the process of the court. It is seen that the attachment was void, and was levied upon property not subject to levy, yet the parties responsible for it—officers of the court—are permitted to use the evidence thus obtained. If the writ had been valid, and the property taken under it had been subject to levy, it was the duty of the sheriff "to safely keep the same to satisfy any judgment that may be received by the plaintiff in such attachment." How. Stat. § 7990. Instead of doing this, the writ was used as a search warrant for evidence, and, having obtained the evidence sought, the books were returned. Had the defendants been charged with a crime, it would have been necessary, in order to obtain a writ which would accomplish what was accomplished here, to show to the satisfaction of the court that probable cause existed, which showing must have been supported by oath or affirmation, the place particularly described, and a description of the property to be searched for or seized have been set forth with exact particularity. "Search warrants were never recognized by the common law as process which might be availed of by individuals in the course of criminal proceedings, or for the maintenance of any mere private rights; but their use was confined to the case of public transactions instituted and

pursued for the suppression of crime, and the detection and punishment of criminals." Cooley, Const. Lim. 6th ed. p. 878. Article 6, § 26, of our own state constitution, provides: "The person, houses, papers and possession of every person shall be secure from unreasonable searches or seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause supported by oath or affirmation." Here the parties were charged with no crime, yet upon a void process—one which the parties causing its issue confessedly knew to be void—a levy is made upon property not subject to seizure, and copies made thereof; and these copies are now held by these officers, and have actually been permitted to be used in one case as evidence, and in the present case are the foundation upon which the writ was issued. But one case has been called to our attention where such a proceeding has before been attempted. In *Hergman v. Detlebach*, 11 How. Pr. 46, it appears that a deputy sheriff, under an attachment, levied upon certain books, papers, letters, and correspondence of a partnership. It was held that under the New York statute the books of a partnership were subject to levy, but letters and correspondence were not among those authorized to be taken. It was said: "As the whole proceeding on the part of the deputy in examining the books and papers is grossly irregular, an order must be made that the regular books of account of the firm, and its notes, policies of insurance, and all other securities and vouchers, be safely kept by the sheriff under lock and key, without power on the part of such deputy or any other person, except the defendants, to look into or examine the same, except under the special order of the court, to be made on notice to the defendants." It was further said: "All other papers, of every name and description, taken by such deputy, and all translations or copies of such translations, if any, of the books, letters, vouchers, or papers, must be delivered up forthwith to the defendants' attorneys; and, to insure the same, such delivery must be made under an affidavit to be made by such deputy, by the plaintiffs, and their attorneys and counsel, that, at the time of such delivery, such copies embraced every translation or copy of such translation or copy of such original which the deponent knows of or believes, or has any reason to believe, exists; and the plaintiffs, and their attorneys, agents, and counselors, are hereby restrained from in any way using such original books and papers, or using or disclosing the contents of such copies, in any manner whatsoever, except by special order of the court. This order must be complied with forthwith." The process of courts of justice can never be used for inquisitorial purposes or for oppression, and such use be sustained. If such a practice should be countenanced, no man's private papers would be free from search or seizure.

The writ must be granted as prayed.

The other Justices concur.

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PEOPLE of the State of Michigan

v.

Michael BELLET, *Plff. in Err.*

(.....Mich.....)

The equal privileges or immunities of citizens are not violated by prohibiting the business of a barber on Sunday under greater penalties than those imposed upon other business, or because an exception is made as to those who conscientiously observe the seventh day of the week as the Sabbath, nor is such a statute invalid as class legislation.

(February 20, 1904.)

ERROR to the Recorder's Court of Detroit to review a judgment convicting defendant of unlawfully engaging in the business of a barber on Sunday. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. George F. Robinson for plaintiff in error.

Mr. A. A. Ellis, Atty. Gen., with *Messrs. Allan H. Fraser, Pros. Atty.,* and *Ormund F. Hunt, Asst. Pros. Atty.,* for defendant in error:

All Sunday laws are police regulations, and the prevention of a trespass is the invariable purpose of a police regulation. Therefore, it is unquestioned that noisy trades and amusements and other like disturbances, may be prohibited on that day in complete conformity with the limitations of police power.

State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 808.

But there is a constitutional reason why the prohibition of labor on Sunday should be extended to other than noisy trades and employments.

Tiedeman, Pol. Powers, pp. 181, 182; *Ex parte Newman*, 9 Cal. 520; *Ex parte Andrews*, 18 Cal. 678; *Ex parte Burke*, 59 Cal. 6. See also *Ex parte Koser*, 60 Cal. 177; *Shover v. State*, 10 Ark. 259.

Laws public in their object may extend to all citizens or be confined to particular classes.

Cooley, Const. Lim. 5th ed. pp. 482, 483; Story, Const. 5th ed. § 1961.

The 14th Amendment to the Constitution of the United States means that no person or class of persons shall be denied the same pro-

NOTE.—The constitutionality of a Sunday law is attacked in the above case on grounds somewhat different from those considered in *JUDFIND v. STATE*, post. 721. The question of class legislation or of equal privileges and immunities of citizens is here the basis of attack, but even the fact of discrimination in respect to penalties between barbers and other persons is held not to take the case out of the general rule, which upholds Sunday regulations.

As to what constitutes an unconstitutional discrimination between citizens, see *note* to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 579.

As to what constitutes Sunday labor which is prohibited, see *note* to *Quarles v. State* (Ark.) 14 L. R. A. 192.

tection of the laws which is enjoyed by other persons or other classes in the same place, and under like circumstances.

Missouri v. Lewis, 101 U. S. 81, 25 L. ed. 992.

The provision in the amendment just referred to does not prohibit the legislature from making laws applying only to certain classes or localities.

Slaughter-House Cases, 88 U. S. 16 Wall. 36, 21 L. ed. 894; *Strauder v. West Virginia*, 100 U. S. 803, 25 L. ed. 664.

The distinction between this kind of legislation and class legislation, so called, is very clearly stated by Judge Cooley in his work on Constitutional Limitations, at page 483.

Uniformity of laws is attained by their operation upon all persons in like situations.

Iowa Railroad Land Co. v. Soper, 39 Iowa, 112; *United States Exp. Co. v. Ellyson*, 28 Iowa, 870; *McAunich v. Mississippi & M. River R. Co.* 20 Iowa, 838; *Haskel v. Burlington*, 30 Iowa, 232; *Alexandria v. Dearmon*, 2 Sneed, 104; *Davis v. State*, 3 Lea, 376; *Brooks v. Hyde*, 87 Cal. 366; *People v. Judge of Twelfth Dist.* 17 Cal. 554. See also *Ex parte Smith* and *Ex parte Keating*, 38 Cal. 702; *Ex parte Burke*, 59 Cal. 6.

Cooley on Constitutional Limitations, 6th ed. page 584, says: "The Jew who is forced to respect the first day of the week when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief."

We have not found any decision in the state of Michigan which purports to show that it has ever been contended in this state that the above provision of the Michigan statutes, making exception in favor of those classes who observe the seventh day of the week, is unconstitutional.

Johns v. State, 78 Ind. 332, 41 Am. Rep. 577.

Is the work of a barber one of necessity? It has been held, both in England and this country, it is not.

Phillips v. Innes, 4 Clark & F. 234; *Com. v. Waldman*, 11 L. R. A. 563, 140 Pa. 89; *Com. v. Dextra*, 143 Mass. 28; *Com. v. Jacobus*, 1 Pa. Legal Gaz. Rep. 491.

Whether or not shaving is a work of necessity, the opening of barber shops as such are not necessary, within the meaning of the law; and if the legislature sees fit in its discretion to enact additional legislation in furtherance of the same design it may lawfully do so.

State v. Fernandez, 39 La. Ann. 538; *Com. v. Matthews*, 18 L. R. A. 761, 152 Pa. 166; *Merchants Wharf Boat Asso. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76; *People v. Moses*, 65 Hun, 161; *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *Lindenmuller v. People*, 33 Barb. 548.

The question of how far these restrictions should be carried is for the legislature, not for the courts.

Lieberman v. State, 26 Neb. 464.
23 L. R. A.

Montgomery, J., delivered the opinion of the court:

1. The respondent was convicted of a violation of the provisions of Act No. 148 of the Public Acts of 1893, and the sole question presented for our consideration is whether the act in question is constitutional. The act provides: "That it shall be unlawful for any person or persons to carry on or engage in the art or calling of hair cutting, shaving, hair dressing and shampooing, or in any work pertaining to the trade or business of a barber, on the first day of the week, commonly called Sunday, except such person or persons shall be employed to exercise such art or calling in relation to a deceased person on said day. Sec. 2: That it shall be unlawful for any such person or persons to keep open their shops or places of business aforesaid, on said first day of the week commonly called Sunday for any of the purposes mentioned in section one of this act: provided, however, that nothing in this act shall apply to persons who conscientiously believe the seventh day of the week should be observed as the Sabbath and who actually refrain from secular business on that day."

It is urged that the act is invalid because it conflicts with article 6 of section 32 of the Constitution of this state, which provides, among other things, that no person shall be deprived of life, liberty, or property without due process of law, and for the further reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws." It is conceded that the state, in the exercise of its police power, has the right to enact Sunday laws, and that it also has the right to provide for the regulation and restriction of those engaged in an employment which, in and of itself, may prove harmful to the community, such as the liquor traffic. But it is contended that the business of conducting a barber shop is not of this class, and that it is in the nature of class legislation to prohibit this business under more severe penalties than those provided for the conduct of other legitimate business on Sunday. We do not deem the act in question open to such objection. By class legislation, we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another, in like case, offending.

In Cooley on Constitutional Limitations (page 482), it is said: "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. They may embrace many subjects or one, and they may extend to all citizens, or be confined to particular classes, as minors or married women, bankers or traders, and the like. . . . The legislature may also deem it desirable

to prescribe peculiar rules for the several occupations, and to establish distinctions in the rights, obligations, duties, and capacities of citizens. The business of common carriers, for instance, or of bankers, may require special statutory regulations for the general benefit; and it may be matter of public policy to give laborers in one business a specific lien for their wages, when it would be impracticable or impolitic to do the same for persons engaged in some other employments. If the laws be otherwise unobjectionable, all that can be required, in these cases, is that they be general in their application to the class or locality to which they apply; and they are then public in character, and of their propriety and policy the legislature must judge." In *Lieberman v. State*, 26 Neb. 464, an ordinance of the city prohibited the keeping open of any business house, bank, store, saloon, or office, excepting telegraph offices, express offices, photograph galleries, railroad offices, telephone offices, hotels, restaurants, cigar stores, eating houses, ice-cream parlors, drug stores, etc. It was contended that the ordinance was open to the objection that it did not operate upon all citizens alike; that the respondent was compelled to close his place of business on Sunday, while drug stores, tobacco houses, and others in competition in business, were not required to do so. But the court held the act valid. In the present case it may have been the judgment of the legislature that those engaged in the particular calling were more likely to offend against the law of the state providing for Sunday closing than those engaged in other callings. If so, it became a question of policy as to whether a more severe penalty should not be provided for engaging in that particular business on Sunday than that inflicted upon others who refuse to cease from their labors one day in seven.

2. Another question which naturally presents itself, but which has not been discussed by respondent's counsel is whether the law is open to the objection that it is class legislation, for the reason that those who observe the seventh day of the week as the Sabbath are excepted from its provisions.

It has been held in one case *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 558, that such a provision is unconstitutional because it discriminates between religious sects. But we find that such an exception to the general statute of this state relative to the observance of Sunday has been in force since 1846. See How. Anno. Stat. § 2021. And while this question has never been directly passed upon, the validity of the act in question has been assumed in a large number of cases.

A similar question was raised in *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577, and it was held not to conflict with a provision of the constitution which reads: "The general assembly shall not grant to any citizen, or to any class of citizens, privileges or im-

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munities which, upon the same terms, shall not belong equally to all citizens." It was said: "The framers of the statute meant to leave it to the consciences and judgments of the citizens to choose between the first and seventh day of the week. One or the other of these days, they must refrain from common labor. Which it shall be is to be determined by their own consciences. It was not the purpose of the lawmakers to compel any class of conscientious persons to abstain from labor upon two days in every week." The supreme court of Ohio has gone so far as to hold that a statute which did not contain such an exception was for that reason unconstitutional. See *Cincinnati v. Rice*, 15 Ohio, 225; *Canton v. Nist*, 9 Ohio St. 439.

The better reason for maintaining the police power to prohibit citizens from engaging in secular pursuits on Sunday is the necessity of such regulation as a sanitary measure. As to those employments which are noiseless, and harmless in themselves, and conducted in a manner not calculated to offend those who, from religious scruples, observe Sunday as the Lord's day, this necessity appears to be the only valid source of legislative power; and this is based upon the fact that experience has demonstrated that one day's rest is requisite for the health of most individuals, and not all individuals possess the power to observe a day of rest of their own volition. As is well said by Mr. Tiedeman: "If the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly characteristic of the American nation, would ultimately prevent, not only the wage earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instincts of self-preservation, by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment and destroy this instinct. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed." Tiedeman, Pol. Powers, 181.

In *Cooley on Constitutional Limitations* (page 477), it is said: "It appears to us that, if the benefit of the individual is alone to be considered, the argument against the law which he may make who has already observed the first day of the week is unanswerable. The obligation to cease from secular pursuits on one day of the week does not discriminate either in his favor or against him."

We think the statute under consideration is within the police power of the state, and not in conflict with any express provision of the constitution, and that it does not conflict with the Fourteenth Amendment of the Constitution of the United States. It follows that the conviction should be affirmed, and the case remanded, with directions to the recorder to proceed to judgment.

The other Justices concur.

FLORIDA SUPREME COURT.

Arthur F. ODLIN, *Appt.*,

v.

Seth WOODRUFF, Tax Collector of Orange County.

(31 Fla. 100.)

If a tax collector seizes personal property to enforce a tax levied under an**Headnote by TAYLOR, J.****NOTE.—Injunction to restrain the collection of illegal taxes.***General doctrine against.*

Upon this question the courts are not harmonious in their opinions, which are to some extent irreconcilable.

Generally speaking relief is refused upon the ground that to grant it, except in extreme cases, would be an interference with the powers of government leading to grave and serious consequences, as stopping the collection of revenue without which no government can exist.

Injunction is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. *Bona parte v. Camden & A. R. Co. Baldw. 205, 218.*

The power to tax is vested in the sovereign authority of the state, no constitutional government can exist without it; its exercise is essential to the very existence of the state government. *Linton v. Athens, 53 Ga. 588.*

All regular governments subsist by means of taxes, which are assessed, levied, and collected under laws necessarily stringent and summary, in order to insure prompt payment. It is therefore obvious that the courts should not interfere, by injunction, with the regular working of these laws, unless an injury to the citizen will be thereby inflicted, for which he has no other adequate remedy. *Parmley v. St. Louis, 1 M. & S. R. Co. 8 Dill. 18.*

It does not belong to the jurisdiction of chancery, as a court of equity, to review or control the determination of supervision, but the review and correction of all errors, mistakes, and abuses in the exercise of the powers of subordinate public jurisdictions, and in the official acts of public officers, belong to the supreme court, and have always been a matter of legal and not of equitable cognizance. *Magee v. Cutler, 43 Barb. 239; Mooers v. Smedley, 6 Johns. Ch. 23, 31, 2 L. ed. 43, 44; Wiggins v. New York, 9 Paige, 16, 4 L. ed. 591; Heywood v. Buffalo, 14 N. Y. 534; Susquehanna Bank v. Broome County Suprs. 25 N. Y. 314.*

Equity cannot look into the proceedings of subordinate tribunals of special or local jurisdictions with a view to setting them aside if void at law, or for the purpose of staying or restraining such proceedings. *Thatcher v. Dusenbury, 9 How. Pr. 32; Bouton v. Brooklyn, 15 Barb. 375.*

The policy of the law is against the granting of an injunction to prevent the collection of taxes, the wheels of government being liable to be stopped thereby. *Messeck v. Columbia County Suprs. 60 Barb. 190.*

No court of equity will allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed and he has no adequate remedy by the ordinary processes of the law. *Dows v. Chicago, 78 U. S. 11 Wall. 108, 20 L. ed. 65; Milwaukee v. Koeffer, 116 U. S. 219, 29 L. ed. 612, 23 L. R. A.*

act that is unconstitutional, such seizure would be a trespass for the redress of which there is ample remedy at law. A court of equity has no jurisdiction to restrain a trespass upon personal property except in rare cases where the property has some peculiar intrinsic value to the owner that could not be compensated in money. The case of *Young v. Thomas, 17 Fla. 103*, involving the constitutionality of a license tax on lawyers, approvingly referred to.

(January 31, 1893.)

The court does not sit to correct errors or mistakes of law, and cannot attempt to prevent any more than will redress all wrongs. *Frost v. Flick, 1 Dak. 128.*

Judicial interference is, as a general rule, denied in the collection of state taxes. *Georgia Code, § 3868; Decker v. McGowan, 59 Ga. 805; Georgia Mut. L. Asso. v. McGowan, Id. 811.*

Its use rests in the sound discretion of the court. *Cutting v. Gilbert, 5 Blatchf. 259.*

Where the tax is assessed in the ordinary way, and unaccompanied by any circumstances of peculiar injury, relief will not lie, even though the act authorizing the tax be unconstitutional. *McCoy v. Chillicothe, 3 Ohio, 370, 17 Am. Dec. 607; Mechanics & T. Branch of State Bank v. Deboit, 1 Ohio St. 591; Exchange Bank of Columbus v. Hines, 3 Ohio St. 1.*

There can be no interference where the consequences would be only a trifle less serious and injurious by allowing the tax to be collected. *Harkness v. Board of Public Works, 1 McArth. 121.*

Where the law is constitutional although the powers under it may be irregular or erroneous, equity will not interfere by way of injunction, the remedy at law being complete. *Livingston v. Hollenbeck, 4 Barb. 9.*

If the assessment be illegal or unconstitutional, its payment cannot be enforced, and the plaintiff cannot anticipate his defense to a suit at law by application for injunction. *Blake v. Brooklyn, 26 Barb. 301.*

The same was the ruling of the court in *Hoboken Land & Imp. Co. v. Hoboken, 31 N. J. Eq. 462*, where the plaintiffs sought relief upon the ground that they were exempt under the Act of 1874 (Pub. Laws 1874, p. 402) although they did not deny liability to taxation as to other moneys.

But when relief was sought against the sale of real estate for delinquent taxes, the owner having sufficient personal property, the court granted an injunction. *Abbott v. Edgerton, 53 Ind. 198.*

So equity has interfered where the property was not subject to taxation. *Illinois Cent. R. Co. v. McLean County, 17 Ill. 261.*

Even to prevent the assessment and collection of a tax about to be levied under color of a public law. But in all such cases it is upon some peculiar ground of equity jurisdiction. *Hoagland v. Delaware Twp. 17 N. J. Eq. 108.*

Courts of equity, and particularly the federal courts, sitting in equity in the states, exercise great caution in interfering with the collection of revenues by the states, or their public or municipal agencies. *Union Pac. R. Co. v. Lincoln County, 2 Dill. 279.*

Foundation of jurisdiction.

The fundamental law of the land must be violated. *Linton v. Athens, 53 Ga. 588; Cummings v. Merchants Nat. Bank of Toledo, 101 U. S. 153, 25 L. ed. 908.*

The very groundwork of taxation must be affected. *Kaehler v. Dobberpuhl, 56 Wis. 480.*

APPEAL by plaintiff from a decree of the Circuit Court for Orange County in favor of defendant in an action brought to enjoin defendant from enforcing the collection of a license tax. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Arthur F. Odlin in *propria persona* for appellant.

Mr. William B. Lamar, Atty-Gen., for appellee.

Taylor, J., delivered the opinion of the court:

The fourteenth subdivision of section 9 of chapter 4010, Laws approved June 10, 1891, provides as follows: "All dentists and lawyers, practicing their profession in the state of Florida, shall pay to the tax collector, in the counties where their office is located, a license tax of ten dollars." The same section in express terms prohibits any person from engaging in

An established principle of taxation must have been violated so as to incur probable actual injustice. *Warden v. Fond du Lac County Supra.* 14 Wis. 618.

The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive of injunction. *Bonaparte v. Camden & A. R. Co. Baldw.* 205, 218.

It must be shown that the tax is not such an one as the duty of a citizen, defined and regulated by law, requires him to discharge. *Frost v. Flick,* 1 Dak. 128.

As in the case of an illegal discrimination. *Evansville Nat. Bank v. Britton,* 105 U. S. 822, 28 L. ed. 1053; *Hills v. National Albany Exch. Bank,* 105 U. S. 319, 28 L. ed. 1053; *Walling v. Michigan,* 116 U. S. 446, 29 L. ed. 601.

The danger of a substantial loss must be shown, without laches or fault upon the plaintiff's part. *Warden v. Fond du Lac County Supra.* *supra.*

The tax must be clearly illegal, or the powers of the tribunal clearly exceeded, or the taxpayer's rights violated, and there must be no other remedy. *Allegheny County Comrs. v. Union Min. Co. of Allegheny County,* 61 Md. 546; *Frost v. Flick, supra;* *McClure v. Owens,* 21 Iowa, 133.

Such proceedings must be shown to be against conscience. *Mann v. Onondaga Union Free School Dist. No. 2 Board of Education,* 53 How. Pr. 289; *Warden v. Fond du Lac County Supra.* 14 Wis. 618; *Missouri River Ft. S. & G. R. Co. v. Morris,* 7 Kan. 210, 231; *Mills v. Gleason,* 11 Wis. 470, 78 Am. Dec. 721. The reasons must be imperative. *Arnold v. Midletown,* 39 Conn. 401.

There must be the clearest grounds. *Dodd v. Hartford,* 25 Conn. 232.

The tax must be illegal and void. *Delphi v. Bowen,* 61 Ind. 29.

And such that the complainant ought not to be required to pay. *Conway v. Younklin,* 23 Iowa, 235; *Cook County v. Chicago, B. & Q. R. Co.* 85 Ill. 460; *Warden v. Fond du Lac County Supra.* *supra;* *Miltmore v. Rock County Supra,* 15 Wis. 10; *Bond v. Kenosha,* 17 Wis. 234.

The cases must not be ordinary but extraordinary. *Chicago, B. & Q. R. Co. v. Frary,* 22 Ill. 84.

They must be extreme. *Rowland v. First School Dist. of Weston,* 42 Conn. 30.

No matter whether the property to be protected be real or personal. *Id.*; *Waterbury Sav. Bank v. Lawler,* 46 Conn. 243.

Some special equities must be shown. *Greene v. Mumford, Simmons v. Mumford,* 5 R. I. 472, 78 Am. Dec. 79; *Sherman v. Leonard,* 10 R. I. 470; *St. Mary's Church v. Tripp,* 14 R. I. 810.

Clear legal or equitable rights and well grounded apprehension of immediate injury thereto must be shown. *Crawford v. Bradford,* 23 Fla. 404.

Practical operation of principles.

a. Recognized heads.

Every case must be brought within some of the recognized heads of equitable interference. *Montgomery v. Sayre,* 65 Ala. 564; *Alabama Gold Life Ins. Co. v. Lott,* 54 Ala. 499; *State Railroad Tax Cases,* 92 U. S. 575, 23 L. ed. 663; *Hannewinkle v. Georgetown,* 82 U. S. 15 Wall. 547, 21 L. ed. 231; *Shel-*

ton v. Platt, 139 U. S. 561, 35 L. ed. 274; *Union Pac. R. Co. v. Cheyenne,* 113 U. S. 516, 28 L. ed. 1008; *Crevier v. New York,* 12 Abb. Pr. N. S. 340; *Susquehanna Bank v. Broome County Supra.* 25 N. Y. 314; *Mann v. Onondaga Union Free School Dist. No. 2 Board of Education,* 53 How. Pr. 289; *Heywood v. Buffalo,* 14 N. Y. 534; *Messeck v. Columbia County Supra.* 50 Barb. 190,—where it was sought to restrain the tax and prevent a multiplicity of suits but proof failed; *Hoboken Land & Imp. Co. v. Hoboken,* 81 N. J. Eq. 461; *Hoagland v. Delaware Twp.* 17 N. J. Eq. 103,—where relief was refused, the questions being purely those of law and within the jurisdiction of the courts of law; *Murphy v. Harbison,* 29 Ark. 240; *Floyd v. Gilbreath,* 27 Ark. 675,—a tax void as contrary to the Act of March 27, 1871; *Clayton v. Lafargue,* 23 Ark. 137; *Elyton Land Co. v. Ayres,* 62 Ala. 412,—no matter whether it be a state, county, or municipal tax; *Phelps v. Watertown,* 61 Barb. 121; *Butts v. Rochester,* cited in 61 Barb. 121, 123; *Wiggin v. New York,* 9 Paige, 16, 4 L. ed. 591; *Livingston v. Hollenbeck,* 4 Barb. 10; *Blake v. Brooklyn,* 26 Barb. 301; *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 31 N. Y. 91; *Mutual Ben. L. Ins. Co. v. New York County Supra.* 20 How. Pr. 417; *Moore v. Smedley,* 6 Johns. Ch. 23, 2 L. ed. 432; *Van Doren v. New York,* 9 Paige, 388, 4 L. ed. 743; *Brooklyn v. Meserole,* 26 Wend. 132, New York L. Ins. Co. v. New York City Supra. 4 Duer, 192; *Crawford v. Bradford,* 23 Fla. 404; *Greene v. Mumford, Simmons v. Mumford,* 5 R. I. 472, 78 Am. Dec. 79; *Sherman v. Leonard,* 10 R. I. 470; *St. Mary's Church v. Tripp,* 14 R. I. 810; *Dows v. Chicago,* 78 U. S. 11 Wall. 108, 30 L. ed. 65; *Williams v. Grant County Ct.* 26 W. Va. 428, 58 Am. Rep. 94; *Hannewinkle v. Georgetown, supra;* *Durant v. Eaton,* 96 Mass. 499; *Loud v. Charlestown,* 99 Mass. 208; *Whiting v. Boston,* 106 Mass. 89; *Hunnewell v. Charlestown, Id.* 350; *Rockingham Ten Cent Sav. Bank v. Portsmouth,* 52 N. H. 17; *Deane v. Todd,* 23 Mo. 80; *Sayre v. Tompkins,* 23 Mo. 443; *Barrow v. Davis,* 46 Mo. 394; *McPike v. Pew,* 48 Mo. 525; *Baltimore v. Baltimore & O. R. Co.* 21 Md. 560; *Douglass v. Harrisville,* 9 W. Va. 162, 27 Am. Rep. 548; *Corrothers v. Clinton Dist. Board of Education of Monongalia County,* 16 W. Va. 527; *Tome v. Merchants & M. Permanent Bldg. & Loan Co.* 34 Md. 14; *Byran v. Detroit,* 50 Mich. 56; *McDonald v. Murphree,* 45 Miss. 705; *Swinney v. Beard,* 71 Ill. 27; *Cook County v. Chicago, B. & Q. R. Co.* 85 Ill. 460; *McClung v. Livesay,* 7 W. Va. 333; *Burnett v. Whitesides,* 13 Cal. 156; *Clarke v. Ganz,* 21 Minn. 387.

There must be attending circumstances sufficient to give the court jurisdiction of the subject or of the parties. The mere existence of a trespass not being sufficient, other facts must exist. *McCoy v. Chillicothe,* 3 Ohio, 370, 17 Am. Dec. 607.

Mere oppressive, onerous, or unjust taxation is not enough, the law must infringe upon legitimate authority of the union or violate a constitutional right. *Kirtland v. Hotchkiss,* 100 U. S. 491, 25 L. ed. 558.

The remedy by way of injunction against the collection of an illegal tax is not taken away by the provisions of the Kentucky Code. *Gates v. Barrett,* 79 Ky. 286.

The general rule that equity will not interfere is

any business or profession mentioned therein unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount therein provided; and further provides that counties, incorporated cities, and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper when the business, profession, or occupation shall be engaged in within their bound-

aries, provided, that such further tax so imposed shall not exceed fifty per cent of the state tax. Section 10 of the same chapter provides that if any person, firm, or association shall carry on or conduct any business or profession for which a license is required, without first obtaining such license, he shall, except in such cases as are otherwise provided for in said act, be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not

the case of an illegal tax unless some recognized head of equity jurisdiction is shown, applies only to taxes imposed by the sovereign alone. Alexandria Canal, R. & Bridge Co. v. District of Columbia, 1 Mackey, 217.

Where the claimant sought relief upon the ground that less was demanded than the due proportion of the public revenue, relief was refused. *Miltimore v. Rock County Suprs.* 15 Wis. 10.

The distinction between municipal and state taxes, is, the former may be enjoined, but the latter will not except under special circumstances. *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25.

In *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210, 231, it was held that equity would not interfere by way of injunction with the collection of a tax that is merely voidable, unless strong grounds for interference exist.

Where law and equity are administered separately, and by different modes of procedure, an injunction will not lie to prevent the collection of even a void tax, unless the case presents some peculiar grounds for equity jurisdiction, as the prevention of a multiplicity of suits, or the removal of a cloud upon title, or when an action at law cannot afford an adequate remedy. *Delphi v. Bowen*, 61 Ind. 29.

b. Mere illegality, irregularity, etc.

Equity will not as a general rule interfere with the collection of a tax by way of injunction merely because of its illegality or unconstitutionality. *Alexander v. Dennison*, 2 McArthur, 562; *Harkness v. Board of Public Works*, 1 McArthur, 121; *Heywood v. Buffalo*, 14 N. Y. 534; *Mann v. Onondaga Union Free School Dist. No. 2 Board of Education*, 53 How. Pr. 289; *Hanlon v. Westchester County Suprs.* 57 Barb. 383; *Dorn v. Fox*, 61 N. Y. 264; *Campbell v. Seaman*, 63 N. Y. 582, 20 Am. Rep. 567; *Susquehanna Bank v. Broome County Suprs.* 25 N. Y. 812; *Selma Bldg. & Loan Assn. v. Morgan*, 57 Ala. 33,—the case of a tax remitted by act of the general assembly, with no grounds of equitable relief shown; *Oliver v. Memphis & Little Rock R. Co.* 30 Ark. 123; *Montgomery v. Sayre*, 65 Ala. 564; *Elyton Land Co. v. Ayres*, 62 Ala. 413,—no matter whether the tax be state, county, or municipal; *Greene v. Mumford*, *Stimmons v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79; *Sherman v. Leonard*, 10 R. I. 470; *St. Mary's Church v. Tripp*, 14 R. I. 310; *Brodhead v. Milwaukee*, *Porter v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Youngblood v. Sexton*, 32 Mich. 403, 20 Am. Rep. 654; *Dows v. Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *Williams v. Grant County Ct.* 26 W. Va. 488, 53 Am. Rep. 94; *Hannewinkle v. Georgetown*, 82 U. S. 15 Wall. 548, 21 L. ed. 232; *Shelton v. Platt*, 139 U. S. 598, 35 L. ed. 275; *Union Pac. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. ed. 1098; *Durant v. Eaton*, 96 Mass. 469; *Loud v. Charlestown*, 99 Mass. 308; *Whiting v. Boston*, 106 Mass. 89; *Hunnell v. Charlestown*, 106 Mass. 360; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N. H. 17; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Baltimore v. Baltimore & O. R. Co.* 21 Md. 50; *McCoy v. Chillicothe*, 3 Ohio, 370, 17 Am. Rep. 607; *Douglas v. Harrisville*, 9 W. Va. 163, 27 Am. Rep. 22 L. R. A.

548; *Corrothers v. Clinton Dist. Board of Education of Monongalia County*, 16 W. Va. 527; *Christie v. Malden*, 23 W. Va. 667; *Brown v. Concord*, 56 N. H. 875; *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500; *McClung v. Livesay*, 7 W. Va. 383,—upon the ground of public policy; *Sewall v. St. Paul*, 20 Minn. 511, 525.

Where the tax is merely irregular or erroneous equity will not, as a general rule, interfere by way of injunction with the collection of such tax. *Montgomery v. Sayre*, 65 Ala. 564; *Kellogg v. Oshkosh*, 14 Wis. 623; *West v. Ballard*, 38 Wis. 168,—a case of over assessment; *Dean v. Gleason*, 16 Wis. 1,—a case of a tax invalid through defects; *Mills v. Gleason*, 11 Wis. 470, 78 Am. Dec. 721; *Burlington & M. River R. Co. v. Saline County Comrs.* 12 Neb. 396; *Ryan v. Leavenworth County Comrs.* 30 Kan. 185; *Kansas Pac. R. Co. v. Russell*, 8 Kan. 558; *Adams v. Beman*, 10 Kan. 37; *Parker v. Chalias*, 9 Kan. 155; *Smith v. Leavenworth County Comrs.* Id. 296; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Hallenbeck v. Hahn*, 2 Neb. 377; *Hannewinkle v. Georgetown*, 82 U. S. 15 Wall. 547, 21 L. ed. 201; *Livingston v. Hollenbeck*, 4 Barb. 10; *Van Doren v. New York, Striker v. New York, Pearson v. New York*, 9 Paige, 388, 4 L. ed. 743; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Moore v. Smedley*, 6 Johns. Ch. 28, 2 L. ed. 43; *Brooklyn v. Meserole*, 26 Wend. 132; *Heywood v. Buffalo*, 14 N. Y. 534; *Liebstein v. Newark*, 24 N. J. Eq. 200, *Dusenbury v. Newark*, 25 N. J. Eq. 236; *Sleeper v. Bullen*, 6 Kan. 300; *Ottawa v. Barney*, 10 Kan. 270; *Lawrence v. Killam*, 11 Kan. 490; *Chalias v. Atchison County Comrs.* 15 Kan. 49; *Cedar Rapids & M. River R. Co. & The I. R. Co. v. Carroll County*, 41 Iowa, 153; *S. C. & St. P. R. Co. v. Osceola County*, 45 Iowa, 168; *Powers v. Bowman*, 53 Iowa, 359; *Iowa Railroad Land Co. v. Sac County*, 39 Iowa, 124; *Iowa Railroad Land Co. v. Carroll County*, 39 Iowa, 151; *Conway v. Younklin*, 23 Iowa, 206; *Ricketts v. Spraker*, 77 Ind. 571; *Delphi v. Brown*, 61 Ind. 29; *Evans v. Gage*, 1 Ill. App. 202; *State Railroad Tax Cases*, 22 U. S. 575, 613, 23 L. ed. 663, 673; *Huck v. Chicago & A. R. Co.* 86 Ill. 352; *Du Page County Suprs. v. Jenks*, 65 Ill. 275; *Metz v. Anderson*, 23 Ill. 463; *Jones v. Summer*, 27 Ind. 510,—upon the ground of public policy and want of equity jurisdiction; *McBride v. Chicago*, 22 Ill. 574,—to the same effect; *Center & W. Gravel Road Co. v. Black*, 32 Ind. 468,—where the burden is imposed by law; *Traders Ins. Co. v. Farwell*, 102 Ill. 413,—mere error in judgment, or in deduction, in the absence of fraud; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Du Page County Suprs. v. Jenks*, *supra*; *Merritt v. Farris*, 22 Ill. 303; *Munson v. Minor*, Id. 504; *McBride v. Chicago*, Id. 574; *Chicago, B. & Q. R. Co. v. Frary*, Id. 34; *Finnegan v. Ferdinandina*, 15 Fla. 379, 21 Am. Rep. 292; *King v. Gwynn*, 14 Fla. 32; *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210; *Frost v. Flick*, 1 Dak. 128,—as equity does not sit to correct errors or mistakes of law; *McClure v. Owens*, 21 Iowa, 133; *LeRoy v. New York*, 4 Johns. Ch. 354, 1 L. ed. 806; *Clayton v. Lafarge*, 23 Ark. 137; *Chicago, B. & Q. R. Co. v. Siders*, *supra*; *Moore v. Wayman*, 107 Ill. 195; *Harrison v. Vines*, 46 Tex. 15,—a case of mere misdescription in the tax roll; *Dodd v. Hartford*, 23 Conn. 13; *Albany & B. Min. Co. v. Auditor General*, 16 Vt. 226; *L. J. 451*; *Munson v. Miller*, 66 Ill.

more than double the amount required for such license. And the latter section provides further that the payment of all license taxes may be enforced by the seizure and sale of property by the collector. The same chapter provides also for a fee of twenty-five cents to the county judge for the issuance of the li-

cense. The appellant, who is a lawyer, having neglected and refused to pay the license tax prescribed by this statute to be paid by all persons engaging in the practice of his profession, had his personal property seized and levied upon by the appellee, as tax collector for the purpose of enforcing its payment. The

880; *Greene v. Mumford*, 5 R. I. 472, 78 Am. Dec. 79; *Dows v. Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591; *Messeck v. Columbia County Suprs.* 50 Barb. 190; *Williams v. Grant County Court*, 26 W. Va. 488, 53 Am. Rep. 94; *Durant v. Eaton*, 96 Mass. 499; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Hunnell v. Charlestown*, Id. 350; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N. H. 17; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 448; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 585; *Baltimore v. Baltimore & O. R. Co.* 21 Md. 50; *Kelgwin v. Hamilton Twp. Drainage Comrs.* 115 Ill. 347; *Houston & T. C. R. Co. v. Presidio County*, 53 Tex. 518,—where proper steps to refer to the board had not been taken; *Christie v. Malden*, 28 W. Va. 697; *Sherman v. Leonard*, 10 R. I. 499.—a case of improper assessment; *Hagaman v. Cloud County Comrs.* 19 Kan. 394; *Gage v. Evans*, 90 Ill. 569; *Vieley v. Thompson*, 44 Ill. 13; *McBride v. Chicago*, 22 Ill. 574; *Deming v. James*, 72 Ill. 78; *George v. Dean*, 47 Tex. 73.—a case of misdescription; *Burt v. Wadsworth*, 39 Mich. 129; *Truesdell's App.* 58 Pa. 148; *Albany & B. Min. Co. v. Auditor General*, 37 Mich. 391; *Stoddert v. Ward*, 81 Md. 562, 100 Am. Dec. 53; *Allegheny County Comrs. v. Allegheny County Union Min. Co.* 61 Md. 545; *O'Neal v. Virginia & M. Bridge Co.* 18 Md. 1, 79 Am. Dec. 699,—a case of error in the corporation's name; *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500; *Coulson v. Harris*, 43 Miss. 728,—an excessive tax; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602,—an excessive tax upon capital stock of railroad; *Swinney v. Beard*, 71 Ill. 27; *Sewall v. St. Paul*, 20 Minn. 511, 525; *Challiss v. Atchison County Comrs.* 15 Kan. 49; *Stebbins v. Challiss*, 15 Kan. 55; *Lawrence v. Killan*, 11 Kan. 499.

c. *Adequate remedy at law.*

Relief will be refused where there is adequate remedy at law—*Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499,—a case of taxation of credits secured by mortgage of taxable property, as not contrary to the constitution; *Thurston v. Elmira*, 10 Abb. Pr. N. S. 119; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N. H. 17; *Brooks v. Howland*, 58 N. H. 98; *Brown v. Concord*, 56 N. H. 375; *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161,—money paid bona fide or under protest; *Chicago & N. W. R. Co. v. Fort Howard*, 21 Wis. 44, 91 Am. Dec. 458; *Adsl v. Lieb*, 76 Ill. 198,—an increased valuation by state board of equalization upon assessment of county assessors already too high; *Wilson v. New York*, 4 R. D. Smith, 675,—where plaintiff was taxed in a state whereof he was not a resident; *Brewer v. Springfield*, 97 Mass. 152,—a drainage tax imposed under the Statute of 1863, chap. 107; *Harkness v. Board of Public Works*, 1 McArthur, 121; *Cutting v. Gilbert*, 5 Blatchf. 259; *Le Roy v. New York*, 4 Johns. Cas. 352, 1 L. ed. 865; *Pierpont v. Fowle*, 2 Woodb. & M. 29; *Horsburg v. Baker*, 20 U. S. 1 Pet. 236, 7 L. ed. 127; *McKay v. Carrington*, 1 McLean, 62; *Russell v. Clark*, 11 U. S. 7 Cranch, 69, 3 L. ed. 271; *Shelton v. Platt*, 139 U. S. 593, 35 L. ed. 275; *Bonaparte v. Camden & A. R. Co. Baldw.* 205; *Chemical Bank v. New York*, 12 How. Pr. 476,—a tax upon bank surplus funds and United States stock wherein invested; *Messeck v. Columbia County Suprs.* 50 Barb. 190; *Livingston v. Hollenbeck*, 4 Barb. 9; *Wiggin v. New York*, 9 Paige, 18, 4 L. ed. 591; *Hoboken Land & Imp. Co. v. Hoboken*, 81 N. J. Eq. 461,—where the question of the taxability of annexed territory was

involved, the fact that many taxpayers were affected not affording jurisdiction; *Hoagland v. Delaware Twp.* 17 N. J. Eq. 103; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Hunnell v. Charlestown*, Id. 350; *Hagenbuch v. Howard*, 34 Mich. 1; *Selma Bldg. & Loan Assn. v. Morgan*, 57 Ala. 33,—the case of a tax remitted by act of the general assembly; *Cedar Rapids & M. River R. Co. & The I. R. L. Co. v. Carroll*, 41 Iowa, 153; *Iowa Railroad Land Co. v. Sac County*, 39 Iowa, 124; *Iowa Railroad Land Co. v. Carroll County*, Id. 151; *Ricketts v. Spraker*, 77 Ind. 371; *Hume v. Little Flat Rock Drain. Assn.* 72 Ind. 499; *Houk v. Barthold*, 78 Ind. 21; *Grusenmeyer v. Loganport*, 76 Ind. 549; *Union Trust Co. v. Weber*, 96 Ill. 344; *Peoria v. Kidder*, 23 Ill. 351; *Chicago, B. & Q. R. Co. v. Frary*, 22 Ill. 84; *Burnes v. Atchison*, 2 Kan. 454.—a case of a municipal tax to pay interest upon bonds issued for railroad stock and a tax levied for street improvements in addition to one levied for general city revenue; *Wilkerson v. Walters*, 1 Idaho, 564; *Frost v. Flick*, 1 Dak. 126,—irregularity or error in assessment; *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243; *Arnold v. Middletown*, 39 Conn. 401,—an alleged irregular and illegal tax assessed without notice; *Dodd v. Hartford*, 25 Conn. 222,—a case of city tax for public expenses upon personal property; *Bucknall v. Story*, 35 Cal. 67; *De Witt v. Hays*, 2 Cal. 469, 56 Am. Dec. 833,—a wharfage tax; *Burr v. Hunt*, 18 Cal. 307; *Robinson v. Gaar*, 6 Cal. 275; *Berri v. Patch*, 12 Cal. 299, 300,—where it was not shown that the county collector could not respond in damages; *Weber v. San Francisco*, 1 Cal. 455; *Hardenburgh v. Kidd*, 10 Cal. 403; *Ritter v. Patch*, 12 Cal. 298; *Merrill v. Gorham*, 6 Cal. 41; *Murphy v. Harbison*, 29 Ark. 340; *Floyd v. Gilbreath*, 27 Ark. 675; *Cutting v. Gilbert*, 5 Blatchf. 259; *Western R. Co. v. Nolan*, 48 N. Y. 518; *Sheldon v. Centre School Dist.* 26 Conn. 224; *Chamblee v. Tribble*, 23 S. C. 70; *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1,—case of an unconstitutional tax for the recovery of which an adequate remedy was provided by statute; *Mechanics & T. Branch of State Bank v. Debolt*, 1 Ohio St. 591,—where relief was refused against a tax imposed under Ohio Stat. 1851, taxing banks and bank stock as other property; *Kelgwin v. Hamilton Twp. Drainage Comrs.* 115 Ill. 347; *Renwick v. Hall*, 84 Ill. 162, *Osborn v. People*, 103 Ill. 424; *Alderman v. School Directors*, 91 Ill. 179; *DuPage County Suprs. v. Jenks*, 65 Ill. 275; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Gage v. Evans*, 90 Ill. 569; *Swinney v. Beard*, 71 Ill. 27; *Nunda v. Chrystal Lake*, 79 Ill. 314; *Cook County v. Chicago, B. & Q. R. Co.* 35 Ill. 468; *Johnson v. Roberts*, 102 Ill. 655; *Felsenthal v. Johnson*, 104 Ill. 21; *Peoria v. Kidder*, 23 Ill. 351; *McBride v. Chicago*, 22 Ill. 574; *Greene v. Mumford*, 5 R. I. 472, 78 Am. Dec. 79,—a case of improper assessment; *Sherman v. Leonard*, 10 R. I. 499,—a similar case; *Byram v. Detroit*, 50 Mich. 56,—a case of void state improvement assessments with remedy by means of reassessment. *Miller v. Gorman*, 38 Pa. 309; *McPike v. Pew*, 48 Mo. 525,—the officer seizing being a mere trespasser; *Staines v. Franklin County*, 48 Mo. 167, 8 Am. Rep. 87,—a county court tax for construction of a county road; *Scribner v. Allen*, 12 Minn. 148; *Dunham v. Miller*, 75 Ill. 379,—where the tax was paid; *Archer v. Terre Haute & I. R. Co.* 103 Ill. 493,—a tax due upon capital stock acquired right of way of railroad, as successor to another road; *Conway v. Waverly Twp. Board*, 15 Mich. 257.

appellant thereupon filed his bill in equity in the circuit court of Orange county against the appellee, as tax collector of said county, alleging therein that he was a member of the bar of said circuit court, and had been such member since the 31st day of December, 1885, on which day he was granted a license to prac-

tice the profession of law by said circuit court, and that ever since then he has continued in the practice of said profession in the various courts of this state, and has an office for such practice in the city of Orlando.

The bill assails the foregoing statute as being unconstitutional in so far as it affects the

If the tax has been illegally imposed or there is a valid objection upon the face of the proceeding, there is an adequate remedy at law and equity will not interfere. *De Witt v. Hays*, 3 Cal. 469, 56 Am. Dec. 352; *Robinson v. Gaar*, 6 Cal. 275; *Merrill v. Gorham*, 6 Cal. 41.

Under the Nebraska laws there is a complete remedy at law before the county board of equalization, and relief in equity is denied. *Burlington & M. River R. Co. v. Seward County Comrs.* 10 Neb. 211.

A remedy prescribed by law must be followed. *O'Neal v. Virginia & M. Bridge Co.* 18 Md. 1, 79 Am. Dec. 699; *Deane v. Todd*, 22 Mo. 90; *Hughes v. Kline*, 30 Pa. 227.

Yet in a proper case it will be granted independent of statutory remedy. *Corrothers v. Clinton Dist. Board of Education of Monongalia County*, 16 W. Va. 527.

But equity will assume jurisdiction when both parties consent to leave the case to its decision, even though there may be a complete remedy at law. *Modus et conventio vincunt legem*. *Bank of Utica v. Utica*, 4 Paige, 389, 3 L. ed. 487, 27 Am. Dec. 71.

d. Necessity of payment, etc., of tax due.

Where the relief is sought by reason of the irregularity or erroneousness of the assessment, or its excessiveness, the court will refuse to interfere except the amount actually due and owing be first paid or tendered, it being one of the maxims of equity that he who seeks equity must do equity. *Huntington v. Palmer*, 7 Sawy. 355; *German Nat. Bank of Chicago v. Kimball*, 103 U. S. 732, 23 L. ed. 469; *Pelton v. Commercial Nat. Bank of Cleveland*, 101 U. S. 143, 25 L. ed. 901.—a case of over valuation of mortgage capital; *Tallasee Mfg. Co. v. Spigener*, 49 Ala. 292; *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *Whittaker v. Janesville*, 38 Wis. 76; *Kaehler v. Dobberpuhl*, 56 Wis. 490; *Kellorg v. Oshkosh*, 14 Wis. 624; *Myrick v. LaCrosse*, 17 Wis. 442; *Bond v. Kenosha*, 17 Wis. 234; *Hersey v. Milwaukee County Suprs.* 16 Wis. 146; *Warden v. Fond du Lac County Suprs.* 14 Wis. 618; *Multimore v. Rock County Suprs.* 15 Wis. 10; *Hallenbeck v. Hahn*, 2 Neb. 377; *Burlington & M. River R. Co. v. York County Comrs.* 7 Neb. 487, 496; *Iler v. Colson*, 8 Neb. 331.—where relief was sought by purchaser under foreclosure sale against tax-sale purchaser; *Wood v. Helmer*, 10 Neb. 65; *Hunt v. Easterday*, Id. 165; *Miller v. Madden*, 35 Kan. 455; *Dudley v. Gilmore*, Id. 555; *Franz v. Krebs*, 41 Kan. 223; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 693; *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25; *Lawrence v. Killam*, 11 Kan. 499; *Ottawa v. Barney*, 10 Kan. 270; *Smith v. Leavenworth County Comrs.* 9 Kan. 236; *Leavenworth v. Norton*, 1 Kan. 432; *Sleeper v. Bulten*, 16 Kan. 300.—a case of an alleged illegal special tax; *Montgomery v. Sayre*, 65 Ala. 564; *Hudson v. Marietta*, 64 Ga. 238; *Fifield v. Marinette County*, *Beebe v. Marinette County*, 62 Wis. 537; *Blanc v. Meyer*, 59 Tex. 86; *Harrison v. Vines*, 45 Tex. 22; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *Overall v. Ruenzl*, 67 Mo. 203.—a case of an excessive tax, where injunction held to be the remedy; *Palmer v. Napoleon Twp.* 16 Mich. 178; *Smith v. Humphrey*, 20 Mich. 398; *Morrison v. Hershire*, 32 Iowa, 271; *Hagaman v. Cloud County Comrs.* 19 Kan. 394; *George v. Dean*, 47 Tex. 73; *Labadie v. Dean*, Id. 90; *Pillsbury v. Humphrey*, 26 Mich. 245; *Rinard v. Nordyke*, 76 Ind. 130; *Johnson v. Roberts*, 102 Ill. 23 L. R. A.

655; *Ewing v. Batzner*, 24 Ind. 409; *Roseberry v. Huff*, 27 Ind. 12; *Faris v. Reynolds*, 70 Ind. 359; *Mulikin v. Reeves*, 71 Ind. 231; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Wilson v. Weber*, 3 Ill. App. 125; *Mobile v. Waring*, 41 Ala. 139.—a municipal tax; *Worthen v. Badgett*, *Worthen v. Faust*, 32 Ark. 493.—a school tax case; *Lewis v. Spencer*, 7 W. Va. 639, 23 Am. Rep. 619; *Union Pac. R. Co. v. Ryan*, 2 Wyo. 408; *Stuart v. Meyer*, 54 Md. 454.

And this is so no matter whether the tax be general or special. *Lawrence v. Killam*, 11 Kan. 499; *Challies v. Atchison County Comrs.* 15 Kan. 49.

Irregularity must be shown and payment or tender made. *Pillsbury v. Humphrey*, 26 Mich. 245; *Cheney v. Jones*, 14 Fla. 597.

And there must be no demand of a receipt in full. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 693.

A mere offer to pay or payment into court is not enough. *Parmley v. St. Louis, I. M. & S. R. Co.* 3 Dill. 25.

But in *Connors v. Detroit*, 41 Mich. 123, the failure to tender amount due was held not to be a ground for the refusal of relief if the claimant concedes an amount due and offer to pay it, but he will subject himself to costs by reason of such non-tender before action.

And the averment of an offer to pay the amount due was held unnecessary when the bill stated the amount illegal. *Clement v. Everest*, 29 Mich. 19.

The use of every other means of relief must be shown; and willingness to pay alleged. *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649.

No tender is necessary, however, in the case of a void assessment, as distinguished from an excessive one. *Albany City Nat. Bank v. Maher*, 20 Blatchf. 341.

Relief granted.

a. Multiplicity of suits.

Whenever the relief sought is such that it will prevent multiplicity of suits, equity will interfere by way of injunction to restrain the collection of an illegal tax. *Dundee Mortgage Trust Investment Co. v. School Dist. No. 1, Multnomah County*, 19 Fed. Rep. 359.—where taxes were levied upon mortgages and notes under a void law, as contrary to the Fourteenth Amendment as against due process of law; *Coulson v. Portland*, *Deady*, 481.—where a tax levied in payment of illegal interest coupons was enjoined; *Louisville & N. R. Co. v. Gaines*, 2 Flipp. 621.—a case of a tax upon property exempt from taxation; *City Nat. Bank of Paducah v. Paducah*, 2 Flipp. 61.—where an illegal tax upon personal property was restrained, the law imposing a tax upon bank shares against stockholders being void; *Wells Fargo & Co. v. Dayton*, 11 Nev. 161; *Union Pac. R. Co. v. Ryan*, 113 U. S. 516, 23 L. ed. 1098; *Hannewinkle v. Georgetown*, 82 U. S. 15 Wall. 547, 21 L. ed. 231; *New York L. Ins. Co. v. New York City Suprs.* 4 Duer, 192; *Alexander v. Dennison*, 2 McArthur. 592; *Harkness v. Board of Public Works*, 1 McArthur. 121; *Bouton v. Brooklyn*, 15 Barb. 375; *Pacific Mail S. S. Co. v. Mayor*, 57 How. Pr. 511; *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 227.—where the tax was upon property declared exempt by the supreme court; *Brooklyn v. Meserole*, 28 Wend. 132; *Crevier v. New York*, 12 Abb. Pr. N. S. 340; *Heywood v. Buffalo*, 14 N. Y. 534; *Mann v. Union Free School Dist. No. 2 Board of Education*, 53 How. Pr. 299; *Hanlon v. Westchester County Suprs.* 57 Barb. 353; *Dorn v. Fox*, 61 N. Y.

complainant, and urges that it conflicts with that provision of the constitution of the United States that prohibits the states from passing any law impairing the obligation of contracts. That the license to the complainant to practice law, granted December 31, 1885, was a grant from the state of Florida, by the implied terms

of which he acquired the vested right to practice law in this state, subject only to be deprived of that right by reason of misconduct, etc.

The bill prays that the said license tax may be declared null and void as to the complainant, and that the defendant, as tax collector,

284; *Campbell v. Seaman*, 68 N. Y. 582, 20 Am. Rep. 567; *Messeck v. Columbia County Suprs.* 50 Barb. 190.—where, however, the facts failed to show grounds for relief upon this head; *Susquehanna Bank v. Broome County Suprs.* 25 N. Y. 312; *Liebstein v. Newark*, 24 N. J. Eq. 200; *Dusenbury v. Newark*, 25 N. J. Eq. 295; *Paterson & H. R. R. Co. v. Jersey City*, 9 N. J. Eq. 434.—where relief was granted after the supreme court had passed upon the liability of plaintiff's property to taxation, the legal rights having been determined; *Morris Canal & Bkg. Co. v. Jersey City*, 12 N. J. Eq. 227.—a similar case; *Dows v. Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *Savings & Loan Soc. v. Austin*, 46 Cal. 415.—a tax imposed by the state board of equalization but relief refused the board being constitutional; *Vanover v. Davis*, 27 Ga. 354; *Clayton v. Lafargue*, 23 Ark. 187; *Mobile v. Baldwin*, *Stone v. Mobile*, 57 Ala. 61, 29 Am. Rep. 712.—a case of a personal tax where relief was refused; *Howell v. Buffalo*, 2 Abb. App. Dec. 412; *Blake v. Brooklyn*, 28 Barb. 301; *Cutting v. Gilbert*, 5 Blatchf. 259.—where the right is established at law and is plain; *Harkness v. District of Columbia*, 1 McArth. 121; *Alexander v. Dennison*, 2 McArth. 562; *Holland v. Baltimore*, 11 Md. 188, 69 Am. Dec. 198.—a levy made without the consent of the necessary majority of property payers; *Williams v. Grant County Court*, 26 W. Va. 483, 53 Am. Rep. 94.—an unconstitutional dog tax imposed under Act of 1881, chap. 23; *South Platte Land Co. v. Buffalo County Comrs.* 7 Neb. 258; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *Corrothers v. Clinton Dist. Board of Education of Monongalia County*, 16 W. Va. 537; *Polk v. Rose*, 26 Md. 162; *George v. Dean*, 47 Tex. 73.—provided the question could be dealt with as well before as after payment; *McDonald v. Murphree*, 45 Miss. 705; *Scribner v. Allen*, 12 Minn. 148; *Cook County v. Chicago*, B. & Q. R. Co. 85 Ill. 460; *Blessing v. Galveston*, 43 Tex. 641.—either upon constitutional or other grounds; *Sewall v. St. Paul*, 20 Minn. 511, 525; *Scribner v. Allen*, *supra*; *Minnesota Linsced Oil Co. v. Palmer*, 20 Minn. 468; *Clarke v. Ganz*, 21 Minn. 387; *Greedup v. Franklin County*, 30 Ark. 101; *Steuart v. Meyer*, 54 Md. 454, 468; *Polk v. Rose*, 25 Md. 153, 161, 162.

Where the question involved the validity of the whole tax and assessment upon every person, relief was granted. *Sherman v. Benford*, 10 R. I. 559.

Relief was granted upon this ground where the necessary consent of the majority of property owners was not obtained, in *Holland v. Baltimore*, *supra*.

A tax levied by a municipal corporation in payment of illegal interest coupons, upon property, was enjoined to prevent a multiplicity of suits, in *Coulson v. Portland*, *Deady*, 481.

b. Irreparable injury.

So where refusal to grant relief would work irreparable injury. *Louisville & N. R. Co. v. Gaines*, 2 Flipp. 621.—a case of an unconstitutional tax, by reason of its assessment upon exempt property; *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561.—a case of wrongful assessment; *Alexander v. Dennison*, 2 McArth. 562; *Harkness v. Board of Public Works*, 1 McArth. 121; *Bouton v. Brooklyn*, 15 Barb. 875; *Pacific Mail S. S. Co. v. Mayor*, 57 How. Pr. 411; *Brooklyn v. Meserole*, 26 Wend. 132; *Heywood v. Buffalo*, 14 N. Y. 534; *Mann v. Union Free School Dist.* No. 2 22 L. R. A.

Board of Education, 58 How. Pr. 239; *Hanlon v. Westchester County Comrs.* 57 Barb. 383; *Dorn v. Fox*, 61 N. Y. 264; *Campbell v. Seaman*, 68 N. Y. 582; *Liebstein v. Newark*, 24 N. J. Eq. 200; *Dusenbury v. Newark*, 25 N. J. Eq. 295; *Dows v. Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *Shelton v. Platt*, 129 U. S. 591, 35 L. ed. 274; *Bonaparte v. Camden & A. R. Co.* *Baldw.* 205; *Union Trust Co. v. Weber*, 26 Ill. 346; *McBride v. Chicago*, 22 Ill. 574; *Frost v. Flick*, 1 Dak. 126; *Berri v. Patch*, 12 Cal. 299, and *Ritter v. Patch*, 12 Cal. 298.—where relief denied because such injury was not shown in the collection of a county tax, the collector not being irresponsible; *Oliver v. Memphis & Little Rock R. Co.* 30 Ark. 123.—where the enforcement of an unconstitutional tax worked an irreparable injury upon a railroad. *Clayton v. Lafargue*, 23 Ark. 187; *Mobile v. Baldwin*, *Stone v. Mobile*, 57 Ala. 61.—a case of a personal tax where relief was refused; *Howell v. Buffalo*, 2 Abb. App. Dec. 412; *Blake v. Brooklyn*, 28 Barb. 301; *Parmley v. St. Louis*, L. M. & S. R. Co. 3 Dill. 13; *Youngblood v. Sexton*, 22 Mich. 406.—an unlawful tax upon a franchise; *Osborn v. Bank of United States*, 23 U. S. 9 Wheat. 738, 6 L. ed. 204.—upon the ground that the trespass if permitted would operate to destroy the bank, the object of the statute being the destruction of the franchise; *Vieley v. Thompson*, 44 Ill. 9; *Mechanics & T. Branch of State Bank v. Debolt*, 1 Ohio St. 501; *South Platte Land Co. v. Buffalo County Comrs.* 7 Neb. 253; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *George v. Dean*, 47 Tex. 73.—provided the question could be dealt with as easily before as after payment; *First Nat. Bank of Hannibal v. Meredith*, 44 Mo. 500; *State v. Parkville & G. River R. Co.* 32 Mo. 496.—a case of a county tax, the court acting without jurisdiction and relief refused; *McDonald v. Murphree*, 45 Miss. 705; *Coulson v. Harris*, 43 Miss. 723; *Scribner v. Allen*, 12 Minn. 148; *Cook County v. Chicago*, B. & Q. R. Co. 85 Ill. 460; *Blessing v. Galveston*, 43 Tex. 641.—in case of a state or municipal tax on either constitutional or other grounds; *McClung v. Livesay*, 7 W. Va. 338; *Burnett v. Whitesides*, 13 Cal. 156; *Sewall v. St. Paul*, 20 Minn. 511, 525; *Scribner v. Allen*, *supra*; *Minnesota Linsced Oil Co. v. Palmer*, 20 Minn. 468.

c. Inadequate legal remedy.

And where the remedy imposed by law is inadequate or incomplete, equity will grant relief against the collection of an illegal tax. *De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 353; *Louisville & N. R. Co. v. Gaines*, 2 Flipp. 621.—a case of an unconstitutional tax by reason of its assessment upon property exempt; *Union Pac. R. Co. v. Lincoln County*, 2 Dill. 279; *Dows v. Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *New York L. Ins. Co. v. New York City Suprs.* 4 Duer, 122; *Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. ed. 612; *Allen v. Baltimore & O. R. Co.* 114 U. S. 811, 29 L. ed. 200; *Louisiana Board of Liquidation v. McComb*, 28 U. S. 571, 23 L. ed. 623; *Gates v. Barrett*, 79 Ky. 236.—tax upon a nonresident where relief granted; *Wilkinson v. Walters*, 1 Idaho, 554; *Gates v. Barrett*, *supra*—a case of relief granted against double taxation, the code not including such remedy; *Parmley v. St. Louis*, L. M. & S. Co. 3 Dill. 18; *Cutting v. Gilbert*, 5 Blatchf. 259.—where the right is plain and established by law; *First Nat. Bank of Omaha v. Douglas County*, 3 Dill. 298.—where the illegal tax could not be recovered from the state; *Mechanics & T.*

may be perpetually enjoined from enforcing the collection thereof. The bill was demurred to for want of equity. This demurrer was sustained and the bill dismissed, and from this order the appellant appeals here.

That the court of equity has no jurisdiction

to interfere by injunction to restrain trespass upon personal property, except in rare cases where the property trespassed upon or taken has some peculiar intrinsic value to the owner that could not be compensated in money; and that the remedy is at law, is well settled in this

Branch of State Bank v. Debolt, 1 Ohio St. 591; McClung v. Livesay, 7 W. Va. 229; Richardson v. Scott, 47 Miss. 236,—an illegal tax and no remedy against tax collector; State v. Parkville & G. River R. Co. 38 Mo. 496—a county tax, the court acting without jurisdiction; McDonald v. Murphy, 45 Miss. 705; Coulson v. Harris, 43 Miss. 723; Clarke v. Gann, 21 Minn. 387; Miller v. Grandy, 13 Mich. 540.

.d. Cloud upon title.

Equity has entertained jurisdiction to restrain the collection of an illegal tax the groundwork of which is wanting, where it has been shown that the refusal of relief would cast a cloud upon the title to real estate which the court of chancery could alone remove. Alexander v. Dennison, 2 McArthur. 562; Harkness v. Board of Public Works, 1 McArthur. 121,—when the illegality is shown by evidence *afundae*; Dows v. Chicago, 78 U. S. 11 Wall. 108, 20 L. ed. 65,—before the aid of equity could be invoked; Hanne-winkle v. Georgetown, 32 U. S. 15 Wall. 547, 21 L. ed. 231; Union Pac. R. Co. v. Ryan, 113 U. S. 516, 28 L. ed. 1098; Greedup v. Franklin County, 30 Ark. 101; Hare v. Carnall, 39 Ark. 196; Burr v. Hunt, 18 Cal. 303; Hollister v. Sherman, 63 Cal. 38; Houghton v. Austin, 47 Cal. 646,—where the state board's action was held unconstitutional under section 3868, but relief was denied there being no cloud shown after sale; Ritter v. Patch, 12 Cal. 296; Key City Gas-Light Co. v. Munsell, 19 Iowa, 305; Berri v. Patch, 12 Cal. 299; Steuart v. Meyer, 54 Md. 454, 468,—a tax sale without requisite notice; Polk v. Rose, 25 Md. 162, 39 Am. Dec. 773; Palmer v. Rich, 12 Mich. 414,—where the tax was illegal and the tax deed evidence, by statute, of regularity relief being granted; Scofield v. Lansing, 17 Mich. 437,—to the same effect; Minnesota Lined Oil Co. v. Palmer, 20 Minn. 468; Sewall v. St. Paul, 12, 511,—where no notice of assessment for local improvements as required by Act of 1871, had been given; Mayall v. St. Paul, 30 Minn. 294,—where the record showed a valid lien, a case of special assessment, illegal as contrary to Special Laws of 1874, relating to street improvements; Armstrong v. St. Paul, 30 Minn. 299,—to the same effect; Scribner v. Allen, 12 Minn. 148; South Platte Land Co. v. Buffalo County Commrs. 7 Neb. 258; Burlington & M. River R. Co. v. Clay County, 13 Neb. 367,—a sinking fund tax case, the tax being prima facie a lien; Folkerts v. Power, 42 Mich. 233; Earl v. Duras, 13 Neb. 234,—the tax creating an incumbrance; Wells Fargo & Co. v. Dayton, 11 Nev. 161; Brooks v. Howland, 58 N. H. 98,—wherein the execution of a deed was restrained; Brown v. Concord, 56 N. H. 375; Morris Canal & Bkg. Co. v. Jersey City, 12 N. J. Eq. 227,—where the property was declared exempt by the supreme court; Susquehanna Bank v. Broome County Supra. 25 N. Y. 312; New York L. Ins. Co. v. New York City Supra. 4 Duer, 192; Heywood v. Buffalo, 14 N. Y. 534; Crevier v. New York, 12 Abb. Pr. N. S. 840; Hatch v. Buffalo, 38 N. Y. 276; Scott v. Onderdonk, 14 N. Y. 9, 97 Am. Dec. 106,—where a claim could be established by the record; Magee v. Cutler, 43 Barb. 239; Douglas v. Harrieville, 9 W. Va. 162, 27 Am. Rep. 548; Dean v. Madison, 9 Wis. 402,—where village trustees acted without authority; Delaplaine v. Madison, 9 Wis. 409; Knowlton v. Rock County Supra. 9 Wis. 410,—where tax imposed under city charter contrary to state constitution requiring uniform taxation; Jenkins v. Rock County Supra. 15 Wis. 11,—where lots were taxed collectively instead of separately for street improvements, the deed being prima facie evidence of validity; Mitchell v. Milwaukee, 18 Wis. 92,—a void tax for street improvements; Judd v. Fox Lake, 28 Wis. 583,—at any time after assessment, invalidity not appearing upon the face; Marsh v. Clark County Supra. 42 Wis. 502,—where the ground-work of the tax is wanting; Weeks v. Milwaukee, 10 Wis. 242; Soens v. Racine, 1d. 271; Mills v. Gleason, 11 Wis. 470, 78 Am. Dec. 721; Foster v. Kenosha, 12 Wis. 616; Rogers v. Milwaukee, 13 Wis. 610; Warden v. Fond du Lac County Supra. 14 Wis. 618; Hersey v. Milwaukee County Supra. 16 Wis. 185, 32 Am. Dec. 713; Bond v. Kenosha, 17 Wis. 284; Myrick v. La Crosse, 1d. 442; Mills v. Johnson, 1d. 598; Smith v. Milwaukee, 18 Wis. 63; Kneeland v. Milwaukee, 1d. 411; Kimball v. Ballard, 19 Wis. 601, 38 Am. Dec. 705; Wells v. Burnham, 20 Wis. 112; Crane v. Janesville, 1d. 306; Pierce v. Schutt, 1d. 423; Howes v. Racine, 21 Wis. 514; Lefterts v. Calumet County Supra. 1d. 683; May v. Holdridge, 23 Wis. 93; Hamilton v. Fond du Lac, 25 Wis. 490; Siegel v. Outagamie County Supra. 26 Wis. 70; Dean v. Charlton, 27 Wis. 622; Dean v. Borchsenius, 30 Wis. 236; Whittaker v. Janesville, 33 Wis. 76; Quinny v. Stockbridge, 1d. 505; Dayton v. Relf, 34 Wis. 86; Morgan v. Hammett, 1d. 512; Hersey v. Barron County Supra. 37 Wis. 75; Manning v. Ames, 1d. 645; Pier v. Fond du Lac, 38 Wis. 470; Johnson v. Milwaukee, 40 Wis. 815.

In such cases the proceedings appear valid upon their face, and extrinsic evidence is required to prove the contrary. Greedup v. Franklin County, 30 Ark. 101; Hare v. Carnall, 39 Ark. 196; Burr v. Hunt, 18 Cal. 303; Sewall v. St. Paul, 20 Minn. 511, 525; Scribner v. Allen, 12 Minn. 148; Minnesota Lined Oil Co. v. Palmer, 20 Minn. 468; South Platte Land Co. v. Buffalo County Commrs. 7 Neb. 258; Liebstain v. Newark, 24 N. J. Eq. 200; Dusenbury v. Newark, 25 N. J. Eq. 236; Heywood v. Buffalo, 14 N. Y. 534; Mann v. Union Free School Dist. No. 2 Board of Education, 53 How. Pr. 239; Hanlon v. Westchester County Supra. 57 Barb. 333; Marsh v. Brooklyn, 59 N. Y. 280; Dorn v. Fox, 61 N. Y. 264; Campbell v. Seaman, 63 N. Y. 532, 20 Am. Rep. 567; Jenkins v. Rock County Supra. 15 Wis. 11; Judd v. Fox Lake, 28 Wis. 583.

But where the assessment is void upon its very face, the record casts no cloud upon title and no relief will be granted. Hanne-winkle v. Georgetown, 32 U. S. 15 Wall. 547, 21 L. ed. 23; Harkness v. Board of Public Works, 1 McArthur. 121; Floyd v. Gilbreath, 27 Ark. 675,—where it was sought to enjoin a tax as contrary to the provisions of the Act of March 27, 1871; Hollister v. Sherman, 63 Cal. 38,—a tax imposed upon property administered by the regents of the university; Bucknall v. Story, 36 Cal. 67; De Witt v. Hays, 2 Cal. 469, 56 Am. Dec. 262; Burr v. Hunt, 18 Cal. 307; Robinson v. Gaar, 6 Cal. 275; Berri v. Patch, 12 Cal. 299; Weber v. San Francisco, 1 Cal. 455; Hardenburgh v. Kidd, 10 Cal. 403; Hatch v. Buffalo, 38 N. Y. 276.

In such a case the complainant would have a valid defense in an action of ejectment by the purchaser. Livingston v. Hollenbeck, 4 Barb. 8; Van Doren v. New York, 9 Paige, 383, 4 L. ed. 743; Mooers v. Smedley, 6 Johns. Ch. 23, 2 L. ed. 43; Brooklyn v. Meserole, 26 Wend. 132; Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264; Horton v. Audumood, 7 Wend. 300; Parker v. Walrod, 16 Wend. 514, 30 Am. Dec. 124; Wiggan v. New York, 9 Paige, 10, 4 L. ed. 591; Magee v. Cutler, 43 Barb. 239.

state as elsewhere. *Baldwin v. Tucker*, 16 Fla. 259, and authorities there cited.

If the contention of the appellant in his bill is true, that the statute imposing this tax upon

his exercise of his profession as a lawyer is unconstitutional, then the levy of the tax collector upon his goods for the enforcement of such tax would amount to a trespass, for the redress

In *Mitchell v. Milwaukee*, 18 Wis. 92, relief was granted against the sale, the plaintiff's substantial rights being affected.

Where the uniform rule of taxation is defeated, the whole assessment is vitiated as the foundation of a valid tax, and equity interferes against the issuing of a deed without proof of other injury from the pretended tax. *Marsh v. Clark County Suprs.*, 43 Wis. 502; *Dean v. Madison*, 9 Wis. 402; *Delaplaine v. Madison*, id. 409; *Knowlton v. Rock County Suprs.*, 9 Wis. 410.

And the mere prevention of multiplicity of suits is not sufficient in the absence of litigation or threats thereof. *Magee v. Cutler*, *supra*.

It must be shown *dehors* the record that the defect exists, and that the proceedings are irregular and invalid, and that such could not be detected upon enforcement of the lien. *Marsh v. Brooklyn*, 50 N. Y. 230; *Pacific Mail S. S. Co. v. Mayor*, 57 How. Pr. 511.

In *Red v. Johnson*, 58 Tex. 284, equity refused to enjoin the collection of a state school tax, no individual damage being shown except a cloud upon title.

The bill must aver unlawful sale, causing irreparable injury. *Coulson v. Harris*, 43 Miss. 723.

Where, however, the deed is made *prima facie* evidence by the act of the legislature, relief will be granted. *Palmer v. Boling*, 8 Cal. 383.

By the Wisconsin laws a tax is a lien both before and after a tax sale, and an injunction will be granted restraining its collection and setting aside the proceedings and to cancel the sale certificate where such tax is void and illegal. *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51, following *Hamilton v. Fond du Lac*, 26 Wis. 490, and distinguishing and approving *Chicago & N. W. R. Co. v. Fort Howard*, 21 Wis. 44, 91 Am. Dec. 453.

Such jurisdiction exists even though no sale has taken place, or even been advertised. *Roe v. Lincoln County*, 56 Wis. 66.

The tax being a lien and a cloud as soon as levied. *Ibid*.

Where the certificate for special improvement taxes issued without authority of law and the tax had been anticipated by a sale of the evidence, and the cost of improvements collected from the United States, equity relieved against a sale of the property upon a certificate for special improvement taxes as casting a cloud upon title. *Alexander v. Dennison*, 2 McArthur. 522.

Relief was granted against the taking of property under void and null proceedings, in *Baltimore v. Grand Lodge of I. O. O. F.* 44 Md. 445.

Special state doctrines.

In some states the courts have granted relief where the tax is illegally imposed without the authority of law; levied by unauthorized persons; assessed upon property exempt from taxation; when fraud has been practiced; and in other cases working irreparable injury. *Moore v. Wayman*, 107 Ill. 195; *Du Page County Suprs. v. Jenks*, 65 Ill. 275; *Munson v. Miller*, 66 Ill. 380; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591; *Ottawa v. Walker*, 21 Ill. 605, 74 Am. Dec. 121; *Cowgill v. Long*, 15 Ill. 202; *Beverly v. Sabin*, 20 Ill. 357; *Merritt v. Farris*, 22 Ill. 303; *Munson v. Minor*, id. 594; *Cook County v. Chicago, B. & Q. R. Co.* 35 Ill. 465; *Mount Carbon Coal & R. Co. v. Blanchard*, 54 Ill. 244; *Swinney v. Beard*, 71 Ill. 29; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 596; *Nunda v. Chrystal Lake*, 79 Ill. 311; *Ottawa Glass Co. v. McNeble*, 81 Ill. 556; *McBride v. Chicago*, 23 Ill. 574; *Chicago, B. & Q. R. Co. v. Frary*, 23 L. R. A.

23 Ill. 36; *Vieley v. Thompson*, 44 Ill. 9; *Deming v. James*, 72 Ill. 78; *McConkey v. Smith*, 73 Ill. 313,—where indebtedness not belonging to, was added to the capital; *Kimball v. Merchants Sav. Loan & T. Co.* 89 Ill. 611; *Lemont v. Singer & Talcott Stone Co.* 98 Ill. 94; *Keigwin v. Hamilton Twp. Drainage Comrs.* 115 Ill. 347; *Phoenix Grain & Stock Exchange v. Gleason*, 121 Ill. 524; *Evans v. Gage*, 1 Ill. App. 202; *Illinois Cent. R. Co. v. McLean County*, 17 Ill. 291; *Drake v. Phillips*, 40 Ill. 388; *Jeffersonville v. Patterson*, 32 Ind. 140; *Indianapolis, P. & C. R. Co. v. Tipton County Comrs.* 70 Ind. 385; *Columbus, C. & I. Cent. R. Co. v. Grant County Comrs.* 65 Ind. 427; *Riley v. Western U. Teleg. Co.* 47 Ind. 511,—a tax upon capital stock of a foreign company; *Shoemaker v. Grant County Comrs.* 36 Ind. 175; *Toledo, W. & W. R. Co. v. Lafayette*, 22 Ind. 262; *Greencastle Twp. v. Black*, 5 Ind. 557; *Lafayette v. Jenners*, 10 Ind. 70; *Delphi v. Bowen*, 61 Ind. 29, 37; *Conway v. Younkin*, 23 Iowa, 235; *Cattell v. Lowry*, 45 Iowa, 478; *Rood v. Mitchell County Suprs.* 39 Iowa, 444; *Zorger v. Rapids Twp.* 36 Iowa, 175; *Williams v. Peinny*, 26 Iowa, 436; *Hubbard v. Johnson County Suprs.* 25 Iowa, 130; *Powers v. Bowman*, 53 Iowa, 359; *Macklot v. Davenport*, 17 Iowa, 379; *Litchfield v. Polk County*, 18 Iowa, 70; *Smith v. Osburn*, 53 Iowa, 474; *Barber v. Farr*, 64 Iowa, 59; *Remey v. Burlington Equalization Board*, 80 Iowa, 474; *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 404; *Gates v. Barrett*, 79 Ky. 295; *Covington v. Southgate*, 15 B. Mon. 491; *Arbogast v. Louisville*, 2 Bush, 271; *Bradshaw v. Omaha*, 1 Neb. 16.

The injury must be real and likely to occur. *Cook v. Miller*, 26 Ill. App. 421.

The assessment must work an injury such as a court of equity alone will take cognizance of. *Chicago, B. & Q. R. Co. v. Siders*, 68 Ill. 320.

It was granted in the case of an assessment against one not the owner, as being without warrant of law. *Searing v. Heavysides*, 106 Ill. 85; *Seeley v. Westport*, 47 Conn. 294, 36 Am. Rep. 70; *Deming v. James*, 72 Ill. 78,—where the collector was insolvent.

And as against an arbitrary assessment. *Cleg-horn v. Postlewaite*, 48 Ill. 423.

Where the vote was upon the appropriation of two railroads jointly and not upon each separately the tax levied thereon was enjoined as a nullity. *Finney v. Lamb*, 54 Ind. 1; *Garrigus v. Parke County Comrs.* 39 Ind. 66; *Bronenberg v. Madison County Comrs.* 41 Ind. 502.

Where the distinctions between actions at law and suits in equity and the forms of actions are abolished the remedy by injunction, to restrain the collection of an illegal and void tax, may be sought at once. *Delphi v. Bowen*, 61 Ind. 29.

In *Darling v. Gunn*, 50 Ill. 424, equity enjoined the collection of an increased tax levied without notice to the plaintiff, upon the ground that it was unauthorized and the party was entitled to an opportunity to be heard.

In *Indianapolis, P. & C. R. Co. v. Tipton County Comrs.*, 70 Ind. 385, the court restrained the collection of a tax imposed for the purpose, and in aid of, a railroad, under Reg. Sess. Acts 1875, p. 121, more than three years prior to the Act, which project has failed, the appropriation being void and illegal.

Where the illegal tax has been paid the only remedy is by appeal to the justice of the law-making power. *Shoemaker v. Grant County Comrs.* 36 Ind. 175.

The assessment must be shown to be void and illegal. *Delphi v. Bowen*, 61 Ind. 29.

of which there is ample remedy at law; and he has no standing in a court of equity. The demurrer to his bill was, therefore, properly sustained, and the dismissal of the bill properly followed.

Where the defect is in the law itself the court can interfere by injunction. *Center & W. Gravel Road Co. v. Black*, 82 Ind. 468.

So where there was no proper assessment and levy, equity enjoined its collection. *Brandriff v. Harrison County*, 50 Iowa, 164, there being an entire absence of taxing power.

Where it was alleged that the petition was not signed by the requisite number of taxpayers as required by the Laws of 1870, chap. 102, § 2, relating to taxation in aid of railroads which authorized the township trustees to order an election upon the petition of a given number of the resident taxpayers, the court refused the injunction. *Zorger v. Rapids Twp.* 36 Iowa, 175.

Where the assessment was wholly unauthorized, and not merely erroneous, the court held that it was not necessary for the plaintiff to appeal to the board of supervisors prior to filing a bill to enjoin the collection of a tax. *Hubbard v. Johnson County Supra*, 23 Iowa, 180.

Where a tax legal in itself was not certified as required by law, nor properly listed, the court refused relief by way of injunction. *Iowa Railroad Land Co. v. Carroll County*, 39 Iowa, 151.

If the tax were absolutely void, if the property was not subject to taxation; if it was exempted by law from taxation; or if the taxing officers had no jurisdiction over it, nor power to tax it,—then there could hardly be any doubt of the right of the taxpayer to maintain a suit by way of injunction. *Kan. Gen. Stat. p. 677, § 253; Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210, 222.

Where plaintiff's tract was liable to taxation as one lot, and portions thereof were assessed and taxed as lots surrounded by streets and alleys, the assessment including elements of value not existing in the case of unplatted land, having no pecuniary measurement, the court granted an injunction upon such assessment as being irregular and unjust. *Stebbins v. Challa*, 15 Kan. 55.

Some courts have held, that where the legislature, unjustly, and with the improper motive of increasing the revenues of a city, have brought within its limits and subject to its taxation, property purely agricultural in its nature, and so situated as not to receive the benefits of city government, conveniences and regulations, taxation upon such property will be restrained. *Covington v. Southgate*, 15 B. Mon. 491; *Arbogust v. Louisville*, 2 Bush, 271; *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 13 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 404; *Bradshaw v. Omaha*, 1 Neb. 16.

Where the requirements of the law as laid down in the Maryland Act of 1856, chap. 164, were disregarded, the court held the proceedings of the city commissioners *coram non iudice* and void and granted an injunction restraining the collection of a tax upon property for street grading. *Baltimore v. Porter*, 18 Md. 301.

Under the Massachusetts General Statutes, chap. 18, § 79, equity can restrain and prevent by way of injunction any violation or abuse of the legal right and power of raising taxes and assessments. *Freeland v. Hastings*, 10 Allen, 570,—where relief was refused against a tax levied for contingent expenses, the refunding of money contributed for bounties.

In *Kinyon v. Duchene*, 21 Mich. 498, the court enjoined a tax imposed by commissioners whose appointment was void, being contrary to the statute.

In *Anderson v. State*, 23 Miss. 459, the court granted an injunction in a suit between the tax

This disposes of the case, but we deem it proper to add that we have thought, and are still of the opinion, that the case of *Young v. Thomas*, disposed of by this court at its January term, 1879 (17 Fla. 169, 85 Am. Rep. 98),

collector and the assignee of a bank enjoining the selling of bank securities for taxes, the question being whether the state had, under the statutes of the state, a lien for taxes over the assignee.

So in the case of a statutory exemption from taxation. *Mechanics Bank v. City of Kansas*, 73 Mo. 555.

It was held to be enjoinable in case of an excess of authority, in *South Platte Land Co. v. Buffalo County Comrs.* 7 Neb. 253; *Lemont v. Singer & Talcott Stone Co.* 98 Ill. 94.

Assessments raised or increased without notice have been held restrainable. *South Platte Land Co. v. Buffalo, supra; Cleghorn v. Postlewaite*, 43 Ill. 428.

In *Burnet v. Cincinnati*, 3 Ohio, 73, 17 Am. Dec. 582, equity enjoined the sale of city lots for illegal taxes.

To the same effect, *Dyer v. Branch Bank at Mobile*, 14 Ala. 625, *Collier, Ch. J.*

In *Culbertson v. Cincinnati*, 16 Ohio, 574, equity enjoined a special tax levied by a city council as illegally imposed, the ordinance being irregular, in not providing for a review.

So where no opportunity was given a nonresident to work out his tax. *Miller v. Gorman*, 38 Pa. 300.

The mere allegation of irreparable injury is not sufficient, some impediment to the legal remedy must be shown. *McClung v. Livezey*, 7 W. Va. 329.

And if the act creating the tax is *ultra vires* equity will interfere. *Christie v. Malden*, 23 W. Va. 667,—a wharfage tax for use of ferry landing within corporate limits.

The intentional omission of property subject to taxation renders all taxes levied thereon void and illegal, and relievable against in equity. *Hersey v. Milwaukee*, 16 Wis. 185, 32 Am. Dec. 713.

Aliter, an unintentional omission. *Ibid.*

Equity will enjoin a tax sale where the tax is levied on a wrong basis. *Sohtettler v. Fort Howard*, 43 Wis. 48.

Where a statute required assessors to make an actual view, and exercise their judgment upon each tract, its advantages and disadvantages, quality, etc., it was held that a classification which was arbitrary as disregarding these principles was illegal, and restrainable by injunction. *Hersey v. Barron County Supra*, 37 Wis. 75.

And any tax levied without a lawful assessment may be restrained without proof of other injury to the plaintiff. *Marsh v. Clark County Supra*, 43 Wis. 502.

Fraud.

In some jurisdictions the courts have granted relief upon the ground of fraud.

The power of the chancellor to restrain the collection of the revenue is one that will never be exercised except, *inter alia*, where a clear case of fraud is shown. *Union Trust Co. v. Weber*, 98 Ill. 346; *McBride v. Chicago*, 22 Ill. 574; *DuPage County Supra v. Jenks*, 65 Ill. 275, 296; *Vieley v. Thompson*, 44 Ill. 9; *McDonough County Supra v. Campbell*, 42 Ill. 490; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Albany & B. Min. Co. v. Auditor General*, 35 Mich. 391; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602,—an overvaluation tax upon capital stock of railroad; *Swinney v. Beard*, 71 Ill. 27; *Leitch v. Wentworth*, Id. 146; *Ottawa v. Walker*, 21 Ill. 606, 74 Am. Dec. 121,—where the tax was imposed to pay a fraudulent judgment; *Drake v. Phillips*, 40 Ill. 388; *McConkey v. Smith*, 73 Ill. 315; *Chicago, B. & Q. R. Co. v. Cole*, 75 Ill. 591; *Gage v. Evans*, 90 Ill. 569; *Lemont v. Singer & T. Stone Co.* 98 Ill. 94; *Kel-*

is fully decisive of the question of the constitutionality of legislation imposing license taxes upon the exercise of their profession by lawyers. Though they are not referred to in the opinion in that case, yet the cases of *Ex parte*

Garland, 71 U. S. 4 Wall. 333, 18 L. ed. 366, and "*The Lawyers' Tax Cases*," 8 Helsk. 565, relied upon by the appellant to overturn that case, were brought to the attention of the court in the briefs of counsel in the consideration of

win v. Hamilton Twp. Drainage Comrs. 115 Ill. 347; *Phoenix Grain & S. Exch. v. Gleason*, 121 Ill. 524; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Hannewinkle v. Georgetown*, 82 U. S. 15 Wall. 547, 21 L. ed. 231; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Lefferts v. Calumet County Supra.* 21 Wis. 688,—a case of fraudulent discrimination in the assessment for the purpose of obtaining more than justly due; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51, a similar case.

If fraud is alleged it must be proved by clear and irresistible evidence, and the injury must be likely to be considerable. *Union Trust Co. v. Weber*, 96 Ill. 346.

Where the township supervisor fraudulently and with a view to imposition, assessed property above its value and relatively above the value of other assessments upon his roll, the court granted an injunction restraining such excessive tax. *Merrill v. Humphrey*, 24 Mich. 170.

An allegation of fraud in the assessment of the supervisors, will not confer jurisdiction, where there is adequate remedy at law. *Hagenbuch v. Howard*, 84 Mich. 1.

Where a larger tax was imposed than was due with a fraudulent intent to apply the excess to unlawful purposes, the court refused to interfere except the money was being used for such purpose and the remedy at law was inadequate. *West v. Ballard*, 82 Wis. 163.

Personal tax.

In the case of a tax levied upon personal property, equity will not in general interfere with its collection upon the ground of illegality as it is a mere trespass for which the remedy at law is adequate. *Union Pac. R. Co. v. Lincoln County*, 2 Dill. 279; *Judd v. Fox Lake*, 28 Wis. 583; *Van Cott v. Milwaukee County Supra.* 18 Wis. 247,—a case of a municipal tax; *McCoy v. Chillicothe*, 8 Ohio, 370, 17 Am. Dec. 607,—a case of an unconstitutional tax with no peculiar injury; *Brooks v. Howland*, 58 N. H. 98; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 53 N. H. 17; *Peck v. School Dist. No. 4*, 21 Wis. 516,—a tax imposed to pay an illegal town contract; *Folkerts v. Power*, 42 Mich. 238; *Quinney v. Stockbridge*, 33 Wis. 505; *Conley v. Chedic*, 6 Nev. 222,—unless judgment at law is not collectible; *Chicago & N. W. R. Co. v. Fort Howard*, 21 Wis. 44, 91 Am. Dec. 458,—a case of threatened levy upon rolling stock; *Mutual Ben. L. Ins. Co. v. New York City and County Supra.* 8 Bosw. 683; *Wilson v. New York*, 4 R. D. Smith, 675,—plaintiff a resident in another state; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Williams v. Detroit*, 2 Mich. 560; *Henry v. Gregory*, 29 Mich. 68; *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 96 Mass. 469; *Loud v. Charlestown*, 90 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Hunnewell v. Charlestown*, Id. 350; *Dodd v. Hartford*, 25 Conn. 232; *Ritter v. Patch*, 12 Cal. 236; *Berri v. Patch*, 12 Cal. 239; *Worth v. Fayetteville Town Comrs.* Winst. Eq. 70; *Greene v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 448; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Brooklyn v. Meserole*, 26 Wend. 132; *Livingston v. Pippin*, 61 Ala. 543; *Baltimore v. Baltimore & Ohio R. Co.* 21 Md. 50; *Moore v. Smedley*, 6 Johns. Ch. 28, 2 L. ed. 43; *Susquehanna Bank v. Broome County Supra.* 25 N. Y. 312; *Mohawk & H. R. Co. v. Clute*, 4 Paige, 384, 3 L. ed. 480; *Pacific Mail S. S. Co. v. Mayor*, 87 How. Pr. 511; *Hannewinkle v. Georgetown*, 82 U. S. 15 Wall. 547, 21 L. ed. 231; *Dows v. Chicago*, 78 U. S. 11 Wall. 106, 22 L. R. A.

20 L. ed. 65,—a tax upon shares of stock in a national bank assessed too high, and plaintiff a non-resident, no special circumstances being shown to bring the case within equity jurisdiction; *Milwaukee v. Koefler*, 116 U. S. 219, 29 L. ed. 612,—a case of a tax upon a non-resident; *Baldwin v. Tucker*, 16 Fla. 258; *Bryan v. Long*, 14 Fla. 366; *McCullom v. Morrison*, Id. 414; *Bowes v. Hoeg*, 15 Fla. 403; *Davidson v. Floyd*, Id. 667; *Dodd v. Hartford*, 25 Conn. 232,—a city tax for public expenses; *Mobile v. Baldwin*, *Stone v. Mobile*, 57 Ala. 61; *Conley v. Chedic*, 6 Nev. 222; *Crawford v. Bradford*, 23 Fla. 404; *Mechanics & T. Branch of State Bank v. Debolt*, 1 Ohio St. 591; *Chicago & N. W. R. Co. v. Fort Howard*, 21 Wis. 44, 91 Am. Dec. 458; *Exchange Bank of Columbus v. Hines*, 8 Ohio St. 2, 36; *Lockwood v. St. Louis*, 24 Mo. 20; *Peck v. School Dist. No. 4 of Beloit*, 21 Wis. 521; *Lenz v. Charlton*, 23 Wis. 430; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Quinney v. Stockbridge*, 33 Wis. 505; *Beund v. Wisconsin Cent. R. Co.* 45 Wis. 568; *Henry v. Gregory*, 29 Mich. 68,—except there is some peculiar value which damages would not compensate; *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 233,—unless special value be shown and no remedy for adequate damages; *Clarke v. Ganz*, 21 Minn. 387,—to the same effect; *City Nat. Bank of Paducah v. Paducah*, 5 Cent. L. J. 347; 1 *Thomp. Nat. Bank Cas.* 300.

Although the above is the general rule with regard to the restraining, by injunction, the collection of taxes against personal property, yet it seems that no difference between taxes upon personal and real property is made by the courts of Illinois, Indiana, Iowa, and Kentucky, relief being granted by the courts in these states in both classes of cases.

Equity will not enjoin the collection of a personal tax or fee by an officer where there is no ground of apprehension of an attempt to enforce it contrary to the plaintiff's will. *Crawford v. Bradford*, 23 Fla. 404.

Still relief has been granted even in the case of a personal tax where a peculiar value in the property has been shown, such as damages at law would not compensate. *Henry v. Gregory*, 29 Mich. 68; *Clarke v. Ganz*, 21 Minn. 387; *Baldwin v. Tucker*, 16 Fla. 258; *Bryan v. Long*, 14 Fla. 366; *McCullom v. Morrison*, Id. 414; *Bowes v. Hoeg*, 15 Fla. 403; *Davidson v. Floyd*, Id. 667.

Estoppel.

Where the owner of property has requested improvements or acquiesced therein, or had notice thereof and raised no objection, relief has been refused. *Kellogg v. Ely*, 15 Ohio St. 64,—where an assessment was made for the construction of a ditch, under Statute March 24, 1859, the plaintiff being guilty of laches; *Weber v. San Francisco*, 1 Cal. 455; *Byram v. Detroit*, 50 Mich. 56; *Motz v. Detroit*, 18 Mich. 495; *Lafayette v. Fowler*, 34 Ind. 140; *Sleeper v. Bullen*, 6 Kan. 300; *Dusenbury v. Newark*, 25 N. J. Eq. 295.

When plaintiff's lot was assessed with another not belonging to him, even after the required notice of the completion of the tax lists and neglect to inspect same relief was granted. *Crane v. Janeville*, 20 Wis. 305.

Yet it has been held that presumptive or actual knowledge of the progress of city improvements will not work an estoppel where the proceedings authorizing the work are illegal. *Steckert v. East Saginaw*, 22 Mich. 104.

So the mere submission to an illegal tax will not

that case. With the conclusions reached in that case we are in full accord, and have been unable to find anything to shake our faith in its correctness. In addition to the authorities there cited, the following will be found to sustain also the conclusions therein reached, and in them will be found a discussion of every

phase of the propositions contended for by the appellant: *St. Louis v. Sternberg*, 4 Mo. App. 458; *State v. Gaslay*, 5 Ohio, 15; *Languille v. State*, 4 Tex. App. 312; *Cooley*, Taxn. pp. 576, 577; *Weeks*, Attorneys, 2d ed. § 41.

The decree appealed from is affirmed.

work an estoppel of a subsequent denial, except the case be extreme. *Langworthy v. Dubuque*, 18 Iowa, 86.

Set-off.

The mere fact that a debt is due from the municipality or county is no ground for a set-off. *Finne-*

gan v. Fernandina, 15 Fla. 379, 21 Am. Rep. 288; *Scobey v. Decatur County*, 72 Ind. 551.

And the fact of payment of illegal taxes upon former occasions makes no ground for relief, by way of set-off. *Fremont v. Mariposa & Early Counties*, 11 Cal. 361; *Wayne v. Savannah*, 56 Ga. 448. E. W.

KANSAS SUPREME COURT.

Joseph L. SHELDON *et al.*, *Plffs. in Err.*,
v.

Simon PRUESSNER *et al.*

(.....Kan.)

*1. The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded.

2. Where a mortgagee, residing in this state, owns and has in his possession a note for \$1,700, secured by a mortgage upon real estate in this state, and pretends to transfer, by merely indorsing his name thereon, but without actually delivering the same, such note and mortgage to his father in another state, without any demand being made upon him to do so, to secure \$450 and interest for prior borrowed money, but really for the purpose of evading the payment of taxes justly due the state,—*Held* that, in an action brought in the name of the father to recover upon the note and mortgage, the mortgagee, on account of his acts in evading the payment of taxes, and thereby defrauding the revenues of the state, cannot have any recovery in the name of his father or otherwise on any part of the note or mortgage belonging to him. *Held*, also, that if the father did not have any knowledge of such alleged transfer, and his name is used to collect such note and mortgage without his consent, or if he merely accepted the note and mortgage as a *particeps criminis*, to defraud the revenue laws, no recovery of any amount thereon can be had in his name.

3. Where a husband and wife jointly convey a homestead in exchange for other real estate to be occupied by them as a new homestead, upon which there is a prior mortgage, and the husband, with the consent of the wife, takes the conveyance of such real estate in his own name, and expressly assumes the payment of the mortgage thereon, the wife cannot, in an action to foreclose the mortgage, defend against it upon the ground that the real estate so

purchased is a homestead, and therefore that the prior mortgage thereon at the date of the exchange is null and void.

4. Where a higher rate of interest is expressly reserved to be paid after maturity, such amount is recoverable, if not prohibited by statute.

5. Where a judgment is rendered upon two different notes, and for the foreclosure of two different mortgages given to secure the same,—one in favor of the plaintiff, and one in favor of a co-defendant,—and the judgment on the note and the foreclosure of the mortgage in favor of the plaintiff are erroneous for want of sufficient evidence, it is error for the trial court to provide in the decree that upon the sale of the real estate all of the costs involved in the case, including the costs taxed upon the erroneous judgment, shall be first paid from the proceeds of such sale.

(January 6, 1894.)

ERROR to the District Court for Shawnee County to review a judgment in favor of plaintiffs in an action brought to foreclose a mortgage. *Reversed.*

Statement by Horton, Ch. J.:

This action was brought in the district court of Shawnee county by Simon Pruessner against Joseph L. Sheldon *et al.*, May 5, 1891, to foreclose a mortgage given by Joseph L. Sheldon and wife to Henry S. Pruessner to secure the sum of \$1,700 and interest. Afterwards Lewis M. Motter filed his answer, setting up and claiming a mortgage of \$1,000, given by Henry S. Pruessner and wife as a prior lien upon the lands and tenements described in plaintiff's mortgage, being the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 16, township 13, range 16, in Shawnee county. Joseph L. Sheldon and his wife, Lizzie S. Sheldon, filed separate answers to the plaintiff's petition, and also filed separate replies to the answer of their codefendant, Lewis M. Motter. The case was tried on the 5th of December, 1891, and judgment rendered for Simon

NOTE.—The decision that a transfer of a mortgage to evade taxation is so far contrary to public policy that the transferee cannot enforce it for the benefit of the transferor seems to be a novel one. The exact effect of such a transfer on the rights of the parties is left somewhat indefinite. Whether

the transferee could enforce the mortgage if he chose actively to assert his rights for himself, and whether on the other hand the transferor could in his own name enforce the mortgage are important questions left open in this case.

Pruessner for \$1,700, and interest at 7 per cent per annum, and his mortgage foreclosed and adjudged to be a second lien upon the premises described. Judgment was also rendered in favor of Lewis M. Motter against Henry S. Pruessner and wife for the sum of \$1,000 and interest at 12 per cent per annum from date of default, which sum was adjudged to be a first lien upon the same premises. Joseph L. Sheldon and his wife, Lizzie S. Sheldon, bring the case to this court.

Mr. H. C. Root, for plaintiffs in error:

The mortgage made by Joseph L. Sheldon, and wife, Lizzie S. Sheldon, was executed to Henry S. Pruessner on the 6th day of June, 1888; at that time the title to the land was in Henry S. Pruessner; he did not convey the land to Joseph L. Sheldon until about the 14th of June, 1888.

The mortgage of the Sheldons could not convey any interest in the land, because at this time they had no title or interest to mortgage.

Papin v. Goodrich, 103 Ill. 90; *Randall v. Lower*, 98 Ind. 257; *Planters Loan & Sav. Bank v. Dickinson*, 83 Ga. 711; *Brewster v. Madden*, 15 Kan. 249.

Simon Pruessner, the plaintiff, did not own the Sheldon mortgage for \$1,700 when this suit was commenced and therefore was not the real party in interest.

There is simply a blank indorsement upon the note and the assignment on the mortgage is not acknowledged.

An indorsement requires a delivery of the note by the indorsee himself with the intention of passing the property in the note.

Story, *Promissory Notes*, p. 125; *Sainsbury v. Parkinson*, 20 Eng. L. & Eq. 851; Bliss, *Code Pl.* p. 307; *Kain v. Bare*, 4 Ind. App. 440; *Dan. Neg. Inst.* p. 766; *Willey v. Gatling*, 70 N. C. 420; *De Witt v. Van Sickle*, 29 N. J. Eq. 209.

Henry S. Pruessner's motive for the alleged assignment to his father Simon Pruessner is very bad, and shows on his part an utter disregard for all law.

Courts cannot lend their aid to any such purpose, it being abhorrent to justice.

He who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty.

1 Sharswood's Bl. Com. p. 58, *note*.

This court will follow the unbroken line of authority, and will maintain the tax laws of this state and the dignity and integrity of the courts of justice by dismissing this cause at expense of the plaintiff and thereby say to him, and Henry S. Pruessner, the real party in interest, you have undertaken to defraud the state out of its revenues and the court will let you fight your battles single handed.

Gen. Stat. § 6849; *Washburn College v. Shawnee County Comrs.* 8 Kan. 344; *Mitchell v. Leavenworth County Comrs.* 9 Kan. 349, 91 U. S. 206, 23 L. ed. 302; *Hall v. Coppell*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Blythe v. Lovinggood*, 24 N. C. 20, 37 Am. Dec. 402; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Hucy's App.* 1 Grant, Cas. 51; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *Drexler v. Tyr-* 22 L. R. A.

rell, 15 Nev. 114; *Cambioso v. Maffett*, 2 Wash. C. C. 103; *Adams v. Rowan*, 8 Smedes & M. 624; *Valentine v. Stewart*, 15 Cal. 388; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Perkins v. Dibble*, 10 Ohio, 437, 36 Am. Dec. 97; *Thalimer v. Brinkerhoff*, 20 Johns. 396; *Greenhood*, Pub. Pol. p. 53; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423; *Bump. Fraud. Conv. p.* 246; *Stalker v. McDonald*, 6 Hill, 98, 40 Am. Dec. 389.

The \$1,000 mortgage was acknowledged before L. H. Pounds; said attempted acknowledgment was a nullity and although said Motter mortgage was recorded, it, not being acknowledged, did not impart notice to any one.

Gen. Stat. § 1180; *Sanford v. Weeks*, 88 Kan. 324; *Perkins v. Matteson*, 40 Kan. 165; *Hammers v. Dole*, 61 Ill. 308; *Brown v. Moore*, 83 Tex. 645; *Wilson v. Traer*, 20 Iowa, 231; *Beaman v. Whitney*, 20 Me. 418; *King v. Weeks*, 70 N. C. 872; *Snyder v. Sponable*, 1 Hill, 567.

Any stipulation for a greater rate of interest after maturity is null and void, and to enforce the same in a court of equity is inequitable and unjust, and contrary to precedent and authority.

2 Cooley's Bl. Com. bk. 3, p. 432; *Holles v. Wyse*, 2 Vern. 289; *Nicholls v. Maynard*, 3 Atk. 520; *Seton v. Slade*, 7 Ves. Jr. 273.

An agreement in advance that interest shall draw interest is not enforceable in an equitable action.

Howard v. Farley, 19 Abb. Pr. 128; *Toll v. Hiller*, 11 Paige 231, 5 L. ed. 118; 16 Alb. L. J. p. 254; *Van Benschooten v. Lawson*, 6 Johns. Ch. 318, 2 L. ed. 186; *Leonard v. Villars*, 23 Ill. 380; *Levens v. Briggs*, 14 L. R. A. 188, 21 Or. 333.

Mr. Bishop Crumrine, for defendants in error:

A man is not bound to keep his property in this state merely to pay the tax upon it.

Gilmore v. Roberts, 79 Wis. 450; 7 Wait, Act. & Def.

Mr. A. Bergen also for defendants in error.

Horton, Ch. J., delivered the opinion of the court:

In the answer of Joseph L. Sheldon to the petition of Simon Pruessner upon the note and mortgage executed by Sheldon and his wife to Henry S. Pruessner on June 6, 1888, for \$1,700, with interest, it was denied, among other things, that Simon Pruessner was the holder or owner of the note and mortgage; and it was also denied that he had any interest therein, the allegation being that the alleged transfer to him was colorable only, and without consideration. It appears from the evidence of Henry S. Pruessner that his indebtedness to his father before the transfer of the note and mortgage was \$450. If he had given the note secured by the mortgage to his father, or if he had sold the note in good faith to his father for \$450 only, or for any other sum, Simon Pruessner might be entitled, as the holder and owner thereof, to recover the amount with interest, and also to have a foreclosure of the mortgage. If it were not for the general finding of the trial

court in favor of Simon Pruessner, there would be no trouble whatever in this case. Simon Pruessner, the father, lives in Missouri. Henry Pruessner, the son, lives in Shawnee county, in this state.

Henry testified, among other things, as follows: "In order to get rid of paying taxes on the note and interest I owed, I sold the note to my father. In fact, I have not got anything of the money. Therefore I sold to father, being I owed a part to him; and in case I want any more I will get it of him, because I am a poor man, and I cannot afford to pay taxes on an amount I have not got, and pay interest on the same amount at the same time. Q. How did you sell it (the note) to him (your father)? A. I wrote him. Q. What did you write him? A. A letter. Q. What were the contents of the letter? A. It was being I owed him some money. Q. For what? A. I borrowed it. Q. When? A. Just before I made that transfer. Q. How much did you borrow? A. Four hundred and fifty dollars. Q. Four hundred and fifty dollars? A. Yes, sir. Q. How was that four hundred and fifty dollars given to you? A. By note. Q. What was the date of the note? A. I could not say. Q. Was the note ever paid? A. No, sir. Q. What cash did you ever get from your father? A. That much cash. Q. When? A. I could not state the exact time. Q. How did you get it? Did he pay you cash in hand? A. He sent a part and paid a part in cash. Sent by money order and registered letter. Q. Can you locate the year in which the four hundred and fifty dollars was paid? A. No, sir. Q. Was it 1890? A. No, sir. Q. Was it 1888? A. It was before we had any transaction,—before I disposed of the property. Q. That would make it before 1888? A. Yes, sir. Q. Before Sheldon bought? A. Yes, sir. Q. What about the balance of this mortgage? How much do you claim the Sheldons are owing you? A. Seventeen hundred dollars. Q. What was to become of the balance of the seventeen hundred dollars, when collected, after the paying of the four hundred and fifty dollars? A. Father holds it. Q. For you? A. Yes, sir."

The note and mortgage were not transferred at the time that any of the money was borrowed. No demand was made upon Henry for security by his father, or for any transfer of the note or mortgage. They bear the blank indorsement of Henry, but it does not appear that they were delivered personally to Simon Pruessner, or that he employed the attorney to commence this action. It does appear that one of his brothers supports him; that Henry employed the attorney; and that the note and mortgage have been either in his possession or the possession of the attorney all the time. Henry was present at the trial, and seems to have been very much interested. Simon Pruessner was not present at the trial; neither was his deposition read. Construing all of the evidence as favorably as possible for Simon Pruessner, it appears that the note was merely transferred by Henry to evade the payment of taxes justly due in this state, and thereby to defraud the revenues of the

state. His claim that he wanted to secure \$450 of borrowed money due his father seems rather a mere incident of the transfer,—the excuse, but not the controlling motive. The uncontradicted evidence is that the transfer of the note and mortgage was made "to get rid of paying taxes."

We could fairly sustain the general finding of the trial court upon the Pruessner mortgage if Henry had not testified that the transfer was made "to get rid of paying taxes," and because "he was a poor man, and could not afford to pay taxes." This evidence does not seem to us to have been fully considered by the trial court. Perhaps it was not considered because the illegality of the transfer was not specially pleaded in either of the answers; but this was not necessary. The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit a plaintiff to recover upon a transaction against public policy, even if the invalidity of the contract or transaction be not specially pleaded. *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539, and cases cited.

Henry had no hesitation in stating the illegal purpose for which he, in part, transferred the note and mortgage, and cannot complain if this court gives it full effect. Notes and mortgages are subject to taxation in this state. Gen. Stat. 1889, pars. 6846, 6847, 6849; *Kansas Mut. L. Assn. v. Hill*, 51 Kan. 686.

Cooley, in his work on Taxation, says: "There is not only a necessity for taxation, but it is eminently just and equitable that it should be as nearly equal as possible. Hence it is the policy of the law to require all property, except such as is specially exempted, to bear its proportion of the public burdens." "He who saves a sum of money by evading the payment of a tax does exactly the same injury to society as he who steals so much from the treasury, and is therefore guilty of as great immorality, or as great an act of dishonesty." 1 Sharswood, Bl. Com. p. 58, note; *Missouri, R. Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210.

Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful; and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated, or public policy contravened. The law attempts to close the doors to temptations by refusing such parties recognition in the courts. 37 Cent. L. J. 813.

"No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to rise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because it will not lend its aid to such a plaintiff."

Valentine v. Stewart, 15 Cal. 389; *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107; *Gaston*

v. Draks, 14 Nev. 175, 83 Am. Rep. 548; *Drexler v. Tyrrell*, 15 Nev. 114.

If Simon Pruessner is a bona fide owner and holder of the note for \$450 and interest, we think he may be permitted to recover that amount, and have his foreclosure; but, if Henry transferred the note and mortgage to evade the paying of taxes on his interest therein, he cannot be permitted, through Simon Pruessner, to recover any part of the note and mortgage for his own benefit. As before stated, if the note and mortgage had been transferred in good faith as a gift, sale, or as collateral security, without any wrongful intent or purpose on the part of Henry to defraud the revenue laws of the state, the whole amount thereof might be recovered by any owner or holder of the same. But the evidence of Henry, as appearing in the record, unexplained, prevents, in this case, the rendition of the judgment upon the note and mortgage taken by him from the Sheldons, and now attempted to be enforced in the name of his father.

The claim that Joseph L. Sheldon did not own the mortgaged property on the 6th day of June, 1888, at the time of the execution of the note and mortgage, and therefore that there was no consideration given for the \$1,700 note, is not tenable. Henry S. Pruessner, and Joseph and Lizzie S. Sheldon exchanged places; the Sheldons conveying by joint deed their homestead in the city of Topeka to Henry S. Pruessner for the 40 acres of land described in the petition, and giving the \$1,700 note, secured by the mortgage. Henry S. Pruessner may not have actually delivered the deed to the land to Joseph Sheldon until a day or two after the mortgage to him, but at the time of the execution of the note and mortgage the negotiations for the exchange were completed. The deed to Joseph L. Sheldon is dated the 5th day of June, 1888, and was acknowledged on the 8th day of June, 1888. The mortgage is dated the 6th of June, 1888. It was acknowledged on the 11th day of June, 1888, and recorded on the 14th day of June, 1888. Therefore we suppose all of the papers were exchanged about the same time; that all the conveyances were a part of the same transaction. The note and mortgage were really a part of the purchase money, and the mortgage operates at least upon the estate acquired from Henry, the mortgagee. The only estate attempted to be foreclosed is that obtained from Henry S. Pruessner, and it is not contended that the Sheldons succeeded to any after-acquired title from any one except from Pruessner.

Another contention in the case is that the Motter mortgage of \$1,000 was not entitled to be recorded, because it was acknowledged before an interested party, and therefore that Mrs. Sheldon had no constructive or valid notice thereof. The note held by Motter was originally given to J. N. Strickler, cashier, by Henry S. Pruessner and wife, and the

mortgage was taken to J. N. Strickler, as cashier. The acknowledgment was taken before L. H. Pounds, notary public. There is nothing upon the face of the mortgage tending to show that Pounds was an interested party. It appears from the evidence, outside of the mortgage, that J. N. Strickler was the cashier of the Investment Banking Company at Topeka, and that T. L. Pounds was the vice-president of that company; not L. H. Pounds, the person taking the acknowledgment. There is no evidence in the record that L. H. Pounds, the notary public, is or was interested in the Investment Banking Company. When the deed of the mortgaged premises was executed by Henry S. Pruessner and wife to Joseph L. Sheldon, the latter accepted the same upon the expressed condition that he assumed the payment of the Motter mortgage; therefore he not only had personal knowledge of the mortgage, but agreed to pay the same to obtain the conveyance of the property. The amount of the prior mortgage was in the nature of purchase money. No property is exempt from the payment of obligations contracted for the purchase thereof. Further than this, it appears from the evidence that Joseph L. Sheldon was absent on business during a part of the negotiations for the exchange of properties, and that his wife, Mrs. Sheldon, had very much to do with the exchange. It is probable that she had actual notice of the Motter mortgage, or rather of the prior incumbrance on the premises received in exchange for her homestead. The note held by Motter was dated February 1, 1888, and matured in three years thereafter. The rate of interest per annum specified in the note was 8 per cent until maturity and 12 per cent after maturity. Where there is an express stipulation that a certain rate of interest shall run after maturity, interest at that rate is recoverable. 11 Am. & Eng. Encyclop. Law, pp. 416, 417, and cases cited in note; 8 Randolph, Com. Paper, p. 823. § 1718, and cases cited; *Ansel v. Olson*, 39 Kan. 767.

The judgment of the trial court as rendered and entered of record is erroneous as a whole, because the judgment includes not only the amount of the note and mortgage given by the Sheldons to Henry S. Pruessner, but also provides that all of the costs, including the costs in the litigation over the Pruessner note and mortgage, as well as the Motter mortgage, are to be first paid from the proceeds of the sale of the mortgaged premises. The order of sale also contains this erroneous feature. As the costs were improperly adjudged against the Sheldons upon the Pruessner note and mortgage, those costs ought not to have been included in the judgment or the order of sale. Under these circumstances, *the judgment will be set aside*, and the cause remanded for further proceedings.

All the Justices concur.

OREGON SUPREME COURT.

OREGON & CALIFORNIA R. CO. *et al.*,
Respts.,
v.

City of PORTLAND, Substituted, etc., *Appt.*

(.....Or.....)

1. The courts may enjoin the collection of an assessment of abutting owners for the construction of elevated roadways which will not at all benefit the property assessed as there is no foundation for the exercise of discretion of the assessing officers.

2. The enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without due process of law.

(January 15, 1894.)

APPEAL by defendants from a judgment of the Circuit Court for Multnomah County in favor of plaintiffs in a suit brought to enjoin defendants from collecting an assessment upon complainants' property to pay for the construction of certain elevated roadways. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. J. V. Beach and McGinn, Sears & Simon*, for appellants:

The referee having found all the issues in favor of defendants, except upon the question of benefits and upon the sufficiency of the notice of intention to improve, and plaintiffs having moved to confirm said report without objecting to any of said findings, they are precluded from raising any points in this court, except upon the question of benefits and the sufficiency of the notice.

State v. Grover, 10 Or. 66.

The legislature has prescribed what is known as the frontage rule in making assessments to pay for the improvement of streets, granting to the council however the right to reduce the assessment if it determines that the abutting property would not be benefited in the full cost of making such improvement; the council not only did not determine that the abutting property would not be benefited in an amount equal to the cost of the improvement in front of it, but expressly determined and enacted in the ordinances providing for these improvements, which are in evidence in this case, that said property would be benefited in the full cost of making the improvement in front of it, so that both the legislature and the common council have passed upon the question, and their decision in the matter is conclusive, unless the physical condition of the property is such as to render it impossible for it to derive benefit from the improvement.

Poulsen v. Portland, 1 L. R. A. 678, 16 Or. 456; *Cooley*, Taxn. 661 *et seq.*; *Am. & Eng. Encyclop. Law*, p. 801, and cases there cited.

The finding of the referee on this point is to the effect that the improvement is of no benefit to the property as long as it is used for the purpose for which it was purchased, viz.: mak-

ing up trains, switching and the like; but can an abutting owner relieve himself from an assessment of this kind by testifying that he purchased the property for a particular use, and that the improvement is no advantage to him or to the property so long as he makes such use of the property? A statement of such a proposition of law is enough to refute it.

See *Cooley*, Taxn. pp. 668, 664; *Elliott, Roads and Streets*, pp. 408-441.

The referee has found that these streets do not extend any farther west than Water street, the land west of these points being tide or overflowed lands.

If there are no streets there, no property can be assessed for the improvement; but what right have plaintiffs to complain?

If complainants owned the adjoining property they could not prevail in this suit upon the ground that there was no street laid out there, without tendering the amount of the assessment upon the remaining portion of their property.

Mills v. Charleston, 29 Wis. 418, 9 Am. Rep. 578; *Evans v. Sharp*, 29 Wis. 564; *Evansville v. Pfisterer*, 84 Ind. 36, 7 Am. Rep. 214; *Meggett v. Eau Claire*, 81 Wis. 826; *Barker v. Omaha*, 16 Neb. 269; *Cook v. Racine*, 49 Wis. 244.

Mr. A. H. Tanner, for respondents:

The power conferred upon municipal corporations to improve streets and assess the cost thereof upon adjacent property is a special and limited power, and can only be exercised by a strict observance of every requirement of the act conferring it.

Hawthorne v. East Portland, 18 Or. 271; *Northern Pacific Terminal Co. v. Portland*, 14 Or. 27; *Strode v. Washer*, 17 Or. 58; *Van Sant v. Portland*, 6 Or. 395.

The notices of the intention of the common council of the city of East Portland to make these improvements are void, for the reason that they do not describe with the requisite certainty the streets or part thereof to be improved.

Hawthorne v. East Portland, *supra*; *Welty, Assessments*, § 288; *Foss v. Chicago*, 56 Ill. 354.

Under the provisions of the charter of the city of East Portland, property is only liable for the cost of the improvement, or any part thereof, when it is benefited by such improvement, to the extent of such assessment.

Sess. Laws 1885, art. 6, §§ 5, 18, pp. 816, 820.

The benefits to be conferred must be special benefits and advantages to the property in addition to those received by the community at large.

Chamberlain v. Cleveland, 34 Ohio St. 551; *State v. Elizabeth*, 37 N. J. L. 330; *Hammitt v. Philadelphia*, 65 Pa. 146, 8 Am. Rep. 615; *Poulsen v. Portland*, 1 L. R. A. 678, 16 Or. 450; *Nichols v. Bridgeport*, 28 Conn. 189, 60 Am. Dec. 636; *State v. Jersey City*, 86 N. J. L.

NOTE.—The above decision is in accord with the very great weight of authority in holding that special benefits are necessary to sustain special 22 L. R. A.

assessments for public improvements. See *note to Re Bonds of the Madera Irrigation Dist.* (Cal.) 14 L. R. A. 755.

56; *New York & N. H. R. Co. v. New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; Dill. Mun. Corp. § 761; *St. Louis v. Allen*, 53 Mo. 44.

Where property is shown to be so situated with reference to the improvement that there cannot possibly be any actual or present benefit thereto, the finding and declaration of the council that the property is benefited is a legal fraud upon the property owner, which courts of equity will set aside as oppressive and in violation of the constitutional rights of such owner.

Poulsen v. Portland and Chamberlain v. Cleveland, *supra*; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Re Canal Street*, 11 Wend. 154; *State v. Jersey City*, *supra*; *Cooley*, Taxn. pp. 619, 641, 661, 662; *Soady v. Wilson*, 3 Ad. & El. 248; *Hanscom v. Omaha*, 11 Neb. 37; *Brown v. Denver*, 3 Colo. 169; *Johnson v. Milwaukee*, 40 Wis. 315; *Crawford v. People*, 82 Ill. 557; *Creighton v. Manson*, 27 Cal. 614-625; *Zoeller v. Kellogg*, 4 Mo. App. 163; *People v. Brooklyn*, 23 Barb. 166; *Re New York Prot. Episcopal Pub. School*, 75 N. Y. 324; *Allen v. Drew*, 44 Vt. 174; *Louisville v. Louisville R.R. Mill Co.* 3 Bush, 416, 96 Am. Dec. 243; *Elliott, Roads & Streets*, p. 410; *Mulligan v. Smith*, 59 Cal. 206; *Junction R. Co. v. Philadelphia*, 88 Pa. 424; *New York & H. R. Co. v. Morrisania Trustees*, 7 Hun, 652.

Property acquired under legislative authority and held for railroad purposes exclusively, including road-bed, right of way, depots and station grounds, are held for public use, and are treated by the law on grounds of public policy as an entire thing, not legally subject to coercive severance or dislocation, except by some act of the legislature expressly authorizing it. Hence, such property is not subject to assessment for local improvements resulting in a specific lien upon specific parts or portions of such property, and the consequent sale thereof in the same manner as upon execution, as provided by the city charter of East Portland, unless expressly authorized by legislative enactment.

Applegate v. Ernst, 3 Bush, 648, 96 Am. Dec. 272; *Graham v. Mount Sterling Coal Road Co.* 14 Bush, 425, 29 Am. Rep. 412; *Knapp v. St. Louis, K. C. & N. R. Co.* 74 Mo. 374; *Junction R. Co. v. Philadelphia and New York & N. H. R. Co. v. New Haven and New York & H. R. Co. v. Morrisania Trustees*, *supra*; *Philadelphia v. Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Abercrombie v. Ely*, 60 Mo. 23; *Dunn v. North Missouri R. Co.* 24 Mo. 493; *Portland Lumbering & Mfg. Co. v. School Dist. No. 1*, 18 Or. 283; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Phillips, Mechanics' Liens*, § 180; *Parke County Comrs. v. O'Conner*, 86 Ind. 536; *State v. Jersey City*, 36 N. J. L. 56; *Foster v. Fowler*, 60 Pa. 27; *Wilkinson v. Hoffman*, 61 Wis. 637; *Girard Point Storage Co. v. Southwark Foundry Co.* 105 Pa. 248; *Tylee Tap. R. Co. v. Driscoll*, 52 Tex. 13; *McPheeters v. Merrimac Bridge Co.* 28 Mo. 465; *Schulenburg v. Memphis, C. & N. W. R. Co.* 67 Mo. 442; *Skrainka v. Rohan*, 18 Mo. App. 340; *Duno v. Mississippi, O. & R. R. Co.* 27 Ark. 564; *Cox v. Western Pac. R. Co.* 44 Cal. 18; 22 L. R. A.

Buncombe County Comrs. v. Tommey, 115 U. S. 122, 29 L. ed. 305; 2 Jones, Liens, §§ 1618, 1619.

Assessments made upon the property of the plaintiffs as to the benefits received, without notice and an opportunity to be heard upon that question, if deemed final and conclusive, would be unconstitutional as depriving them of property "without due process of law."

State v. Paterson, 41 N. J. L. 83; *Mulligan v. Smith*, 59 Cal. 206; *Weimer v. Bunbury*, 30 Mich. 201; *Thomas v. Gain*, 35 Mich. 154, 24 Am. Rep. 535; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Cooley*, Taxn. p. 266; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 145; *Seifert v. Brooks*, 34 Wis. 443; *Langford v. Ramsey County Comrs.* 16 Minn. 375.

But if the matter of assessments of benefits is left subject to review by the courts, and the decision of the council is not deemed to be final and conclusive, then it is submitted that the property owner is not denied the right to be heard in reference to the assessment of such benefits, and the constitutional guarantee referred to is not violated.

Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 28 L. ed. 569; *Scott v. Toledo*, 1 L. R. A. 688, 36 Fed. Rep. 385; *Gilmore v. Hentig*, 83 Kan. 156; *Cooley*, Taxn. 2d ed. p. 636; *Wilson v. Salem (Or.)* Sept. 12, 1893; *Poulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637.

The elevated roadways in question were extended from one hundred and fifty to two hundred feet west of the west end of the streets, and jutting out for a considerable distance into the Willamette river, which was unauthorized, and renders the whole proceeding void.

Dyer v. Chase, 53 Cal. 441; *Welty, Assessments*, § 286; *Western Pennsylvania R. Co. v. Allegheny*, 92 Pa. 100.

Moore, J., delivered the opinion of the court:

This is a suit originally brought against the city of East Portland, its officers and employes, to restrain it and them from building elevated roadways on G and H streets, adjoining plaintiffs' property, and to enjoin the collection of the assessment therefor. A temporary injunction was granted, restraining the construction of the roadways and the collection of the assessment, which was subsequently modified by permitting the defendants to build the roadways upon giving a sufficient bond conditioned that said structures would be removed if it should be decreed that they were improperly built, or that the proceedings of the city council were insufficient to authorize their construction. After the consolidation of East Portland and Portland, the latter city was, by order of the court, substituted for the other defendants. The plaintiffs protested against the improvements when they were contemplated by the council, and, as soon as they were commenced, began this suit; but the defendants gave the required bond, and proceeded with the work. The complaint sets out the alleged errors of the city council which it is claimed rendered its proceedings void, and, the defendants having deemed all its material alle-

gations, the cause was referred to H. H. Northup, Esq., to take the testimony, and report his findings of fact and conclusions of law thereon. The referee, after taking the testimony, made, among others, the following finding of fact: "(2) The said improvements of G and H streets are of no benefit to the property of the plaintiffs, described in finding of fact No. 6, in its present condition, nor are said improvements of any benefit to said property when used for the purposes for which it was purchased and intended, to wit, yard and depot purposes." The court, at the trial, approved said finding, and rendered a decree perpetually enjoining the collection of the assessment, from which the defendants appeal, and now contend that the assessment of benefits was a matter within the discretion of the city council, which the courts cannot review.

The streets of a city having been dedicated by the proprietor to the public, the state, by its legislative assembly, may determine the necessity for, and character of, any improvement thereto, and what property will be benefited thereby; and whatever power the legislature possesses over the streets of a city it may delegate to its corporate authorities, to be exercised in the mode, and to the extent, prescribed in the act conferring such power. This delegation of power invests the municipal corporation with all the discretion the legislature possessed, and hence it follows that the common council, as agent of the corporation, is clothed with exclusive discretion in determining the necessity for and character of all street improvements, what property will be benefited thereby, and the amount of benefits conferred. These are questions of policy with which the legislature and its creature, the municipal corporation, deal, and the courts have no right to interfere except in case of fraud or oppression, or some wrong constituting a plain abuse of such discretion. Elliott, Roads & Streets, 375; Cooley, Taxn. 661.

It is impossible for a council to fix with mathematical accuracy the amount of benefits that will inure to property in consequence of a local improvement, but if it appear that it has exercised an honest discretion in determining this question of policy, however much it may have erred in judgment, the remedy is at the polls in choosing a new council, and not by reviewing its proceedings in the courts. If the courts were invested with authority to review these questions of policy, but few assessments could ever be collected without an action, and the adjudication of purely legislative questions would be substituted for the discretion of a city council. The only recognized exceptions to this rule are to be found in those cases in which, under pretense of apportionment, a work of general benefit has been treated as one of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation. Cooley, Taxn. 405.

The presumption is that the council has done its duty; but this presumption may be overcome by facts showing that the rule prescribed for the apportionment or the assess-

ment made under it is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principle of taxation. Cooley, Taxn. 662; Elliott, Roads & Streets, 410.

Section 5, article 6, of the charter of East Portland (Sess. Laws 1885, p. 316), under which the assessment was made, provides that "the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor its proportionate share of such cost, and if the council shall adjudge that any such lot or part of lot would not be benefited by the improvement in the full sum of the cost of making the same upon the half of the street abutting upon such lot or part of lot, the council shall assess upon such lot or part of lot, as its proportionate share thereof, such sum only as it shall find the lot to be benefited by such improvement." And section 18 of the same article provides that "each lot or part thereof, within the limits of a proposed street improvement, shall be liable for the full cost of making the same upon the half of the street in front of and abutting upon it, and also a proportionate share of the cost of improving the intersection of two of the streets bounding the block in which said lot or part thereof is situated, unless the council shall have determined that such lot or part thereof will not be benefited by such improvement in the full sum of such cost, in which case such lot or part thereof shall be liable for so much of said cost only as the council shall have found the same to be benefited thereby; and the further cost of making said improvement in excess of the benefits so found shall be paid from the general fund of the city."

These sections of the charter clearly provide that the measure of the assessment is limited to the amount of benefits derived, and invest the council with a discretion in determining that amount; and, so long as this discretion is not abused, the courts are powerless to review its action in a collateral proceeding. Thayer, J., in speaking of the discretion of a common council in assessing benefits, said: "It exercises such authority as agent of the state, and for the public good; and, so long as it keeps within the scope of its power, the courts have no control over it, nor jurisdiction in a collateral proceeding to question its acts. If it were to assess property for the cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of *Hanscom v. Omaha*, 11 Neb. 87, it would exceed its authority, and it would be the duty of the courts to interfere, and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise, and the common council has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits." *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673. This is practically holding that, if property had received any benefit from a

local improvement, courts would not measure the amount, but, if it were so situated that it could not possibly receive any benefit therefrom, they would interfere to prevent the wrong.

The referee who took the testimony found that the property was so situated that it had received no benefit from the improvement, and the court gave this finding its unqualified approval in the following expressive language: "The evidence shows that these elevated roadways led from Second street to the river, where there is no wharf, warehouse, ferry, or landing, or other improvements; that it has not been traveled or used as a thoroughfare, or in fact for any purpose except for the storage of iron and materials; that there is no likelihood that it will ever be used as a traveled street; that it has not served any other cognate purpose; that it is an actual detriment to the property of the plaintiffs for the purpose for which it was purchased, to wit, yard and depot purposes. It appears, also, in the ninth and tenth findings of fact of the referee's report, that the city built these elevated roadways beyond the west end of the streets over private property,—ninety-five feet from the west end of G street, and one hundred and thirty-nine feet from the west end of H street,—and attempted to assess the costs upon the plaintiffs' property. The alleged improvements would appear to be a foolish and wholly uncalled for undertaking, which served neither the public nor the property holders in this instance; and the attempt to charge the property of the plaintiffs with the costs thereof is, to use the words of a famous jurist in a similar instance, 'so plainly, palpably, rankly, and ruinously unjust that it must be pronounced no proper or lawful mode of taxation, but an injustice so gross as to be void against the rights of property, as protected by a bill of rights.'"

The court and referee, from their knowledge of the premises and of the character of the improvement, were well qualified to make these findings, which a careful examination of the record shows were fully warranted by the evidence.

"The courts," says Judge Elliott, "will interfere with reluctance, and only in clear cases, but they will not abdicate all power of review and supervision. They will not substitute their judgment for that of the local officers, but they will not permit those officers to so abuse their discretion as to do great injustice to the citizen." Elliott, Roads & Streets, 411.

"We have no doubt," said the court in *Allen v. Drew*, 44 Vt. 174, "that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax, or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

The court having found that there was no necessity for the improvement, that the elevated roadway, as built, had not been, and probably never would be, used, and that the improvements were of no benefit, but an actual damage, to plaintiffs' property, and these conclusions being amply supported by the evidence, we feel bound thereby. The record shows that these roadways are from 15 to 30 feet above the surface of plaintiffs' property, extending from Second street, on G and H streets, into the Willamette river, a distance of about three blocks, and can only be approached from Second street; that they do not connect with any wharf, bridge, ferry, or landing, and, as the court substantially finds, stand out in the river as monuments of folly; that, though they have been built about two years in a populous city, teeming with life and business energy, they have only been used in a few instances by teamsters hauling away some iron pipes which had been landed thereon from the river. There could not have been much, if any, public necessity for these structures, if their actual use is to be taken as an indication of their utility. They have not been used by the public nor by the plaintiffs, and, as the court finds, probably never will be; and yet it is sought to collect the cost of their construction from the plaintiffs upon the theory of benefits conferred. Courts rightfully hesitate to review the discretion of a city council, and consider it a delicate question; and yet there are cases in which the exercise of the power of assessment becomes such a flagrant abuse that they must interfere to prevent the confiscation of property. In this case it clearly appears that the property of the plaintiffs was in no way benefited by the alleged improvement, and hence there was no foundation for the exercise of discretion on the part of the council in the assessment of such property for its cost, or any part thereof. Under such circumstances, the enforcement of the assessment would be "taking property without due process of law," and *the decree must therefore be affirmed.*

RHODE ISLAND SUPREME COURT.

Re LEGISLATIVE ADJOURNMENT.

(28 R. L. —)

1. A resolution purporting to be passed by the house of representatives after the

NOTE.—Power as to adjournment of legislature. The power of the governor to declare the legislature adjourned in case of a disagreement involves 22 L. R. A.

general assembly had been prorogued by the governor is of no effect.

2. The provision in Const., art. 4, § 9, that neither house, without consent of the other, shall adjourn for more than two days is subject to implied exceptions, such

several interesting questions, which are decided in the above case for the first time.

The case which comes nearest to constituting a

as that where one house has unlawfully unseated members, thereby depriving towns of their constitutional representation. In such case the other house may adjourn until the vacancies can be filled.

3. The question whether or not a "disagreement" exists which authorizes the governor to adjourn the general assembly, under Const., art. 7, § 6, is one on which the decision of the governor is conclusive, and not reviewable by the courts.

4. The fact that the two houses have not yet joined in grand committee for counting and declaring votes does not prevent the governor, under Const., art. 7, § 6, from adjourning the general assembly in case of disagreement between the two houses.

(August 12, 1893.)

ON REQUEST by the House of Representatives for the opinion of the supreme court as to the validity of an adjournment by the senate. *Adjournment sustained.*

The assembly met pursuant to the constitution on May 30, 1893. After organization the house of representatives sent an invitation to the senate to join in grand committee to canvass the votes for general officers, and to elect such officers as had not been elected by the people. The senate declined this invitation because "since the organization of the house, that body, to the knowledge of the members of the senate, had unseated certain of its mem-

bers and seated persons not elected, in violation of law and in defiance of the constitution of the state, thereby changing the character of the grand committee and that therefore the house, as at present constituted, is not the body with which the constitution contemplates that the senate should meet for the purpose named in the resolution;" thereupon the senate voted to adjourn to meet again on the last Tuesday in January, 1894, and transmitted the vote to the house for concurrence. The house refused to concur, and the senate then passed a resolution to adjourn to the time named, claiming the right to do so because of irreconcilable differences between it and the house as to the time and place of adjournment. It also certified to the governor a disagreement, and the governor thereby adjourned the general assembly to meet at the time and place stated in the senate resolution.

The house of representatives then adopted the following resolution:

"Resolved, that the honorable judges of the supreme court be, and are hereby, requested to give to the house of representatives their opinion upon the following questions of law:

"First. Has the senate the constitutional power at the May session to pass a resolution of adjournment for a longer period than two days, until after it has joined with the house of representatives in grand committee, request having been made to the senate by the

precedent is that of *People v. Hatch*, 33 Ill. 2, in which the court regretted its inability to find any similar case, and held that a valid adjournment must be held to have been made when the governor's proclamation of an adjournment had been acquiesced in by both houses of the legislature by dispersing. It also held that a joint rule for adjournment *sine die* by resolution, not being a constitutional requirement, was not indispensable to such adjournment; and that where the legislature disperses without meeting again on the following day, and the journals show no adjournment to any particular day, it must be presumed that the adjournment was *sine die*. This decision was rendered under a constitutional provision substantially identical with that of Rhode Island in respect to the power of the governor to adjourn the legislature.

The Illinois case is the only one we have been able to find which really touches the question of power to adjourn the legislature, except that of *Trammell v. Bradley*, 37 Ark. 374, which only decides that a concurrent resolution to continue a session of the legislature for ten days after the time when the session would otherwise expire is one of the "questions of adjournment," which, under Ark. Const., art. 6, § 16, are excepted from those orders or resolutions which must be presented to the governor.

In *Story on the Constitution*, § 844, it is said in respect to the adjournment of legislative bodies by the executive "under the colonial governments, the undue exercise of the same power by the royal governors constituted a great public grievance and was one of the numerous cases of misrule upon which the Declaration of Independence strenuously relied."

It is not strange therefore that the constitutions of nearly all the states have incorporated provisions to govern legislative adjournments. In a large number of states it is provided, in substantially the same language, that neither house can

adjourn for more than three days without the consent of the other. Ala. Const. (1875) art. 4, § 16; Ariz. Rev. Stat. § 2397; Ark. Const. (1874) art. 5, § 23; Cal. Const. (1849) art. 4, § 15; Colo. Const. (1876) art. 5, § 15; Del. Const. (1831) art. 2, § 10; Fla. Const. (1885) art. 3, § 13; Ga. Const. (1877) art. 3, § 7, subd. 24; Ind. Const. (1851) art. 4, § 10; Iowa Const. (1857) art. 3, § 14; Ky. Const. (1850) art. 2, § 23; La. Const. (1860) art. 33; Md. Const. (1867) art. 3, § 25; Mich. Const. (1850) art. 4, § 12; Minn. Const. (1857) art. 4, § 6; Miss. Const. (1869) art. 4, § 13; Neb. Const. (1875) art. 3, § 8; Nev. Const. (1864) art. 4, § 15; N. J. Const. (1844) art. 4, § 4, subd. 6; Or. Const. (1859) art. 4, § 11; Pa. Const. (1790) art. 1, § 16; S. C. Const. (1862) art. 2, § 25; Tenn. Const. (1870) art. 2, § 16; Tex. Const. (1845) art. 3, § 19; Vt. Amend. 3 (1836) to Const. of 1793; Va. Const. (1869) art. 5, § 6; W. Va. Const. (1872) art. 6, § 23; Wis. Const. (1848) art. 4, § 10.

In a few states it is provided that such adjournment by either house without the consent of the other shall be for not more than two days. Ill. Const. (1870) art. 4, § 10; Kan. Const. (1859) art. 2, § 10; Me. Const. art. 4, pt. 3, § 12; Mo. Const. (1875) art. 4, § 23; N. Y. Const. (1875) art. 3, § 11; Ohio Const. (1861) art. 2, § 14; R. I. Const. (1842) art. 4, § 9.

But in Kansas, Minnesota, and Ohio Sundays are expressly excepted from the days limited.

In Massachusetts and New Hampshire the provisions are separately made in respect to the senate and house of representatives. They declare affirmatively that the senate may adjourn themselves provided the adjournment shall not exceed two days at a time. Mass. Const. (1780) pt. 2, art. 6, § 2; N. H. Const. (1793) pt. 2, art. 35. And the same provision is made as to adjournment of the house of representatives. Mass. Const. pt. 2, chap. 1, § 3, art. 8; N. H. Const. pt. 2, art. 18. But nothing is said expressly in either case about the consent of the other house; or of a longer adjournment with such consent.

In respect to the senate it is also provided by N. H. Const. (1793) pt. 2, art. 35, that on an impeach-

house of representatives to join in such grand committee for the purpose of counting and declaring the votes cast for general officers at the preceding April election?

"Second. In case a resolution of adjournment to the city of Providence to the fourth Tuesday in January following should have been adopted by the senate before joining the house of representatives in grand committee at the annual May session, for the purpose of counting and declaring the votes cast for general officers at the preceding general election, should not have been acted upon by the house of representatives, does such a state of things constitute a 'disagreement' on the subject of adjournment, which confers upon the governor the power to adjourn the general assembly, under section 6, article 7, of the Constitution?"

"Third. Can the general assembly at the May session be adjourned by the governor under the power conferred upon him by section 6, article 7, of the Constitution, until after the two houses have joined in grand committee for the purpose of counting and declaring the votes cast for general officers at the preceding April election?"

This resolution was indorsed: "In House of Representatives, June 2, 1893. Read and passed. John E. Conley, Clerk."—and was transmitted by the speaker of the house to the court.

The court returned the following opinion:

ment trial it may adjourn as it thinks proper, although the legislature be not assembled on such day nor at such place.

In nearly but not quite all the above-named states the provision limiting the number of days for which either house to adjourn without consent of the other is connected with a provision that it shall not adjourn to any other place without such consent. Ala. Const. (1875) art. 4, § 16; Ariz. Rev. Stat. § 2297; Ark. (1874) art. 5, § 22; Cal. Const. (1849) art. 4, § 15; Colo. Const. (1876) art. 5, § 15; Del. Const. (1831) art. 2, § 10; Fla. Const. (1885) art. 3, § 13; Ga. Const. (1877) art. 3, § 7, subd. 24; Ill. Const. (1870) art. 4, § 10; Ind. Const. (1851) art. 4, § 10; Iowa Const. (1857) art. 3, § 14; Ky. Const. (1850) art. 2, § 22; La. Const. (1850) art. 33; Me. Const. (1819) art. 4, pt. 3, § 12; Mich. Const. (1850) art. 4, § 12; Minn. Const. (1857) art. 4, § 6; Miss. Const. (1869) art. 4, § 12; N. J. Const. (1844) art. 4, § 4, subd. 5; Ohio Const. (1851) art. 3, § 9; Or. Const. (1859) art. 4, § 11; R. I. Const. (1842) art. 4, § 9; S. C. Const. (1882) art. 2, § 25; Tenn. Const. (1870) art. 2, § 16; Vt. Amend. 3 (1836) to Const. 1793; Va. (1880) art. 5, § 6; W. Va. (1872) art. 6, § 23.

In Maryland it is provided that such adjournment shall not be made to another place without a concurrent vote of two thirds present. Md. Const. (1867) art. 3, § 25.

In Missouri it is provided that if the general assembly take an adjournment or recess for more than three days, it shall have the effect of and be an adjournment *sine die* (Mo. Const. (1875) art. 4, § 21); but an adjournment of three days or less shall not interrupt the session. Section 22.

A large number of states, though not quite so many as are above mentioned, also provide in their constitution that the governor may adjourn the legislature in case of disagreement. Such is the provision in Ga. Const. (1877) art. 3, § 7, subd. 24. The greater number of these, like Rhode Island, provide that in such case the adjournment shall be for such time as the governor shall think proper, provided it shall not be for a time which shall ex-

To the Honorable Franklin P. Owen, Speaker of the House of Representatives:

We have received from you a resolution, purporting to have been passed by the house of representatives, propounding certain questions of law upon which we are requested to give our opinion.

Before proceeding to specifically consider said questions, we feel called upon to say that, from the character and tenor thereof, we must infer that, prior to the passage of the resolution submitting said question to us, the general assembly had been prorogued by his excellency, the governor.

This being so, and assuming, as we are bound to do, that the said act of the governor was legal, said resolution was not passed by the house of representatives, and we are not, therefore, called upon to take notice of the same. See article 10, § 3, of the Constitution. The gravity of the situation, however, in which both the legislative and executive branches of our state government are at present placed, of which we cannot fail to take notice, and the importance of the principles and rights involved, are a sufficient warrant, we think, for us to assume the right and duty of replying to said questions.

In doing so we have the honor to say:

First. That under the provisions of article 4, § 9, of the Constitution, neither house has the power, without the consent of the other, to adjourn for more than two days, nor to

tend beyond the time for the beginning of the next regular session. Ark. Const. (1874) art. 5, § 20; Cal. Const. (1849) art. 5, § 11; Colo. Const. (1876) art. 4, § 10; Conn. Const. (1818) art. 4, § 7; Ill. Const. (1870) art. 5, § 9; Miss. Const. (1869) art. 5, § 7; Fla. Const. (1885) art. 4, § 10; Iowa Const. (1857) art. 4, § 13; Kan. Const. (1859) art. 1, § 6; Me. Const. (1819) art. 5, pt. 1, § 13; Neb. Const. (1875) art. 5, § 9; Nev. Const. (1864) art. 5, § 11; R. I. Const. (1842) art. 7, § 6; S. C. Const. (1882) art. 3, § 16; Tex. Const. (1845) art. 5, § 8.

In Colorado the governor's authority can be exercised only when the fact of disagreement is certified by the house which has last moved for an adjournment. Colo. Const. (1876) art. 4, § 10.

In two states such adjournment by the governor cannot be for more than ninety days, and his authority must be exercised under the advice of his counsel. Mass. Const. (1790) pt. 2, chap. 2, § 1, art. 6; N. H. Const. (1793 and Amends.) pt. 2, art. 42.

In New Hampshire it is further provided that the governor shall dissolve the same seven days before the first Wednesday in January.

In Delaware the limit of adjournment by the governor in case of such disagreement is three months. Del. Const. (1831) art. 3, § 12.

In Kentucky and Pennsylvania the governor may make such adjournment in case of disagreement for not more than four months. Ky. Const. (1850) art. 3, § 12; Pa. Const. (1790) art. 3, § 12.

While in Vermont the provision is that, in such case, he may adjourn the legislature to such time as he thinks proper. Vt. Const. Amend. 3 (1836) to Const. of 1793.

And this would seem to be the effect of Ga. Const. (1877) art. 3, § 7, subd. 24, which does not expressly limit the time for adjournment.

Many states also have constitutional provisions for adjournment of a legislative house from day to day for lack of a quorum but this is matter quite different from permanent adjournment.

B. A. R.

any other place than that in which they may be sitting. A condition of things can be imagined, however, which would warrant an adjournment in the circumstances stated in the questions. For example, suppose the house of representatives should unseat or expel thirty-five members, leaving only a bare quorum, and several towns unrepresented; the constitution clearly implies that the representation of all the towns shall be complete, even though all the members-elect may not attend the session. This implication is found in the fact that members of the preceding body may hold their seats until their successors are qualified to act; and in the further provision of article 8, § 7, that where a failure to elect a governor is produced by rejecting the entire vote of any town, city, or ward, a new election shall be ordered. The idea is plain that each town shall be entitled to its full representation and vote, both in an election by the people, or, in case of failure, by the assembly. If, therefore, either house should, by its own action, deprive towns of representation to the extent supposed, we do not think it could be claimed that the other house is bound to go into grand committee with a house so constituted. The supposed case is an extreme one, but it illustrates the principle that each town is entitled to the full representation which the constitution contemplates, and this principle is equally violated, though not to the same extent, if one town is illegally deprived of its full representation. In such cases the assembly may properly adjourn until the vacancies can be filled.

Other emergent causes, sufficient to justify an adjournment, may arise, such as an epidemic, after the assembly has convened; a riot, or great public disturbance; the destruction of the statehouse; a palpable violation of the constitution by the expulsion of members contrary to its provisions, whereby the character of the grand committee is changed, and the like. In the latter case, notwithstanding the fact that each house is to be the judge of the qualifications of its own members, a decent self-respect would entitle the other branch to refuse to be a party to such illegal constitution of the grand committee, and to base its action thereon. The question then resolves itself into this: Whether the assembly, by joint resolution, may adjourn for more than two days after both houses are organized, and before counting the votes; for what both bodies may pass by concurrent vote, one may first pass and transmit to the other for concurrence. We regard the provision of the constitution requiring the assembly to count the votes at the May session as in the highest degree imperative. Yet, as we have said, there may be circumstances which would justify, and, indeed, require, the postponement of this duty for more than two days. Hence, as an abstract proposition, we must answer the question in the affirmative. Whether any given state of affairs is one to justify or demand such adjournment, and how long such adjournment should be, are legislative questions, necessarily left to the decision of the body whose action is proposed, and when decided by such body can 22 L. R. A.

only be reviewed by the approval or rebuke of the electors.

Second. In reply to the second question, we have to say that whether or not the circumstances stated therein constitute such a "disagreement" as is contemplated under the provision of article 7, § 6,* of the Constitution, is a question which it is not within either the province or power of the judiciary to determine, but which, under the constitution, rests solely in the sound judgment and discretion of the chief executive of the state. Whatever our personal opinions might be as to the propriety of certifying a disagreement under the circumstances stated, an expression of such opinion, after the act is done, with no power to correct it, would amount only to a criticism upon the action of a co-ordinate branch of the government, which it would be improper to make; for it must be constantly borne in mind that the powers of our government are distributed into three departments,—the legislative, the executive, and the judicial,—all co-ordinate and of equal authority in their proper spheres, though mutually interwoven, and, in some measure, dependent upon each other. As said by the great expounder of constitutional law: "A separation of departments, so far as practicable, and the preservation of clear lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries." 4 Webster, Works, p. 122. See also Works of Rufus Choate, by Samuel Gilman Brown, p. 364.

The powers vested in the executive department are to be exercised by the governor under his oath of office, and under the express constitutional injunction that he "shall take care that the laws be faithfully executed;" and he is responsible to the people alone for the manner in which he discharges the duties of his high office. If he violates the constitution or the laws which he is sworn to support, he may be impeached, and removed from office, and may also be indicted and punished like any other person. See article 2, Const. But for the exercise of his powers and prerogatives as governor, neither the legislative nor the judicial department of the government has any power to call him to account, nor can they, or either of them, review his action in connection therewith. In short, it cannot be questioned that the governor is supreme and independent in the executive department, as is the legislature in the legislative, and the court in the judicial, department of the government. *People v. Mahaney*, 13 Mich. 481; *People v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Hovey v. State*, 127 Ind. 588-600, 11 L. R. A. 763.

Moreover, this is a case in which the executive department of the state government has the power and duty to finally pass upon a question of constitutional construction. It

*Sec. 6. In case of disagreement between the two houses of the general assembly, respecting the time or place of adjournment, certified to him by either, he (the governor) may adjourn them to such time and place as he shall think proper: provided that the time of adjournment shall not be extended beyond the day of the next stated session."

belongs to that class of cases, as well stated by Judge Cooley in his excellent work on Constitutional Limitations (p. 54), "where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer: so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive." "Under every constitution," says the same learned author, "cases of this description are to be met with, and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final."

The power of the executive which we are considering is a political power, "in the exercise of which," in the language of Chief Justice Marshall in *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60, "he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience; and, whatever opinion may be entertained of the manner in which the executive discretion may be used, still there exists no power to control that discretion." "The subject is political." "It respects the state, not individual rights; and, being intrusted to the executive, the decision of the executive is conclusive." See also, *People v. Brooks*, 16 Cal. 11, 54 et seq.; *United States v. Arredondo*, 31 U. S. 6 Pet. 691, 729, 780, 8 L. ed. 547, 561, and cases cited; *Hawkins v. The Governor*, 1 Ark. 570, 586-596, 33 Am. Dec. 846.

In *Mauran v. Smith*, 8 R. I. 192-228, 5 Am. Rep. 564, which was a petition for a writ of mandamus to compel the governor to prefer charges against, and convene a court-martial for the trial of, the petitioner, the general question here involved was very fully and ably discussed by eminent counsel, and it was held by this court, Durfee, J., giving the opinion, that the court had no authority to grant the writ, for the reason that the governor, while acting within the sphere of his authority, constituted an independent co-ordinate department of the government. See also, *Taylor v. Place*, 4 R. I. 324, 330-364.

We can no better define and illustrate the power and duty of the judiciary in the premises, than by quoting from the able opinion of Caton, Ch. J., in *People v. Bissell*, 19 Ill. 229, 231, 68 Am. Dec. 591. He says: "To the judiciary is confided the power and the duty of interpreting the laws and the constitution whenever they are judicially presented for consideration. Hence it becomes our duty to determine what is the meaning of the laws passed by the legislature, and also whether those laws are such as the legislature was authorized by the constitution to pass. So also, of the acts of the executive, we are bound to determine whether such acts are authorized by the laws and the constitution, whenever they are brought before us judicially, but not otherwise; and hence the judicial department of the government exercises a certain controlling, or rather restraining, power, over both the other departments 32 L. R. A.

of the government. Notwithstanding all this, when carefully considered, it will be seen that each department, within its proper constitutional sphere, acts independently of both the others, and restraint is only placed upon it when such sphere is actually transcended, or express authority is given by the constitution, for restraint or control, by another department. As from necessity and the very nature of all government there must be an ultimatum somewhere, whose duty it is to determine whether such sphere has been passed or not, that duty in most cases falls on the judicial department, from the fact that in this department is reposed the responsibility of enforcing or giving effect to the acts of the other departments; but it is only when thus called upon, in some form known to the law, to give effect to such acts of the other departments, that the judiciary can determine whether such acts were done in the exercise of a constitutional power. In no other way, nor in any other cases, can this department construe the constitution for, or exercise any control over, any other department. Where final action upon any subject is confided to either of the other departments, there the responsibility must rest of conforming such action to the law and the constitution. "It is because such final action is generally devolved upon the judiciary that the judiciary is most frequently called upon to give a final and conclusive construction to the constitution and laws. It results, therefore, from this philosophical arrangement of our governmental system, that the control which the judicial department exercises over the others is of a restraining, and not of a compulsory, power. But this is only practically, and not literally, so. We may not enjoin the others from doing an unconstitutional act, but by refusing to give effect to such act, or relieving against it, when properly and judicially applied to for that purpose, we may restrain them. We cannot restrain the governor from issuing the bonds of the state, contrary to law; but when the question is properly presented before us we can declare such bonds void; and so of a patent for the public land which he might issue. And so, if he should step beyond his constitutional sphere, and unlawfully imprison a party, we could discharge such party on habeas corpus. But we have no power to compel either of the other departments of the government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those departments may compel us to perform our duties. The governor is, and must be, as independent of us as is the legislature, or as we are of either of them."

Third. As to the third and last question submitted to us, we have to say that, under article 7, § 6, of the Constitution, above referred to, the power of the governor to adjourn the general assembly upon the happening of the event therein mentioned is general, and not dependent upon the fact as to whether the two houses have joined in grand committee or not. The exigency provided for by the constitution had arisen. The necessary and only warrant required for action on

his part was the certificate of disagreement. It is true, he was not bound to act on that certificate. The records of both houses are public, and the executive is as fully entitled to take notice of them as the judiciary. He may go behind the certificate, and determine by an inspection of the records of the two houses whether, in fact, the disagreement exists as certified; and even if the record of one house should not disclose that it had acted, nonaction is sometimes equivalent to adverse action, and may be so treated by the executive in determining whether a disagreement exists, which calls for the exercise of his constitutional prerogative.

The argument as to jurisdiction implies a power of review by the judiciary; but this question being left by the constitution entirely in the hands of the legislature and the executive, we think we are bound to consider action taken as an accomplished fact. It is like the judgment of a court of general jurisdiction, which is final and conclusive. Whenever, therefore, there shall be a disagreement between the two houses as to the time or place of adjournment certified to the governor by either,—and, as before stated, he is the sole judge as to the fact of the existence of such disagreement upon such certification to him,—we think he has the con-

stitutional power to adjourn them under said section 6 of the Constitution. The state of the business pending before the assembly would doubtless be taken into account both by the house taking the initiative in the matter of the adjournment, and also by the governor in declaring that the exigency provided for in said section had arisen; but we do not think the power granted therein would be affected thereby. Nor, it appearing of record that by reason of the certification aforesaid he had jurisdiction in the premises, have we any authority to inquire into the facts upon which the governor based his said action; for, as said by Judge Story in *Martin v. Mott*, 25 U. S. 12 Wheat. 19, 31, 6 L. ed. 587, 541: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." We therefore answer said third and last question in the affirmative.

Charles Matteson.
John H. Stiness.
P. E. Tillinghast.
George A. Wilbur.
Horatio Rogers.
Wm. W. Douglas.

MARYLAND COURT OF APPEALS.

John W. JUDEFIND, *Ptff. in Err.*,

v.

STATE of Maryland.

(.....Md.....)

1. No writ of error lies to the court of appeals of Maryland from a decision of the circuit

court on an appeal from the judgment of a justice of the peace.

2. A statute prohibiting labor on Sunday is not in conflict with the Constitution of the United States or of Maryland.

3. A constitutional guaranty of religious liberty is not violated by a statute prohibiting Sunday labor.

NOTE.—*The constitutionality of Sunday laws.*

The case of *JUDEFIND v. STATE*, above reported, and the case of *PEOPLE v. BELLER*, *ante*, 696, revive the question of the constitutionality of Sunday laws, which has been settled so far as decision can settle it by overwhelming authority.

The decision of a recorder at *nisi prius* in an early South Carolina case held a Sunday closing ordinance unconstitutional as to a Jew, but this decision was reversed on appeal, deciding that it was a mere police regulation which did not interfere with the exercise of religious privileges. *Charleston v. Benjamin*, 3 Strobb. L. 508, 49 Am. Dec. 608.

In *Ex parte Newman*, 9 Cal. 502, a Sunday law prohibiting the sale of goods was held by two of the three judges to be unconstitutional as an unnecessary denial of the right to acquire property, and as violating the constitutional prohibition against discrimination or preferences as to religious profession or worship; but Judge Field, who has since been for many years a justice of the Supreme Court of the United States, made a vigorous dissent from the decision, and in *Ex parte Andrew*, 18 Cal. 378, the decision was expressly overruled, adopting the former dissent of Judge Field.

This later decision upholding the constitutionality of such a statute was followed and fully approved in *Ex parte Burke*, 59 Cal. 6, which was a case as to the keeping open of a saloon on Sunday.

In *Ex parte Koser*, 60 Cal. 177, the same doctrine 22 L. R. A.

was followed, upholding a law requiring stores, workshops, and similar places of business to be closed on Sunday, and deciding that it did not violate the constitutional guaranty of freedom of religious profession and worship without discrimination or preference. Three judges, however, dissented from this decision, of whom two attempted to distinguish the case from *Andrew's Case* on the ground that in the present case the statute attempted to make the observance of Sunday a religious observance as it was in a portion of the statutes headed "crimes against religion and conscience, and other offenses against good morals."

The other cases in which the constitutionality of a statute requiring cessation from business on Sunday has been questioned and discussed have in every instance decided that such statutes are not unconstitutional.

The constitutional provisions as to due process of law, equal privileges and immunities of citizens, right to acquire property, as well as those prohibiting the establishment of religion and guaranteeing freedom of worship, have been among those under which such statutes have been attacked.

While in some cases courts have based their decision in support of Sunday laws on religious grounds, the decisions generally, especially in recent cases, are based on the proposition that a Sunday law is a civil or police regulation.

This is the doctrine held in *Bloom v. Richards*, 3 Ohio St. 387; *McGatrick v. Wason*, 4 Ohio St. 562;

(January 23, 1894.)

ERROR to the Circuit Court for Kent County to review a judgment convicting defendant of working on Sunday, contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Mr. James T. Ringgold for plaintiff in error.

Mr. John P. Poe, Atty-Gen., for defendant in error:

No writ of error lies to this court from the final decision of a circuit court, on an appeal to it from the judgment of a justice of the peace.

Rayner v. State, 52 Md. 368; *Clark v. Vannort* (Md.) Nov. 16, 1893.

Mr. William M. Slay also for defendant in error.

Boyd, J., delivered the opinion of the court:

The plaintiff in error was arrested, under a warrant issued by a justice of the peace for Kent county, for husking corn on Sunday. He was tried, convicted, and fined five dollars and costs, in accordance with the provisions of article 27, § 247, of the Code of Public General Laws. He appealed to the circuit court, where he elected to be tried before the court, and was convicted and fined five dollars and costs by that court. He has brought the case to this court by petition in the nature of a writ of error, in which he designates the following as the points of law to be reviewed: (1) That section 247 of article 27 of the Code is void because it is in violation of the first paragraph of the 14th article of the Constitution of the United

State v. Bott, 31 La. Ann. 663, 33 Am. Rep. 224; *State v. Judge of Criminal Dist. Ct. of Orleans*, 39 La. Ann. 132; *Charleston v. Benjamin*, 2 Strobb. L. 503, 49 Am. Dec. 608; *Specht v. Com.* 3 Pa. 312, 49 Am. Dec. 518.

In *Fiolickstein v. Mobile*, 40 Ala. 726, it is said that "the legislature is not prohibited from making municipal regulations because they have the sanction also of a religious society," and adds that the designation of a day of rest would not infringe the constitution, whether that day should be the Christian or Jewish Sabbath.

In *St. Joseph v. Elliott*, 47 Mo. App. 418, it is said: "The truth is that some courts have concluded (perhaps without sufficient justification) that laws enacted for the observance of Sunday as a religious duty were repugnant to constitutions guaranteeing religious freedom, and yet determined to uphold them and set about to find other reasons than those based on Christianity. These reasons Ringgold in his work on the Law of Sunday, p. 101, declares to be an 'afterthought of the courts; that is to say, that it is an attempt to find a sanction for those statutes in Constitutions which have never been the moving cause of their enactment.' But the court says further, 'Whatever may be the reason for such statutes, they are valid enactments.'"

In considering the constitutionality of Sunday laws, it is well to remember that, as mentioned in *Lindenmuller v. People*, 33 Barb. 548, "the Sabbath is older than our state government; was a part of the laws of the colony; and its observance regulated by colonial laws;" therefore, in considering whether constitutional provisions were meant to preclude laws for Sunday observance, the fact that such laws existed at the time of, and before the adoption of the Constitution is very significant.

In *Shover v. State*, 10 Ark. 259, it is held that a statute prohibiting the sale of goods on Sunday does not violate constitutional provisions for freedom of worship, and that no person shall be compelled to attend, erect, or support any place of worship, or maintain any minister, against his consent.

In *State v. Amba*, 20 Mo. 214, a statute prohibiting Sunday labor is held not to violate constitutional provisions for freedom of worship and conscience, and that no person shall be hurt or molested in his religious profession or sentiments, if he does not disturb others, and that no preference shall be given to any sect or mode of worship.

So in *Fiolickstein v. Mobile*, 40 Ala. 726, such a statute is held valid as to a Jew, under constitutional provisions that no person shall be hurt, molested, or restrained in his religious sentiments or profession, provided he does not disturb others in their religious worship.

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In *Voglesong v. State*, 9 Ind. 112, such a statute is upheld without discussion of its constitutionality, with the mere statement that this question is hardly open.

So in *Ex parte Sundstrom*, 25 Tex. App. 133, a Sunday law is upheld and declared not to violate the constitutional right of Jews, under provisions as to equal rights and freedom of worship.

To the same effect is *Specht v. Com.* 3 Pa. 312, 49 Am. Dec. 518, holding that even as to persons who observe the seventh day as the Sabbath, a Sunday law does not violate constitutional provisions for freedom of worship and conscience. This case follows *Com. v. Wolf*, 3 Serg. & R. 48, in which it was held that Jews were subject to the Sunday laws.

A Sunday closing law is also held valid as to a Jew in *State v. Judge of Criminal Dist. Ct. of Orleans*, 39 La. Ann. 132, deciding that it does not deny equal privileges or immunities, nor the right to life, liberty, and property nor to due process of law.

It is held in *Com. v. Hyneman*, 101 Mass. 30, that the law, as a law prohibiting sales of liquor on Sunday, applied to Jews, although they might be exempted from the Sunday law as to labor by their observance of the Jewish Sabbath.

But in *Com. v. Haas*, 122 Mass. 40, a statute prohibiting the opening of shops on Sunday is held good, even as to seventh day believers, and not a violation of the constitutional provision that "no subordination of any one sect or denomination shall ever be established by law."

The equal privileges and immunities of citizens are held in *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577, not to be violated by a statute against Sunday labor which excepts from its operation those who worship on the seventh day of the week.

While, on the other hand, an ordinance which makes an exception from the Sunday law of those who keep Saturday and close their place of business on that day, was held an unconstitutional discrimination between citizens. *Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553.

Following this case it was held in *Anonymous*, 12 Abb. N. C. 455, that an injunction against the prosecution of a Jew for violation of the Sunday law would not be granted, notwithstanding an exception in the statute as to those who observed another day of the week, because the court regarded this exception as an unconstitutional discrimination between citizens.

Exactly opposite to this decision is the decision in Ohio that an ordinance prohibiting business on Sunday is void, if it does not make an exception of those who observe the seventh day. *Canton v. Nist*, 9 Ohio St. 429.

See on this point the case of *People v. Bellmer*, ante, 603.

States. (3) That said statute is void because it is in violation of article 36 of the Bill of Rights of the Constitution of Maryland. (8) That the circuit court for Kent county had no jurisdiction to try and convict the traverser, since the justice of the peace had no jurisdiction: First. Because (a) the warrant charged no offense under the statute, as it failed to set forth that the husking of corn on Sunday was not a work of necessity or charity. (b) The warrant shows upon its face that it was issued on Sunday, and its mandate is to apprehend the traverser immediately. It is admitted that it was actually served on Sunday. For these reasons it is void, and no jurisdiction could be acquired under it. Second. That the bond for appearance of the traverser in the circuit court is void because it held him to answer a charge of Sabbath breaking, and no such offense is known to the laws of this state; and it is also in fatal variance with the warrant, which says nothing of Sabbath breaking by the traverser, but charges him with husking corn on Sunday.

The attorney-general, on behalf of the state, moved to quash the writ of error on the ground that no writ of error lies to this court from the decision of the circuit court, on an appeal to it from the judgment of a justice of the peace. That motion must prevail. It is well settled in this state that, when the circuit court has jurisdiction to hear and decide an appeal from a justice of the peace, its decision is final, and an appeal or writ of error to this court will not lie, unless, of course, the statute authorizes such appeal or writ of error to this court. If the traverser desired to contest the constitutionality of the law under which he was arrested, and have that question properly presented for the consideration of this court, he could have applied for the writ of certiorari upon the specific ground of the unconstitutionality of the law, and the consequent want of power and jurisdiction of the justice of the peace to proceed under it. This court could then have reviewed the judgment of the circuit court on an appeal or writ of error. Nor can we review the decision of the circuit court

A statute prohibiting dramatic performances on Sunday is held constitutional in *Lindenmuller v. People*, 33 Barb. 548; *Neuendorff v. Duryea*, 60 N. Y. 557, 25 Am. Rep. 226; *People v. Hoym*, 30 How. Pr. 76.

These cases hold that such a law does not infringe liberty of conscience or the free exercise or enjoyment of religious privilege and worship without discrimination or preference.

A territorial statute prohibiting saloons to be open on Sunday has been held not contrary to public policy, in *People v. Griffin*, 1 Idaho, 476.

A statute prohibiting saloons to be opened on Sunday is not against the constitutional provision for the "uniform operation" of laws of a general nature. *Ex parte Burke*, 60 Cal. 6.

A statute prohibiting stores, workshops, saloons and other places of business from being open on Sunday is not a special law, within the meaning of a constitutional provision as to special laws. *Ex parte Koser*, 60 Cal. 177.

But a penal statute applicable to bakers only, prohibiting them from baking on Sunday, was held in *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47, to be a special law within the meaning of a constitutional provision against special laws for crimes and misdemeanors.

The validity of municipal ordinances prohibiting the sale of intoxicating liquors, or other business on Sunday, except so far as it involves the question of legislative power to make Sunday laws, is not here considered. It is expressly held in *Nashville v. Linck*, 12 Lea, 499, that the legislature may authorize such ordinance.

In addition to the cases contained in this note, there are a very large number of cases in which the constitutionality of Sunday laws has been assumed and acted upon. Among these are all the cases found in the note on "Sunday Labor" with the case of *Quarles v. State*, 14 L. R. A. 192, also in the note on "Prohibition of Sunday Sports or Games," *State v. O'Rourke*, 17 L. R. A. 890, as well as the cases in the note on "Remedy of Party as to Rescission of Sunday Contract," with the case of *Kelly v. Cogrove*, 17 L. R. A. 779.

These cases are only a small portion in which Sunday laws have been enforced. It is very evident therefore, that the judicial sanction of Sunday laws, though they have been attacked on many points, has been very nearly unanimous. Considering the fact mentioned above, that Sun-

day laws were in existence in the colonies before the adoption of any state constitutions, and that Sunday is incidentally recognized in many of the state constitutions, as in its exception from the computation of days within which a bill must be returned by the governor, it is plain that the people in adopting the constitution of such a state did not intend by any implication to deny the validity of such laws. Therefore, if they were to be held unconstitutional, it could only be on the ground of inevitable repugnance to some fundamental provision of the constitution. That such laws are not repugnant to fundamental constitutional principles is now so universally established in every jurisdiction in which such laws have been attacked that it would seem to be settled as fully as judicial decisions can settle anything.

And a statute prohibiting barbers only from keeping open a bathroom on Sunday is held unconstitutional class legislation. *Raglo v. State*, 26 Tenn. 272.

In these two cases last cited, it will be seen that the same act which other persons could do lawfully was made an offense when done by a particular class of persons.

But a Sunday statute excepting druggists from its provisions is not unconstitutional as a denial of equal rights, or as a special law. *Bohl v. State*, 3 Tex. App. 683.

And a Sunday law is not void for discrimination between classes of persons and as a denial of equal rights, privileges, and immunities, because it does not apply to certain classes of business, but excepts from its operations drug-stores, offices of physicians, photograph galleries, railroad offices, hotels, restaurants, and various other kinds of business. *Liberman v. State*, 26 Neb. 464.

The exemption from a Sunday law of those who observe the seventh day does not make the statute void. *Ibid*.

The title "An Act to preserve the public peace and order" on Sunday is sufficient for a statute prohibiting dramatic entertainments in New York city on that day. *Neuendorff v. Duryea*, 60 N. Y. 557, 25 Am. Rep. 226.

So the title of an act which states that it is to prevent the sale of intoxicating liquors to minors, drunken persons, etc., is sufficient to cover the prohibition of such sales on Sunday. *Kurtz v. People*, 38 Mich. 273.

B. A. E.

on the question of the alleged defects on the face of the warrant and bond. That court had the power and authority to entertain the appeal from the judgment of the justice on the question of jurisdiction, as well as on other grounds, and, the plaintiff in error having invoked and submitted himself to its jurisdiction, its judgment is final and conclusive. The case of *Rayner v. State*, 52 Md. 368, is directly in point, and it is unnecessary to refer to the other decisions of this court.

The attorney for the plaintiff in error argued at considerable length the constitutionality of the Sunday law involved in this case, and urgently requested this court to pass upon that question, regardless of our views on the motion to quash the writ of error. Having determined that the case is not properly before us, we do not feel called upon to discuss at length the cases cited or reasons assigned by the learned counsel, but, as a refusal to state our conclusions might be deemed by some an indication of doubt on our part, we will briefly state our views on this subject. We have not the slightest hesitation in announcing that the law complained of is not in conflict with the constitution of the United States or of Maryland. Although the argument of the attorney for the plaintiff in error gave evidence of thorough research and great labor, as well as ingenuity and ability, he was compelled to admit that, if we were to be governed by precedent, he had no standing in court, as the cases were opposed to his contention.

There have been numerous decisions in this country, as well as elsewhere, sustaining such law, and we have no desire to be the exception to the general rule. Nature, experience, and observation suggest the propriety and necessity of one day of rest, and the day generally adopted is Sunday. There are, and always will be, honest differences of opinion as to how Sunday shall be spent, but the advantages of having a weekly day of rest, "from a mere physical and political standpoint," are too apparent to permit us to doubt the propriety of having reasonable laws to regulate work on that day. In interpreting them, courts must not place unreasonable constructions upon them. There may be some circumstances under which it would be deemed harsh and severe to punish a man for husking corn on Sunday; but if he defies the laws of the state, or makes himself obnoxious to those desiring the quiet and peace of this day of rest, he should expect the machinery of the law to be put in motion.

If the position taken by the plaintiff in error in reference to the law in question is correct, then the law prohibiting the sale of liquor, etc., on Sunday, is unconstitutional, as would be most, if not all, of our laws concerning Sunday. If the legislature cannot prohibit work, etc., on Sunday, as forbidden by section 247 of article 27 of the Code, why should it be permitted to prohibit the sale of liquor, goods, wares, or merchandise, or prohibit dancing saloons, opera houses, barber shops, etc., from being kept open on that day? The laws and courts of this state have recognized Sunday as a day of rest from the 22 L. R. A.

time the state was formed, and statutes on the subject that were in force in colonial days are still in our Code. This court has, from time to time, given expression to its views on the question in very clear and unequivocal terms.

In *Kilgour v. Miles*, 6 Gill & J. 274, Judge Chambers, in delivering the opinion of the court, said: "The Sabbath is emphatically the day of rest, and the day of rest here is the 'Lord's day' or Christian's Sunday. Ours is a Christian community, and a day set apart as the day of rest is the day consecrated by the resurrection of our Savior, and embraces the 24 hours next ensuing the midnight of Saturday." In *State v. Fearson*, 2 Md. 818, Judge Mason, in passing upon the charge of permitting persons to bet on cards on Sunday, contrary to the statute then in force, sustained the law, and added that, "independent of any statutory prohibition, this is a gross offense against decency and public morals, and therefore richly merits punishment."

In *Philadelphia, W. & B. R. Co. v. Lehman*, 56 Md. 227, 40 Am. Rep. 415, Judge Alvey, in speaking of Sunday laws in the different states, said: "They are substantially the same in their general scope and provision, all looking to keeping the day sacred, and as one of rest from secular employment;" and in other cases our Sunday laws have been enforced. Some of the statutes in force in this state were passed as early as 1728; the one complained of in this case bearing that date originally, and being continued in the Code of 1888. The tendency of legislation in this country is to provide for further rest, rather than to take away "the day of rest" that is welcomed by the industrious and hard-working people of our land. As late as 1899 the legislature of Maryland passed a law authorizing banks in the city of Baltimore to close their doors for business at 12 o'clock noon on every Saturday in the year, and provided for the payment of notes, etc., falling due on Saturday, "on the next succeeding secular or business day."

Article 36 of our Declaration of Rights guarantees religious liberty; but the members of the distinguished body that adopted that constitution never supposed they were giving a deathblow to Sunday laws by inserting that article. Those laws do not prohibit or interfere with the worship of God on any day other than Sunday, nor do they compel any one to worship him on Sunday. It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religions, of all sects and denominations, that observe that day, as rest from work and ordinary occupations enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, except works of necessity and charity, and thereby promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest (as it undoubtedly

is), there is all the more reason for the enforcement of laws that help to preserve it. While courts have generally sustained Sunday laws as "civil regulation," their decisions will have no less weight if they are shown to be in accordance with divine law as well as human. There are many most excellent citizens of this state who worship God on a day other than Sunday, and our constitution guarantees to them the right to do so,—a right which no one can interfere with. The legislature of this state has not undertaken to prohibit work on the day observed by them, and hence they do not have, in their religious work, the advantage of

having their Sabbath made a day of rest by human law; but the legislature has not in any way interfered with their religious liberty, or with their worship of God in such manner as they think most acceptable to Him, as they have a right to do under the above provision in the declaration of rights. If, then, the question was properly before us, we would decide that section 247 of article 27 of the Code was not in violation of the Constitution of the United States or of the constitution of this state, but, as stated above, we must quash the writ of error for the reasons given.

Writ of error quashed, with costs.

IDAHO SUPREME COURT.

Victor RUMPEL, *Respt.*,

OREGON SHORT LINE & UTAH
NORTHERN R. CO., *Appt.*

(.....Idaho.....)

*1. **Exceptions taken during the trial to the rulings of the trial court may be settled and saved in accordance with the provisions of section 4480, Rev. Stat., or they may be settled after the trial, in accordance with section 4480, or in statement on motion for new trial, and when so settled and saved will be reviewed by supreme court on appeal.**

2. **Where the plaintiff, in passing along a street which was blocked by a railroad train with an engine thereto attached, belonging to and then being operated by the defendant, passed under one of the cars of said train five times within an hour and a half, and was caught, and his leg crushed, by the moving of the train in an attempt to pass under the sixth time, he is guilty of such contributory negligence as bars a recovery, and this, even though the servants of the company failed to ring the bell or sound the whistle before starting.**

3. **Every person in the possession of his senses is bound to use ordinary care and prudence to protect his own person in crossing railroad tracks, and he is not relieved of such necessity although the company is guilty of negligence, or a violation of the statute, in failing to ring the bell or sound the whistle before starting.**

4. **Evidence of a railroad company blockading streets at any other time than that at which the accident is alleged to have occurred, or of custom of people to crawl under cars so blockading streets at other times than that at which the accident occurred, is not proper, and should be excluded from the jury.**

(January 31, 1894.)

A PPEAL by defendant from a judgment of the District Court for Ada County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

*Headnotes by MORGAN, J.

NOTE.—For cases as to negligence in passing between or under cars, see *Central R. & Bkg. Co. v. Rylee* (Ga.) 13 L. R. A. 634, and *note*.
22 L. R. A.

Statement by **Morgan, J.:**

Plaintiff brought suit against defendant corporation to recover damages alleged to have been sustained by plaintiff by reason and on account of negligence of defendant. The complaint alleges the corporate character of defendant, and "that on the 20th day of June, 1890, while defendant owned, controlled, and operated a railroad in Ada county, in the state of Idaho, and in the town of Nampa, in said Ada county, Idaho, said defendant negligently, carelessly, etc., allowed, permitted, and caused freight cars and locomotive steam engine to stand, to be, and to remain on their railroad track in said town of Nampa, county and state as aforesaid, in such manner as to block a public highway, commonly known as the 'Boise City, Nampa and River Wagon Road,' designated on plat of Nampa as 'Street F,' at a place or point where the Oregon Short Line and Utah Northern Railway and its switches cross said street, about 175 yards west of the passenger depot of defendant, in said town of Nampa, for the period of about one and one half hours,—from about 7:30 A. M. to about the hour of nine o'clock A. M. on the 20th day of June, 1890. That on the 20th day of June, 1890, this plaintiff was a resident of the territory (now state) of Idaho, and of said town of Nampa, and employed as a day laborer by Ruel Murphy, in said town of Nampa. That as such day laborer, and in the course of the discharge of his duties, plaintiff was required and compelled to cross the railroad at the said street and wagon-road crossing, while said street, highway, and wagon road were so stopped up and blockaded as aforesaid by defendant. That, in order to cross the defendant's railroad at the time and place mentioned herein, this plaintiff was compelled to cross under one of the defendant's freight cars so blockading and stopping up said street, highway, and wagon road as and in the manner aforesaid. That while the plaintiff was so endeavoring and attempting to cross the said railroad track at the time and place aforesaid, and by passing under one of the cars blockading said crossing, defendant carelessly, negligently, and unlawfully, and without warning this plaintiff, without blowing any whistle, without ringing any bell, and without any warning or alarm

whatever, suddenly, carelessly, and unlawfully started in quick motion, and to moving the said locomotive steam engine and freight cars which were so blockading said street, wagon road, and public highway as aforesaid, in such a manner as to knock this plaintiff down, and to pass the wheels of one of said freight cars over the left leg of this plaintiff, crushing, mangling, breaking, and bruising said left leg in such a way and manner as to render the amputation of said leg so mangled, broken, and bruised, just below the knee joint, necessary. . . .

That said injury was not caused or brought about by any careless, negligent, or unlawful act or acts or by contributory negligence of this plaintiff,"—etc., and claims damages in the sum of \$20,000. To this complaint defendant interposed a general demurrer that complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled, to which ruling defendant excepted. Defendant then filed its answer, wherein it denied "each and every allegation" of the complaint "except what is herein specifically admitted; denies that it permitted its freight cars and locomotive steam engine to stand and be upon its track, in the town of Nampa in such manner as to blockade a public highway, wagon road, and street, commonly known as the 'Boise City, Nampa and River Wagon Road,' and designated on the plat of Nampa as 'Street F,' or any other public highway, wagon road, or street; denies that there is a public highway, wagon road, or street at a point 175 yards west of the defendant's depot, in the town of Nampa; denies that it did carelessly, negligently, wickedly, criminally, and unlawfully start its locomotive steam engine and freight cars in motion without warning this plaintiff by ringing its bell and blowing its whistle;" and as a further cause of defense, "that at the time and place this plaintiff alleges he was injured he was a trespasser upon defendant's railway tracks;" "that the injuries complained of by the plaintiff were occasioned by his own carelessness and negligence." Upon the issues thus made up the case went to trial before the court with a jury. The plaintiff having rested his case upon the proofs made in support thereof, defendant moved the court for a nonsuit, upon the ground that "the plaintiff has failed to prove the allegation of his complaint, and failed to make out a cause of action against the defendant; and for the further reason that the evidence in this cause produced on behalf of the plaintiff shows that he was guilty of contributory negligence, and therefore not entitled to recover," which motion was overruled by the court. The defendant declining to offer any evidence, the case was submitted to the jury under instructions from the court, and a verdict was returned in favor of the plaintiff for the sum of \$10,275. A motion for a new trial was made, which was overruled by the district judge, and from the order overruling said motion, as well as from the judgment, this appeal is taken.

Mr. Edgar Wilson, for appellant:

As a matter of law, the plaintiff was guilty

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of contributory negligence in passing under defendant's car as set forth in detail in plaintiff's complaint.

Mr. Beach defines contributory negligence to be "such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of."

1 Harris, *Damages by Corp.* p. 408; *Beach, Contrib. Neg.* p. 7.

The doctrine of contributory negligence is to be taken with this qualification: that if, in addition to the negligence of the defendant, there enters the element of malice or pure willfulness, the contributory negligence of plaintiff is a false quality, and defendant is liable. Although one may have placed himself in a position of danger, yet if the defendant needlessly, or wantonly, or recklessly injures him, the plaintiff can still recover.

1 Harris, *Damages by Corp.* p. 333, citing *Weeks, Damnum Absque Injuria*, 242, citing *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Indianapolis & C. R. Co. v. McCuire*, 26 Ind. 370, 89 Am. Dec. 487; *Mulherrin v. Delaware, L. & W. R. Co.* 81 Pa. 366; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 418; *Cooper v. Central R. Co. of Iowa*, 44 Iowa, 184; *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *State v. Manchester & L. R. Co.* 52 N. H. 528.

In the absence of such willfulness or wantonness the general rule is that if the injured party might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, and did not, the defendant will neither be held liable, nor will the damages be apportioned between them.

1 Harris, *Damages by Corp.* p. 333, citing *Weeks, Damnum Absque Injuria*, 243, citing *Gray v. Second Ave. R. Co.* 65 N. Y. 561; *State v. Manchester & L. R. Co. supra*; *Central R. Co. of N. J. v. Van Horn*, 88 N. J. L. 133; *Garmon v. Bangor*, 38 Me. 443; *Hill v. New Haven*, 87 Vt. 501, 88 Am. Dec. 613; *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486; *Forks Twp. v. King*, 84 Pa. 230; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 28 L. ed. 898; *Michigan Cent. R. Co. v. Campau*, 35 Mich. 468; *Murphy v. Chicago, R. I. & P. R. Co.* 45 Iowa, 661; *Mobile & M. R. Co. v. Ashcraft*, 48 Ala. 15; *Western U. Teleg. Co. v. Quinn*, 56 Ill. 819; *Park v. O'Brien*, 23 Conn. 839; *Jackson v. Greene County Comrs.* 76 N. C. 282; *Laicher v. New Orleans, J. & G. N. R. Co.* 28 La. Ann. 320; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Memphis & C. R. Co. v. Thomas*, 51 Miss. 637.

A person who, by his own fault or negligence, has brought upon himself a loss or an injury, can claim no compensation for it from another.

Hutchinson, *Carr.* § 635, p. 502.

It is contributory negligence, if, in the attempt to avoid that which is merely inconvenient and in no sense dangerous the person

injured encounters a danger obviously apparent to the minds of reasonable men.

Patterson, Railway Accident Law, p. 63, citing *Adams v. Lancashire & Y. R. Co.* L. R. 4 C. P. 739; *Siner v. Great Western R. Co.* L. R. 3 Exch. 150, L. R. 4 Exch. 117; *Galveston, H. & S. A. R. Co. v. Le Gierse*, 51 Tex. 189; *Damont v. New Orleans & C. R. Co.* 9 La. Ann. 441, 61 Am. Dec. 214; *Illinois Cent. R. Co. v. Able*, 59 Ill. 181; *Gavett v. Manchester & L. R. Co.* 16 Gray, 501, 77 Am. Dec. 422; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Bramwell, L. J., in Laz v. Darlington*, L. R. 5 Exch. Div. 28; *Pennsylvania R. Co. v. Aspell*, 28 Pa. 147.

Where the contributory negligence of the person injured is dependent upon his knowledge of the existence of a fact, he, if not physically or mentally incapacitated, must be assumed to have had that knowledge, if he had such opportunity of knowing the fact as would have made it known to a person of average capacity exercising ordinary care for his own safety.

Patterson, Railway Accident Law, p. 50; *Pennsylvania R. Co. v. Henderson*, *supra*.

Plaintiff cannot act upon his suppositions, and then, when he is injured by reason of their being unfounded, make it the predicate of a charge of negligence on the part of the defendant.

Snyder v. Viola Min. & Smelting Co. 2 Idaho, 777.

Contributory negligence may, therefore, be defined to be that want of reasonable care upon the part of the person injured which concurred with the negligence of the railway in causing the injury.

Patterson, Railway Accident Law, p. 48; *Butterfield v. Forrester*, 11 East, 60; *Tuff v. Warman*, 5 C. B. N. S. 573; *Bridge v. Grand Junction R. Co.* 3 Mees. & W. 244; *Holden v. Liverpool New Gas & C. Co.* 3 C. B. 1; *Lott v. Wilkes*, 3 Barn. & Ald. 304; *Ellis v. London & S. W. R. Co.* 2 Hurlst. & N. 424; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439, 24 L. ed. 506; *Pennsylvania R. Co. v. Aspell*, *supra*; *Hice v. Kugler*, 6 Whart. 336; *Simpson v. Hand*, Id. 811, 36 Am. Dec. 231; *Wynn v. Allard*, 5 Watts & S. 524; *Gould v. McKenna*, 86 Pa. 303, 27 Am. Rep. 705; *Thirteenth & F. Streets Pass. R. Co. v. Boudrou*, 92 Pa. 480, 37 Am. Rep. 707; *Heil v. Glandings*, 42 Pa. 493, 82 Am. Dec. 537; *Sills v. Brown*, 9 Car. & P. 601; *Creed v. Pennsylvania R. Co.* 86 Pa. 139, 27 Am. Rep. 693; *Cremer v. Portland*, 86 Wis. 92; *Houston & T. C. R. Co. v. Gorbett*, 49 Tex. 573; *Mackoy v. Missouri Pac. R. Co.* 18 Fed. Rep. 236; *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, 1 Am. & Eng. R. R. Cas. 79; *Harper v. Erie R. Co.* 32 N. J. L. 88; *Deyo v. New York Cent. R. Co.* 84 N. Y. 9, 88 Am. Dec. 418; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; *Higgins v. Hannibal & St. J. R. Co.* 36 Mo. 418; *Sullivan v. Louisville Bridge Co.* 9 Bush, 81.

The reason of the rule is that the defendant cannot justly be called upon to indemnify the plaintiff for a wrong which the plaintiff has done himself.

Heil v. Glandings, *supra*; Patterson, Railway Accident Law, pp. 47, 48.

Where a person of mature years knows a 22 L. R. A.

freight train is standing ready to move between himself and the passenger train, in the night time, and he attempts to pass and is injured, it will amount to such negligence on his part as to defeat a recovery.

Chicago, B. & Q. R. Co. v. Dewey, 26 Ill. 255, 79 Am. Dec. 874.

When, by the negligence of a carrier, a person is injured, while unnecessarily standing in a place which he knows to be dangerous, he is guilty of contributory negligence, and cannot recover.

Schoenfeld v. Milwaukee City R. Co. 74 Wis. 433, 6 Ry. & Corp. L. J. 898; *Beach's Digest of Railway Decisions* (1189), § 65, p. 205.

Passing through or underneath railway trains is negligence.

Lewis v. Baltimore & O. R. Co. 88 Md. 588, 17 Am. Rep. 521; 1 Lacey, *Digest of Railway Decisions*, p. 459; *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724; *Central R. & Bkg. Co. v. Dixon*, 42 Ga. 327; 1 Thomp. Neg. p. 429; 2 Rorer, *Railroads*, pp. 1018, 1019, citing *Rauch v. Lloyd*, 81 Pa. 853, 72 Am. Dec. 747; *O'Mara v. Delaware & H. Canal Co.* 18 Hun, 192; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Bird v. Flint & P. M. R. Co.* 86 Mich. 79; *Hudson v. Wabash Western R. Co.* 101 Mo. 18; *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592; *Flynn v. Eastern R. Co.* 83 Wis. 238.

Statutes exacting special precaution on the part of the owners of dangerous machinery are generally construed as not abrogating the ordinary rules of contributory negligence.

2 Thomp. Neg. p. 1176; *Reynolds v. Hindman*, 32 Iowa, 146; 16 Am. & Eng. Encyclop. Law, p. 421, citing *Briggs v. New York Cent. & H. R. Co.* 72 N. Y. 26; *Knapp's v. Knickerbocker Ice Co.* 84 N. Y. 488; *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75; *Philadelphia, W. & B. R. Co. v. Kerr*, 25 Md. 521; *Hanton v. South Boston Horse R. Co.* 129 Mass. 810; *Billings v. Breinig*, 45 Mich. 65; *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410, 15 Am. & Eng. R. R. Cas. 394; *Shearn & Redf. Neg. § 13*; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; *Stevens v. Onwego & S. R. Co.* 18 N. Y. 422; *Wilcox v. Rome, W. & O. R. Co.* 89 N. Y. 358, 100 Am. Dec. 440; *Dascomb v. Buffalo & S. L. R. Co.* 27 Barb. 221; *Brooks v. Buffalo & N. F. R. Co.* 25 Barb. 600; *Telfer v. Northern R. Co.* 30 N. J. L. 183; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 543, 56 Am. Dec. 471; *Ohio & M. R. Co. v. Eaves*, 42 Ill. 288; *Dodge v. Burlington, C. R. & M. R. Co.* 84 Iowa, 276; *Arts v. Chicago, R. I. & P. R. Co.* 34 Iowa, 153, 88 Iowa, 293, 44 Iowa, 284; *Payne v. Chicago, R. I. & P. R. Co.* 89 Iowa, 523, 44 Iowa, 236, 9 Am. Ry. Rep. 176; *Lang v. Holiday Creek R. & Coal Min. Co.* 49 Iowa, 469; *Brown v. Buffalo & S. L. R. Co.* 22 N. Y. 191; *Havens v. Erie R. Co.* 41 N. Y. 296; *Coogrove v. New York Cent. & H. R. Co.* 13 Hun, 329; *Barringer v. New York Cent. & H. R. Co.* 18 Hun, 398; *Pakalinsky v. New York Cent. & H. R. Co.* 82 N. Y. 424; *Memphis & C. R. Co. v. Bibb*, 37 Ala. 699; *Chicago & A. R. Co. v. McDaniels*, 63 Ill. 122; *Chicago, B. & Q. R. Co. v. Van Patten*, 64 Ill. 510;

Chicago & A. R. Co. v. Henderson, 66 Ill. 494; *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311; *Toledo, W. & W. R. Co. v. Durkin*, Id. 395; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Horn v. Baltimore & O. R. Co.* 54 Fed. Rep. 301; *Cleveland, C. O. & St. L. R. Co. v. Ritchey*, 43 Ill. App. 247; *Krauss v. Walkkill Valley R. Co.* 69 Hun, 482; *Chicago & N. W. R. Co. v. Hatch*, 79 Ill. 137; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago, B. & Q. R. Co. v. Lee*, 60 Ill. 501; 2 Rorer, Railroads, pp. 1009, 1010, citing *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88; *Lake Shore & M. S. R. Co. v. Sunderland*, 2 Ill. App. 307; *Fletcher v. Atlantic & P. R. Co.* 64 Mo. 484; *Leduke v. St. Louis & I. M. R. Co.* 4 Mo. App. 485; *Langan v. St. Louis, I. M. & S. R. Co.* 5 Mo. App. 811; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542.

The omission to make such signals, if required by statute, would not render the company absolutely liable for injuries to persons crossing the track, unless such injury results from the omission alone, without the negligence of the party injured.

Spencer v. Illinois Cent. R. Co. 20 Iowa, 55; *Arts v. Chicago, R. I. & P. R. Co. supra.*

Nor would the absence of such statute excuse the company from making such signals under all circumstances.

Ibid.

The failure of a railway company to comply with the statute by ringing the bell, etc., at a crossing will not render it liable to damages for an injury sustained by a person crossing the track at such crossing, who has gone upon the track without looking for an approaching train.

Ernst v. Hudson River R. Co. 82 Barb. 159, 89 N. Y. 61, 100 Am. Dec. 405; *Wilcox v. Rome, W. & O. R. Co.* Id. 358, 100 Am. Dec. 440; *Harty v. Central R. Co. of N. J.* 42 N. Y. 468; *Havens v. Erie R. Co.* 41 N. Y. 296; *Baxter v. Troy & B. R. Co.* Id. 502; *Gorton v. Erie R. Co.* 45 N. Y. 660; *Dancomb v. Buffalo & S. L. R. Co.* 27 Barb. 231; *Havens v. Erie R. Co.* 53 Barb. 828; *Ernst v. Hudson River R. Co.* 19 How. Pr. 205, 24 How. Pr. 97, 31 How. Pr. 637, note, 35 How. Pr. 641, note, 32 How. Pr. 61, 262, 86 How. Pr. 84, 3 Abb. Pr. N. S. 82; *Stevens v. Oswego & S. R. Co. supra*; *Central R. & Bkg. Co. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 505, 12 Am. & Eng. R. R. Cas. 115; *Atchison, T. & S. F. R. Co. v. Morgan*, 81 Kan. 77, 13 Am. & Eng. R. R. Cas. 499; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 19 Am. & Eng. R. R. Cas. 358; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; *Eaton v. Erie R. Co.* 51 N. Y. 544; *Toledo, P. & W. R. Co. v. Riley*, 47 Ill. 514; *Hinckley v. Cape Cod R. Co.* 120 Mass. 257.

When contributory negligence on the part of the plaintiff is shown, the defendant is only liable for willful negligence, which implies that he has actual knowledge of the plaintiff's danger.

Zimmerman v. Hannibal & St. J. R. Co. 71 Mo. 476, 2 Am. & Eng. R. R. Cas. 191; *St. Louis, I. M. & S. R. Co. v. Freeman*, 86 Ark. 41, 4 Am. & Eng. R. R. Cas. 608; *Rains v. St. Louis, I. M. & S. R. Co.* 71 Mo. 164, 36 Am. 22 L. R. A.

Rep. 459, 5 Am. & Eng. R. R. Cas. 610; *Maryland Cent. R. Co. v. Neubeur*, 62 Md. 391, 19 Am. & Eng. R. R. Cas. 261; *Little Rock & Ft. S. R. Co. v. Pankhurst*, 36 Ark. 371, 5 Am. & Eng. R. R. Cas. 635; *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 8 Am. & Eng. R. R. Cas. 225; *Swigert v. Hannibal & St. J. R. Co.* 75 Mo. 475, 9 Am. & Eng. R. R. Cas. 322; *Yarnall v. St. Louis, K. O. & N. R. Co.* 75 Mo. 575, 10 Am. & Eng. R. R. Cas. 726.

The court erred in allowing any evidence to be introduced in regard to the railway company blockading streets or wagon roads in the town of Nampa at any time or place other than when and where plaintiff was injured.

Gahagan v. Boston & L. R. Co. 1 Allen, 187, 79 Am. Dec. 724; *Peoria & P. U. R. Co. v. Clayberg*, 107 Ill. 644; 2 Rice, Ev. p. 1108; *United States v. Buchanan*, 49 U. S. 8 How. 83, 102, 12 L. ed. 997, 1004; *Minty v. Union Pac. R. Co.* 4 L. R. A. 409, 2 Idaho, 442.

The court erred in allowing plaintiff to show the habit or custom that prevailed among the people of the town of Nampa at and before and after the time of the injury of Rumpel regarding the climbing over, passing through or under cars of defendant, when they were blockading streets of said town.

Hill v. Portland & R. R. Co. 55 Me. 438, 92 Am. Dec. 601, 606, note; *Hibler v. McCarney*, 31 Ala. 501; *Hinckley v. Barnstable*, 109 Mass. 126; *Lawrence v. Hudson*, 12 Heisk. 671; *Deering, Neg. § 9*, and cases cited; *Cleveland v. New Jersey S. B. Co.* 5 Hun, 523; *Sewall's Falls Bridge Co. v. Fisk*, 23 N. H. 171; 16 Am. & Eng. Encyclop. Law, p. 462, citing *Maxwell v. Easton*, 1 Stew. (Ala.) 514; *Stimson v. Jackson*, 53 N. H. 188; 2 Am. & Eng. Encyclop. Law, 891, title, *Carriers of Passengers*; *Clarke's Browne, Usages & Customs, § 107 et seq.*; *Governor v. Withers*, 5 Gratt. 24, 50 Am. Dec. 99, note; *Boon v. The Belfast*, 40 Ala. 184, 83 Am. Dec. 761; *Denver, S. P. & P. R. Co. v. Pickard*, 8 Colo. 163, 18 Am. & Eng. R. R. Cas. 264; 2 Rice, Ev. p. 1108.

Mr. T. D. Cahalan, for respondent:

Defendant's negligence—contributory negligence—approximate cause of the injury—are all questions of fact for the jury and not for the court.

Shearm. & Redf. Neg. § 8.

When the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault.

Needham v. San Francisco & S. J. R. Co. 87 Cal. 41; *Kerohacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246; *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474; *Grand Trunk R. Co. v. Ives*, 144 U. S. 419, 422, 36 L. ed. 490, 491; *Central Pass. R. Co. v. Kuhn*, 86 Ky. 578; *Inland & S. Coasting Co. v. Tolson*, 139 U. S. 551-558, 35 L. ed. 270-272, and cases cited.

Persons are not debarred from using a street because a train of cars is on the street—trainmen must look out; ringing the bell and blowing the whistle is not sufficient.

Robinson v. Western Pac. R. Co. 48 Cal. 409; *KcKerver v. Market Street R. Co.* 59 Cal. 295.

Where the statute is not complied with the contributory negligence of the plaintiff cuts no figure, except in mitigation of damages.

Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671; *Nashville & O. R. Co. v. Smith*, 6 Heisk. 176; *Railroad Co. v. Walker*, 11 Heisk. 386; *Nashville & C. R. Co. v. Nowlin*, 1 Lea, 523; *Hill v. Louisville & N. R. Co.* 9 Heisk. 827, 45 Am. & Eng. R. R. Cas. 61, note; *Toledo, W. & W. R. Co. v. Jones*, 76 Ill. 311; *Harty v. Central R. Co. of N. Y.* 42 N. Y. 468; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 45 Am. & Eng. R. R. Cas. p. 86, note.

A company is responsible under statute if it neglects to comply with the statute.

Western & A. R. Co. v. Jones, 65 Ga. 631, 8 Am. & Eng. R. R. Cas. 267; *Georgia R. Co. v. Williams*, 74 Ga. 723; *Central R. & Bkg. Co. v. Raiford*, 82 Ga. 400, 87 Am. & Eng. R. R. Cas. 481; *Baldana v. Galveston, H. & S. A. R. Co.* 43 Fed. Rep. 863; *Spicer v. Chesapeake & O. R. Co.* 11 L. R. A. 385, 34 W. Va. 514, 45 Am. & Eng. R. R. Cas. 28; *Central Branch Union Pac. R. Co. v. Hehigh*, 28 Kan. 352.

A person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought at the time of the negligent act reasonably possible to follow, if they had been suggested to his mind.

Shearm. & Redf. Neg. §§ 26, 29, and cases; *Livery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12; *Cooley, Torts*, p. 71, and citations.

No statute is necessary to make a railroad company liable for failure to run trains with care and caution at a highway crossing; and the duty of the company may require due warning of the approach of the train by whistle or bell, or in some other way.

Vandewater v. New York & N. E. R. Co. 18 L. R. A. 771, 185 N. Y. 583.

It is the duty of a railroad company, before starting a train which has been standing across a street, in a city or town, and through which persons are climbing over couplings, to give some warning of the starting to those persons who are in a place of danger.

Burger v. Missouri Pac. R. Co. 112 Mo. 288.

Failure to ring the bell upon a railroad train in compliance with a city ordinance, is negligence *per se*.

Meeks v. Southern Pac. R. Co. 56 Cal. 518.

Where it appears from the evidence that the plaintiff exercised such care, and could have avoided the injury had the signals availed to warn him of danger, a recovery may be sustained.

Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761; *Casey v. New York Cent. & H. R. R. Co.* 78 N. Y. 518; *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 103; *Pennsylvania R. Co. v. Weber*, 76 Pa. 167, 18 Am. Rep. 407.

Mr. J. W. Badger also for respondent.

Morgan, J., delivered the opinion of the court:

The record presents to us a "statement on motion for new trial," which contains what purports to be a statement of all the evidence in the case, together with the objections to the admission of evidence, the ruling.

ings of the district court thereon, and the exceptions thereto. Appended to the statement is the following certificate: "State of Idaho, County of Ada—ss. At chambers, this statement settled and allowed in the presence of Edgar Wilson, attorney for defendant, and T. D. Cahalan, attorney for plaintiff, to which ruling and action of the undersigned the plaintiff, by his said counsel, then and there excepted, for the reason that the alleged exception to errors of law as alleged occurring during the trial of said action were not taken in accordance with section 4426, Revised Statutes of Idaho, September 31, 1893. E. Nugent, Judge." It would seem that upon the trial of said cause a stipulation was entered into by the counsel for the several parties "that any exception taken during the trial of said cause may be settled at any time within twenty days subsequent to the termination of said trial, without reducing the same to writing, and settling the same at the time they are made in said trial." It is claimed by respondent that, as no bill of exceptions was ever served or settled on the part of the defendant, such exceptions cannot now be considered or reviewed by this court, although they appear in the statement on motion for a new trial, and settled by the district judge, and were heard, considered, and passed upon by said judge upon said motion. Section 4426, Rev. Stat. Idaho, contains the following provision: "Except as provided in the next section, the exception must be taken and settled at the time the decision is made, and no order of court shall be made for the settlement of such exception at any other time, except by the agreement of both parties. When an exception is taken, the court, judge, tribunal, or judicial officer shall allow sufficient time for the reduction to writing, and settlement of the same, and in case such time shall not be allowed, or such exception shall not be fairly settled, the facts may be shown by affidavit and the party taking such exception may apply to the court, or tribunal, to which an appeal lies, in the action or proceeding, to settle the same fairly, according to the facts, and when so settled, the same shall become a part of the record in such action or proceeding." The paragraphs above quoted were interpolated into section 4426 by an act of the territorial legislature of January 31, 1887. The statutes, as they stood prior to this amendment, were amply sufficient to preserve all the rights of litigants. But nevertheless it is the statute, and so long as it remains, and counsel see fit to avail themselves of its provisions, the court must recognize and enforce it. By the provisions of section 4426, as above cited, where all exceptions are settled at the time they are made, it would seem that nothing further is required at the hands of the trial court, as to the settlements of exceptions. Each exception, when so settled, is a "bill of exceptions," and as such may be embodied in the statement on motion for a new trial, or may be the sole basis of a motion. The view that the amendment of January 31, 1887, was a mere act of expediency is apparent when we consider that section 4430, which provides for

the settlement of bills of exceptions was allowed to remain undisturbed. We cannot say that there is necessarily any conflict between sections 4426 and 4480. The contention of counsel for the respondent would seem to be that, as no exceptions were settled as provided in sections 4426 or 4480, therefore none can be reviewed by this court. We think counsel are wrong in this contention. Section 4820, Rev. Stat. Idaho, provides what papers it is requisite for the party appealing to furnish the court upon an appeal from an order granting or overruling a motion for a new trial, to wit, "the papers designated in section 4443 of this Code." Referring to section 4443, we find that the papers designated therein are: "The judgment roll and the affidavits, or the records and files in the action, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial," etc., and the provisions of this section seem to have been substantially complied with in the case under consideration. The error into which counsel seem to have fallen is in assuming that it is only by a compliance with the provisions of section 4426 that exceptions taken in the district court can be brought before the appellate court. The incorporation of the exceptions in a statement used on motion for a new trial has always been considered under the Code a proper and legitimate method of bringing the same before this court for review. The method of bringing cases here upon bills of exception is only an additional, and frequently more convenient and expeditious, one than that by statement; but either method is effectual.

The next question which the court is called upon to consider is the sufficiency of the complaint. It would appear at first sight that the plaintiff has pleaded himself out of court, inasmuch as he has stated that he was compelled to and did pass under the freight cars of the defendant while they were so blockading the street as above alleged. It is difficult to conceive how the plaintiff could, in the prosecution of his ordinary occupation, be compelled to pass under the freight cars of the defendant, as there could hardly be such a condition of things that it would not be possible for the plaintiff to go around the train instead of under it. It would also seem that there could hardly be a condition of things existing where in passing under one of the cars of a freight train it would not necessarily be contributory negligence, and bar a recovery. We are not prepared to say, however, that under this complaint a state of facts could not be proven which would entitle the plaintiff to recover, and therefore sustain the court below in overruling the demurrer. Should the motion for nonsuit have been granted, the evidence on the part of the plaintiff having been fully taken, and appearing on the record in the transcript herein, and no evidence being offered on the part of defendant? The defendant interposed its motion for nonsuit on the ground that the facts as proven do not entitle

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the plaintiff to recover; that plaintiff was guilty of such contributory negligence as would bar a recovery. The testimony shows beyond controversy the following facts substantially: That on the 30th day of June, 1890, the defendant permitted and caused a train of freight cars, with an engine thereto attached, to stand upon its track in such way as to blockade F street in the town of Nampa, in this state; that the train was permitted to so remain half an hour to an hour and a half,—precise time not proven. Plaintiff was a laborer, and was working in a livery and feed stable. On that morning he was called to breakfast about half past 7. When he was called to breakfast he passed under the cars, going and again coming back to the stable. "After going back to the barn," he says, "I was told to go and fix a wind pump. I had to cross on F street again, and passed under the car. I then had to go back for a bolt, passed under again." In short, defendant states that he went under the cars that morning three times and back three times, in all he passed under the cars six times. There was nothing to hinder plaintiff passing around the train at either end at any time, except that it was inconvenient, and took too much time. He could have passed around the train by walking 100 to 185 yards and back. Plaintiff was an adult, and in possession of all his faculties. When plaintiff attempted to pass under the cars the sixth time, the engineer started the train up, without ringing the bell or blowing the whistle; at least the witnesses state that they did not hear either whistle or bell. Plaintiff was caught by the wheels, and his leg crushed. The law in regard to cases of a similar character is well settled. We quote a few of the many cases at hand. When by law ringing the bell and sounding the whistle are required in approaching and passing over public crossings, the omission thereof amounts to actual negligence on the part of the company. But such omission and negligence do not render the company liable for injuries received at such crossings, unless the omission be the cause thereof or contribute thereto, without contributory negligence of the injured party, if in those states where the doctrine of contributory negligence prevails. 2 Rorer, Railroads, 1006. It is such gross negligence and want of care, and so reckless an act, for a person to pass under the cars, though standing still at the inception of the effort, that if an injury is received in the attempt a recovery cannot be had against the company for the same, even if the cars be suddenly started without giving the usual signal for starting and thereby cause the injury. 2 Rorer, Railroads, 1130; *Memphis & C. R. Co. v. Copeland*, 61 Ala. 380. Negligence in the railroad company in giving the signals or in omitting signals of any kind will not excuse plaintiff's omission to be diligent in such use of his own means of avoiding danger; and where, by such use of his senses, the traveler might avoid danger, notwithstanding the neglect to give signals or warning, his omission is contributory negligence, and should be so peremptorily declared by the court; and, where,

proof of this is clear, the plaintiff thus negligent should be nonsuited. *Ernst v. Hudson River R. Co.* 39 N. Y. 68, 100 Am. Dec. 405. The doctrine of contributory negligence has been recognized as the true doctrine by this court in the case of *Snyder v. Viola Min. & Smelting Co.*, 2 Idaho, 777. The rule may therefore be formulated in these terms: Where the person injured, or the plaintiff, or any person whose negligence is attributable to the plaintiff, has so far contributed to the injury by his want of ordinary care that, but for such want of ordinary care on his part, the injury would not have been done, the railway is not liable to the plaintiff in damages for such injury. Thus stated, the rule is supported by innumerable authorities. Patterson, Railway Accident Law, pp. 46, 47, and a large number of cases there cited. The reason for the rule seems clearly to be as follows: The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is not that the wrong of the one is set off against the wrong of the other; it is that the law cannot measure how much of the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct. Patterson, Railway Accident Law, 47; *Heil v. Glanding*, 42 Pa. 498, 498, 82 Am. Dec. 537. Contributory negligence is therefore defined to be that want of reasonable care upon the part of the person injured which concurred in the negligence of the railway in causing the injury. Patterson, Railway Accident Law, 48. The number of authorities that might be quoted in support of this doctrine leaves no doubt that it is founded upon correct principles. In *Rauch v. Lloyd*, 81 Pa. 870, 72 Am. Dec. 747, the court says that, if the plaintiff is an adult of ordinary prudence and discretion, he would have no right of action; for, however blameworthy the defendants may have been in leaving their cars on the crossing, common prudence would have restrained him from attempting to pass under them, and an adult would be bound to use common prudence. 2 Rorer, Railroads, 1018.

The fact that it was attempted to be proven, over the repeated objection of defendant, that it was the custom of the people of the town of Nampa to crawl under the cars when they blockaded the streets, if fully proven, could not have the slightest effect upon the plaintiff's right to recover, as a custom of the people in putting themselves daily in imminent danger of their lives in passing under cars blockading the streets with an engine attached thereto could not excuse the plaintiff in his indulgence in conduct so reckless and so wanting in ordinary prudence and care. While it is improper and unlawful for a railroad company to unnecessarily blockade a street of a town or city with its cars, yet every man is bound at his peril to use ordinary care to preserve his own life and limbs, however unlawful the conduct of the agents and servants of the company may be; therefore all evidence of the custom of the people in passing under the cars so

blockading the streets was irrelevant and incompetent, and should have been excluded. The failure of the plaintiff—an adult in the full possession of his faculties of seeing, hearing, and reasoning—to exercise ordinary care to protect himself from danger so imminent will bar his recovery. The plaintiff cannot be relieved from the effects of his own negligence by the fact that there is a statute prohibiting the railroad company from obstructing the streets with their cars, or requiring the bell to be rung, or whistle sounded. *Hudson v. Wabash W. R. Co.* 101 Mo. 13. See also decisions cited above: *Lake Shore & M. S. R. Co. v. Pinchin*, 112 Ind. 592; 2 Thomp. Neg. 1175; *Reynolds v. Hindman*, 82 Iowa, 146. When, by law, bell ringing and sounding the whistle are required in approaching and passing over public road crossings, the omission thereof amounts to actual negligence; but such omission and negligence do not render the company liable for injuries received at such crossings unless the omission be the cause thereof or contribute thereto without contributory negligence of the injured party. 2 Rorer, Railroads, 1006; *Reynolds v. Hindman*, *supra*; *Pennsylvania Co. v. Rathgeb*, 82 Ohio St. 66; *Krauss v. Walkill Valley R. Co.* 69 Hun, 482; *Wabash, St. L. & P. R. Co. v. Wallace*, 110 Ill. 114, 19 Am. & Eng. R. R. Cas. 359; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224. The omission of the railway company to give statutory or other signals does not render it liable for injuries to one who, in crossing its track, fails to observe care on his own part. *Krauss v. Walkill Valley R. Co.* 69 Hun, 483; *Atchison, T. & S. F. R. Co. v. Morgan*, 81 Kan. 77. A railroad company and a traveler on the highway have correlative rights. Neither has a superior right, except as it results from the difficulties and necessities of the case. *Galena & C. U. R. Co. v. Dill*, 22 Ill. 264. But, a traveler approaching a crossing at the same time as a train, the traveler must give way as a matter of prudence, and because the necessities of the public are greater than those of any one person. Proof that the railroad company had blockaded the streets of Nampa at any other time than the time when the accident occurred does not prove nor tend to prove that the street was blockaded at the time the accident occurred, nor does it excuse the plaintiff for not exercising ordinary care and prudence in protecting his own person, and such proof should have been excluded. *Gahagan v. Boston & L. R. Co.* 1 Allen, 187, 79 Am. Dec. 724. As to custom. Neither habit of railroad company in blockading the streets of Nampa nor habit of people in creeping under cars so blockading streets, can have anything to do with the case at bar. These are not such customs as the law recognizes and enforces. Customs such as are contemplated in the law must be certain, reasonable, and ancient, and then in some cases have the force of law. It is true that a railway company running through the streets of a crowded city, where many people are passing and repassing across railroad tracks intersecting the streets, are held to greater care in running their trains, and

guarding the crossings; and it is held that railway companies must take notice of the fact that such streets are frequently crowded, and therefore exercise greater care. So, if F street, in the town of Nampa, was much frequented by the people, and many were accustomed to cross and recross the railroad tracks on said streets, and such facts were known to the company, greater care and prudence would be required of the company in running its trains across said street, as human life is more valuable than the business or time of any individual; but, because greater care would be required of the railway company, this would not authorize the individual to relax one jot or tittle of the care and prudence necessary to protect his own life or limb. Therefore any negligence of the company in failing to comply with statutory requirements or in failing to exercise reasonable care and prudence, does not absolve the plaintiff from the necessity of ex-

ercising necessary care and prudence. We are of the opinion, therefore, that plaintiff, in passing under the cars of defendant five times on the morning of the accident, and attempting to pass under them the sixth time, was guilty of contributory negligence of an extraordinary character, and that such negligence bars recovery. The motion for nonsuit should have been allowed.

This opinion sufficiently indicates the errors in the instructions, and, as this decision holds that the nonsuit should have been granted, which practically ends the case, we do not deem it necessary to further notice the instructions.

The judgment of the lower court is reversed, and the cause remanded, with directions to the lower court to enter a judgment of nonsuit. Costs awarded to defendant.

Huston, Ch. J., and Sullivan, J., concur.

MICHIGAN SUPREME COURT.

Christopher CRISP

v.

FORT WAYNE & ELMWOOD R. CO.,
Pf. in Err.

(.....Mich.....)

A garnishee paying into court the amount due the principal defendant in advance of an adjudication, as allowed by How. Anno. Stat., § 8037, which expressly excepts the sum of \$25 due to a householder for personal labor, does so at his peril, unless the principal defendant is estopped by circumstances from asserting his claim for this exemption, since the garnishee may always protect himself by his disclosure by stating at least that he does not know whether the principal defendant is or is not a householder.

(*Long and Grant, JJ., dissent.*)

(February 12, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover wages for which defendant had been garnished at the suit of a third person, and which in that proceeding it had paid into court for distribution. *Affirmed.*

The facts are stated in the opinion.

Messrs. Edwin F. Conely and Orla B. Taylor, for plaintiff in error;

The principal defendant has the right to appear and defend.

Wilson v. Bartholomew, 45 Mich. 41; *Chilcote v. Conley*, 38 Ohio St. 545; *Curran v. Fleming*, 76 Ga. 98.

Mr. Lodge acted with entire propriety in attempting to be heard in the first garnishment case in justice court, and, if the justice

refused to hear him, he had an ample remedy by certiorari. That he did not invoke its aid is not the fault of the defendant; if the principal defendant did not take enough interest in the matter to protect his rights, certainly the garnishee defendant, who has no interest whatever, cannot be blamed for not proceeding. He had ample notice of all of the garnishments, and this is all that could in justice be required of the garnishee defendant.

Pierce v. Chicago & N. W. R. Co. 36 Wis. 283.

The garnishee defendant exonerated itself from liability by payment into court.

Melton v. Kansas City, Ft. S. & M. R. Co. 89 Mo. App. 194.

And if Crisp has failed to assert his rights promptly and vigilantly when notified, he has no redress.

Iliff v. Arnott, 81 Kan. 673.

There is no duty imposed on the garnishee defendant to investigate the domestic relations of the principal defendant.

Barber v. Howd, 85 Mich. 221; *Karp v. Citizens Nat. Bank of Saginaw*, 76 Mich. 679; *Moore v. Chicago, R. I. & P. R. Co.* 43 Iowa, 385; *Laidlaw v. Morrow*, 44 Mich. 547; *Hebel v. Amazon Ins. Co. of Cincinnati*, 83 Mich. 400.

An exemption is a purely personal right which cannot be negotiated or transferred, and such defense must be set up by the principal defendant.

Osborne v. Schutt, 67 Mo. 713; *Moore v. Chicago, R. I. & P. R. Co. supra*; *Conley v. Chilcote*, 25 Ohio St. 320; *Jones v. Tracy*, 75 Pa. 417.

The question as to whether a defendant is a householder should be determined by the court and not by the garnishee defendant.

Moore v. Chicago, R. I. & P. R. Co. supra;

NOTE.—The duty of a garnishee to set up the exemption of the principal debtor or to protect himself by disclosing at least his lack of knowledge concerning it is decided in the above case in accordance with the weight of authority as shown by that part of the note to *Illinois Cent. R. Co. v. Smith* (Miss.) 19 L. R. A. 580.

cord with the weight of authority as shown by that part of the note to *Illinois Cent. R. Co. v. Smith* (Miss.) 19 L. R. A. 580.

Sutherland v. Burrill, 82 Mich. 18; *Maynards v. Cornwell*, 8 Mich. 809; *Newell v. Blair*, 7 Mich. 108; *Sexton v. Amos*, 39 Mich. 695.

Mr. Frank T. Lodge, for defendant in error:

Garnishment proceedings depend solely upon statute. The construction of the statute is strict, and no liability whatever is cast upon the garnishee defendant except by virtue of express statutory provisions.

People v. Cass County Circuit Judge, 39 Mich. 407; *Sievers v. Woodburn Sarven Wheel Co.* 48 Mich. 275; *Blake v. Hubbard*, 45 Mich. 1; *Ford v. Detroit Dry Dock Co.* 50 Mich. 358; *Folkerts v. Standish*, 55 Mich. 468; *Milwaukee Bridge & Iron Works v. Brecoort*, 78 Mich. 155.

The law favors exemption.

Marathon School Dist. No. 4 v. Gage, 39 Mich. 484; *Wilson v. Bartholomew*, 45 Mich. 41; *Anderson v. Odell*, 51 Mich. 492; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168; *Curran v. Fleming*, 76 Ga. 98.

The statute makes this money exempt.

How. Anno. Stat. § 8082.

Defendant had notice that plaintiff was a householder and claimed this money as exempt.

Defendant's disclosures as garnishee of plaintiff do not even hint at the fact of the disclosed indebtedness being exempt or claimed as exempt.

Defendant might have disclosed all the facts and thus have been relieved from all further annoyance from plaintiff Pluff.

Curran v. Fleming, *supra*; *Hosley v. Scott* 59 Mich. 420; *Emmons v. Southern Bell Teleph. & Teleg. Co.* 80 Ga. 760.

It was defendant's duty to disclose all the facts, including plaintiff's claim of exemption rights, or it cannot seek to screen itself here by relying on the garnishment proceedings.

Sexton v. Amos, 39 Mich. 695; *Hosley v. Scott* and *Drake Lake Shore & M. S. R. Co. supra*; *Mace v. Heath*, 84 Neb. 54, 790; *Turner v. Sioux City & P. R. Co.* 19 Neb. 247; *Coleman v. Scott*, 27 Neb. 77; *Parker v. Wilson*, 61 Vt. 116.

The law regards garnishment proceedings with disfavor and construes strictly defenses founded upon them.

Maynards v. Cornwell, 8 Mich. 809; *Weimeister v. Manville*, 44 Mich. 408; *Iron Oliffs Co. v. Lahais*, 52 Mich. 394; *Folkerts v. Standish*, *supra*; *Hanselman v. Kegel*, 60 Mich. 540; *Farwell v. Chambers*, 62 Mich. 316; *Sexton v. Amos* and *Drake v. Lake Shore & M. S. R. Co. supra*.

Garnishee defendants cannot avail themselves of payment of money into court in any case except by virtue of express statutory provisions, and the only provision in the Michigan statutes expressly excepts cases of this kind.

How. Anno. Stat. § 8087.

The garnishee defendant cannot admit away or prejudice his creditor's rights or the rights of others.

Hebel v. Amazon Ins. Co. of Cincinnati, 83 Mich. 400; *Hirth v. Pfeifle*, 42 Mich. 81; *Tabor v. Van Vranken*, 39 Mich. 795; *Marathon School Dist. No. 4 v. Gage*, *supra*.

As to this plaintiff, the garnishment judgments are not *res adjudicata*, and the money may be recovered, notwithstanding the justice's 23 L. R. A.

release, although it does not appear that there was any release in this case.

Curran v. Fleming, 76 Ga. 98.

The defendant can claim no consideration because it paid this money into court.

Tabor v. Van Vranken and Emmons v. Southern Bell Teleph. & Teleg. Co. supra.

It was not authorized to do so.

Marathon School Dist. No. 4 v. Gage, *Wilson v. Bartholomew*, *Anderson v. Odell*, *Drake v. Lake Shore & M. S. R. Co.* and *Emmons v. Southern Bell Teleph. & Teleg. Co. supra*.

Such a course, if sanctioned, would work great hardship to this plaintiff and others similarly situated, and would nullify a beneficial and protective provision of the law.

Curran v. Fleming and Emmons v. Southern Bell Teleph. & Teleg. Co. supra.

It disposes of the plaintiff's money, to which he has a statutory right, without notice to him and without giving him the "day in court" to which even the meanest and least deserving are entitled.

Ibid.

It was not the intention of the framers of the statute to exempt this money from being withheld from plaintiff by means of garnishment proceedings until he should prove his right to it by certiorari or other proceedings in court, but to exempt it from garnishment process. The provision of the statute is, "Nothing herein contained shall be applicable," etc.

1 How. Anno. Stat. § 8082; *Wilson v. Bartholomew*, *Curran v. Fleming*, and *Emmons v. Southern Bell Teleph. & Teleg. Co. supra*.

Hooker, J., delivered the opinion of the court:

The defendant, being garnished in a proceeding in justice's court wherein the plaintiff was principal defendant, disclosed that it was indebted to the principal defendant for his personal labor, but was silent as to whether he was a householder. It does not appear that the fact was within the knowledge of the garnishee defendant, though there was testimony tending to show that it had been so informed by him. At the close of the examination the garnishee paid to the justice all money that was due to the principal defendant, and it was applied to the judgment against him. This action was thereupon brought against the garnishee defendant by the principal debtor to recover his exemptions, which he claims that the garnishee defendant could not lawfully pay over to the justice.

A garnishee proceeding is purely statutory. If the garnishee would protect himself from an action by his creditor, he must see that he takes each step in conformity to law. In other words, he cannot waive any rights of the principal debtor without incurring a personal liability. *Hirth v. Pfeifle*, 42 Mich. 81.

The proceeding is statutory, and in derogation of the common law, and the statute must be strictly followed, to bind the principal defendant. *Maynards v. Cornwell*, 8 Mich. 809; *People v. Cass County Circuit Judge*, 39 Mich. 407; *Sievers v. Woodburn Sarven Wheel Co.* 48 Mich. 275; *Ford v. Detroit Dry Dock Co.* 50 Mich. 358.

In *Hanselman v. Kegel*, 60 Mich. 540, this court said: "The proceedings under the garnishee statutes are in derogation of the common law. Not only must the statutes be strictly construed, but there is no authority for any action or prohibition of action outside of them."

Section 8032, How. Anno. Stat., says that the act shall not apply to \$25 of the amount due the principal defendant, where he is a householder, and the demand was for his personal labor; and section 8087, which permits payment of any sum to the justice in advance of the adjudication, expressly excepts this labor claim.

As the right did not exist independent of the statute, and as the statute does not compel it, but on the contrary expressly denies it, I think the payment of such sum is at the peril of the garnishee, unless circumstances create an estoppel which should preclude the principal defendant from asserting such claim against the garnishee. It may be said that this is a hardship upon the garnishee; that he must determine at his peril whether the principal defendant is or is not the householder, when he may have no means of ascertaining the fact. It may be admitted that the law might be improved, but the hardship is not a necessary one. There is no law that compels a garnishee to determine the question, and to testify accordingly. He may state any fact that has come to his knowledge, by hearsay or otherwise; and it is his duty to do so, under the repeated decisions of this court. *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168; *Sexton v. Amos*, 39 Mich. 695.

He may always safely state that he does not know whether the principal defendant is the householder, and, until it appears that he is not, the labor claim is secure; for, unless the disclosure shows a clear liability of the fund to the process, it cannot be reached. *People v. Cass County Circuit Judge*, 39 Mich. 407; *Sexton v. Amos*, *supra*; *Lyon v. Kneeland*, 58 Mich. 570; *Newell v. Blair*, 7 Mich. 103; *Thomas v. Sprague*, 12 Mich. 120; *Welliver v. Soule*, 30 Mich. 481; *Hewitt v. Wagar Lumber Co.* 38 Mich. 701; *Hackley v. Kanitz*, 39 Mich. 393; *Spears v. Chapman*, 43 Mich. 541; *Weirich v. Scribner*, 44 Mich. 73; *Lorman v. Phania Ins. Co.* 33 Mich. 65.

Thus it is seen that the garnishee may always protect himself by his disclosure, and he may perhaps do the same by giving the principal defendant an opportunity to appear and defend the suit against the garnishee, without which the fund cannot be reached unless he chooses to pay it to the justice. But there is no room for an estoppel here, because the illegal payment was not made in reliance on any representation of the principal defendant, but of defendant's own volition.

The judgment will be affirmed.

McGrath, Ch. J., and Montgomery, J., concurred with **Hooker, J.**

Long, J., dissenting:

On January 2, 1892, Morris Pluff commenced suit in justice's court by summons against the plaintiff, and on January 21, a

judgment was entered by consent against the plaintiff for \$47 damages and \$1.50 costs. On commencement of suit the defendant company was garnished,—the plaintiff being a street-car driver in its employ,—and on July 14, the company paid the amount due Crisp, \$11.90, into court, and filed a disclosure, stating that that amount was due plaintiff at the time of the service of the writ of garnishment. Subsequently, the defendant company was garnished four times upon that judgment, and made disclosures each time, and paid the money due him into court. The disclosures contained no statement that Crisp was a householder. On each occasion, Crisp was notified by the paymaster of the defendant company that his pay had been garnished by Pluff in the suit before the justice, within three or four days after the service of the writ, and in time for him to appear before the justice and protect his interest. On March 8, 1892, when the third writ of garnishment was served, Crisp gave written notice to the defendant company that he was a householder. On one occasion, Crisp claims that the paymaster asked him if he was a householder, when he told him that he was; and the paymaster then instructed him that all he had to do was to go to the justice court, and make a demand for his money, and he would get it. The paymaster, however, denies that such conversation occurred. Crisp claims that he called at the justice court, and, it being near the hour of closing, the justice told him to call the next morning, and he would let him know, which, however, he did not do, as he was out of town the following morning. At another time, Mr. Crisp's attorney attempted to appear for him, but this was refused by the justice. Further than this, it is not claimed that Crisp attempted to protect his interests. He now attempts to recover his wages from the defendant company. He had judgment before the justice for \$60 damages and \$2 costs. Defendant appealed to the circuit court, and on trial there verdict was directed for plaintiff for the same amount. Defendant brings error.

The statute relating to proceedings against garnishees in justice's court (section 8032, being section 2, chap. 276, How. Anno. Stat.), provides: "The person summoned as garnishee, from the time of the service of such summons, shall be deemed to be liable to the plaintiff in such suit to the amount of the property, money, and effects in his hands or possession or under his control or due from him to the defendant in such suit: provided, that when the defendant is a householder having a family, nothing herein contained shall be applicable to any indebtedness of such garnishee to the defendant for the personal labor of such defendant or his family for any amount not exceeding the sum of twenty-five dollars."

Section 8087 provides that "the garnishee may, after the expiration of the time limited by law for an appeal or stay of execution on said judgment, if no appeal has been taken or stay of proceedings put in, pay to the justice before whom the examination was had all money then due and owing by him to the defendant or sufficient to satisfy said judg-

ment (except such is provided by section 2 of this Act), and thereupon such justice shall execute and deliver to the garnishee a release and discharge for the amount laid." The exemption referred to in this section is recited above as a part of section 2.

It is contended by counsel for plaintiff that the defendant might have disclosed all the facts, as such facts had been disclosed by the plaintiff, and that, if it had disclosed the fact of plaintiffs' being a householder, no judgment could have been rendered against the garnishee by the justice; that, the defendant having failed to disclose the fact that the plaintiff was a householder, it cannot now screen itself by the payment of the money into the court, and a release from the justice, if such release had been given.

On the other hand, counsel for defendant contends: (1) That under the law the principal defendant had a perfect right to appear in a garnishment case and protect his own interest. (2) That there is no duty imposed upon a garnishee defendant to investigate the domestic relations of the principal defendant, and determine whether he is a householder having a family. (3) That the question whether the principal defendant in a garnishment case is a householder is a judicial question, and should be determined by the court and not by the garnishee defendant, and that by payment into the court the question is properly placed there for decision.

In these contentions, we think defendant's counsel is correct. In *Wilson v. Bartholomew*, 45 Mich. 41, it was contended that the principal defendant could not, in his own behalf, by writ of certiorari, prosecute an action to review the judgment given against the garnishee defendant. It was said: "It cannot be maintained that the legal rights of Loomis [the principal defendant] were liable to be cut off by the decision of a justice in a case between others, and without his having an opportunity to be heard."

The principal defendant had the right to be heard before the justice, and show why the fund deposited by the garnishee should not be paid over on a judgment rendered against him. The attorney for the principal defendant attempted to appear, and the justice held that he could not do so. In this the justice was in error, but the remedy of the principal defendant in such case, was by appeal or certiorari. *Chilcote v. Conley*, 36 Ohio St. 545; *Curran v. Fleming*, 76 Ga. 98.

In the above cases the rule is stated that the principal defendant may appear and defend in the matter of the garnishment. It is claimed here, however, that it was the duty of the garnishee to have disclosed that the principal defendant was a householder, and that, not having done so, he is liable in the present action. The garnishee complied with the plain intent of the statute. It made disclosure of the amount of its indebtedness to the principal defendant, and paid the money into court. The object of the statute's permitting the payment of money into court is to terminate controversies as to the amount due and owing by the garnishee defendant to the principal defendant, and to release the garnishee from further trouble or annoyance with the matter. *Barber v. Howd*, 85 Mich. 221.

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Having made the disclosure, and paid the money to the justice, its further duty in the premises ended; and the matter then rested between the plaintiff in that suit and the principal defendant, as to how the money was to be applied, and the decision of that question was for the court.

As was said in *Karp v. Citizens Nat. Bank of Saginaw*, 76 Mich. 679: "The object of the garnishee law is to furnish reasonable facilities for reaching property of the debtor, due him or held for him by third persons; but it was never intended to deprive a garnishee of any of his own rights, or to subject him to double action."

In *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa, 885, the court said: "The whole proceeding being based on the statute, we would hesitate long before holding that there are other and greater obligations or duties resting upon a garnishee than those imposed by statute. The law, as it is, imposes inconvenience enough on a garnishee, without enlarging its provisions by judicial construction. Another cogent reason why it was not the duty of the garnishee to make defense is that the exemption of property and wages from execution or attachment is in the nature of a personal right, to be exercised or claimed by the debtor, and not by another. If he fail to claim the exemption, no one indebted to him would have the right to make it for him.

It certainly would be far from reasonable to require a corporation employing hundreds of men to be familiar with the domestic relations of its employes, as that all its officers upon whom legal service of garnishment might be made should have knowledge that a particular employe was a married man." We think that the true rule is that, an exemption being a purely personal right, the defense must be set up by the principal defendant. The garnishee has no interest in the controversy. He is a neutral party. He makes his disclosure, and pays his money into court. When this is done, the principal defendant then has an opportunity to show to the court that the moneys are exempt and should not be paid over to the plaintiff. That the defense must be set up by the principal defendant is held in *Moore v. Chicago, R. I. & P. R. Co.* 43 Iowa, 885; *Conley v. Chilcote*, 36 Ohio St. 820; *Jones v. Tracy*, 75 Pa. 417.

The question whether the principal defendant is a married man and a householder is for the justice to determine, under the facts of the case. While it may be proper for the garnishee to disclose the fact, if within his knowledge, yet the claim of exemption must be made by the principal defendant, if he have notice, if he desires to save the right which the statute gives him. In the present case, he knew of the issue of the trial, and had ample opportunity to do so, but neglected it. He cannot now claim that the moneys were improperly paid into court by the garnishee, or insist that the garnishee should have made the defense for him. The garnishee apparently acted in good faith, and should not be compelled to pay the debt twice. Judgment of the court below should be reversed, with costs of both courts, as we see no reason why a new trial should be awarded.

Grant, J., concurred with Long, J.

OREGON SUPREME COURT.

O. H. LEWIS *et al.*, *Respts.*,
v.
City of PORTLAND *et al.*, *Appts.*

(.....Or.....)

1. A reference in deeds to a map of an addition to a city cannot be taken as constituting a dedication of a street marked on a map of the city which is not shown to have been known to the grantor where the latter had made maps of the addition without showing such streets.
2. A street shown on that portion of a map representing the old part of the city, leaving lots and blocks blank is not dedicated by the map, which is intended merely to show a new portion or addition not touched by such street in which the lots and blocks are marked especially where the maker has prior maps of the portion including such street which do not show any street at that place.
3. The use of the private way to a wharf and warehouse by the public cannot give a prescriptive right of user to the public as it is not inconsistent with private ownership.
4. It is held by the courts of Oregon to be common knowledge that before and after the admission of the state into the Union the right to wharfrage was regarded as incident to riparian ownership on a navigable fresh-water stream.
5. The policy to allow riparian owners on navigable rivers where the tide does not flow to build wharves in aid of navigation is shown in Oregon by the absence of legislation on that subject in connection with legislation providing for the disposal of tide lands.
6. Wharves built by riparian owners under the permission and license of the state are property which cannot be taken on a repeal of such permission without due process of law and due compensation therefor.

(December 26, 1893.)

APPEAL by defendants from a judgment of the Circuit Court for Multnomah County in favor of complainants in a proceeding brought to enjoin defendants from appropriating for bridge abutments and approaches, without making compensation to plaintiffs, certain land which plaintiffs claimed to own.

Affirmed.

The facts are stated in the opinion.

Messrs. J. V. Beach, *City Atty.*, and Whalley, Strahan & Pipes, for appellants:

The legislature merely provided for the doing of future acts by riparian owners, under the regulation of the corporate authorities. It did not in any manner legalize or attempt to legalize wharves theretofore constructed.

Dill. Mun. Corp. §§ 89-91.

NOTE.—The right of riparian owners to build wharves in the absence of constitutional or statutory prohibition is involved in the above decision from which *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632, may be distinguished by virtue of the Washington Constitution, article 15. As to such right generally, see *notes to Miller v. Mendenhall* (Minn.) 22 L. R. A.

Bowlby v. Shively, 22 Or. 410, announces that the state is the absolute owner of the tide lands free from any easement of the upland owner therein and subject only to the paramount right of navigation.

See also *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018.

The right to build bridges across navigable streams wholly in one state, under the authority granted by the state, can be questioned only by the United States. And it is clear that such bridges are regarded as great aids to commerce.

Gilman v. Philadelphia, 70 U. S. 3 Wall. 713, 18 L. ed. 96; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629.

No right can be acquired by private parties which can prevent the state from changing the use to which the soil under water shall, in the public interest, be devoted, so long as such change is made to subserve either navigation, commerce, or fishery.

The license, if one exists, is revocable.

Rundle v. Delaware & R. Canal Co. 55 U. S. 14 How. 80, 14 L. ed. 335; *Shrunk v. Schuykill Nav. Co.* 14 Serg. & R. 71; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312.

This state owns the bed of all navigable rivers, and of all bays, inlets, and estuaries within her borders, by virtue of her sovereignty.

Eisenbach v. Hatfield, 12 L. R. A. 632, *et seq.*, 2 Wash. 236; *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. ed. 802; *Hardin v. Jordan*, 140 U. S. 376, 35 L. ed. 431, 32 Cent. L. J. 297; *McManus v. Carmichael*, 3 Iowa, 1; *Barney v. Keokuk*, 94 U. S. 338, 24 L. ed. 238.

The title to the very spot upon which the wharf stands, being in the state, the erection is wrongful, unless a grant from the state be shown.

Gould, Waters, § 27.

The remedy for a purpresture is either by information for intrusion at common law or by information in equity, at the suit of the attorney-general.

2 Story, Eq. § 922.

If the legislature made a grant directly to the plaintiffs of every right that was vested in the state, so far as it could do so, still it would not be an irrevocable grant.

Illinois Cent. R. Co. v. Illinois, *supra*.

The validity of the Meussdorffer Act, Acts 1891, p. 633, has been sustained.

Winters v. George, 21 Or. 251; *State v. George*, 22 Or. 142.

The public cannot lose its property by the neglect or inaction of the affairs of the municipality.

3 L. R. A. 89; *Hastings v. Grimshaw* (Mass.) 12 L. R. A. 617, and *Eisenbach v. Hatfield*, *supra*.

That riparian rights are property which cannot be taken away without compensation, see also *Rumsey v. New York & N. E. R. Co.* (N. Y.) 15 L. R. A. 618, and *note*.

2 Dill. Mun. Corp. § 669, and notes.

A municipal corporation, authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, where it crosses the street, incurs no liability for damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute.

Northern Transp. Co. of Ohio v. Chicago, 99 U. S. 685, 25 L. ed. 886; *Smith v. Washington*, 61 U. S. 20 How. 185, 15 L. ed. 858.

By their own act the plaintiffs made this parcel of ground a part of their public business, and impressed upon it the stamp of publicity, just as completely as they could have done by an express statutory dedication. Is not forty years of continuous use by the public sufficient?

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; *Elliott, Roads & Streets*, 125; 2 Dill. Mun. Corp. 631; 2 Greenl. Ev. §§ 537-546.

One who without authority lays out a road and permits the public to use it on payment of tolls, thereby dedicates it as a public road, and the portion used by those who, not going so far as the toll house, do not pay tolls, becomes a free public road the use of which is not subject to the payment of tolls.

Blood v. Woods, 95 Cal. 78.

A dedication to whoever had business with the wharf is a dedication to the entire public, because everybody might have business there. Those who traveled this highway for so many years accepted the same for the public.

Meier v. Portland Cable R. Co. 1 L. R. A. 356, 16 Or. 509.

A conveyance by the owner with reference to a plat or map dedicates all the streets shown thereon irrevocably.

Lovensdale v. Portland, 1 Or. 397; 5 Am. & Eng. Encyclop. Law, 405, and notes; *Florentine v. Barton*, 69 U. S. 2 Wall. 57, 17 L. ed. 733; *Portland v. Whittle*, 3 Or. 126; *Carter v. Portland*, 4 Or. 339.

No particular time is necessary to establish dedication.

Parrish v. Stephens, 1 Or. 60.

User with owner's consent establishes dedication.

5 Am. & Eng. Encyclop. Law, 402, note 2.

Formal acceptance by the city is unnecessary.

Carter v. Portland, *supra*.

If the owner open the street and the public use it, it is enough to dedicate.

Woodyer v. Hadden, 5 Taunt. 125; *Chapin v. State*, 24 Conn. 236; *Green v. Oakes*, 17 Ill. 249; *Connehan v. Ford*, 9 Wis. 240.

From the use by the public with the assent of the owner, the law presumes a dedication.

Macon v. Franklin, 12 Ga. 239; *Eastman v. Lamprey*, 12 Minn. 89; *Cady v. Conger*, 19 N. Y. 256.

Messrs. Williams, Wood & Linthicum, for respondents:

There is no evidence in this case that on the plat of 1850 the *locus in quo* was dedicated as a public street; but if there was any such dedication, then the persons who subsequently acquired the title from the United

States or their grantees had a right to revoke such dedication and claim and use the property as private property.

Lovensdale v. Parrish, 63 U. S. 21 How. 290, 16 L. ed. 80.

The McCormick map is not entitled to any consideration. It does not purport to be a map of Couch's addition to the city of Portland.

Leland v. Portland, 2 Or. 46.

Estoppel, to be binding, must be mutual, and if the public authorities are not bound, Mrs. Couch, is not bound. These deeds are collateral matters between individuals, with which the public authorities have nothing to do.

Bingham v. Walla Walla, 3 Wash. Terr. 68; *Bank of America v. Banks*, 101 U. S. 240, 25 L. ed. 850.

The use of the *locus in quo* by the public in the manner in which it was used is entirely consistent with the claim of ownership by the plaintiffs.

Kirk v. Smith, 22 U. S. 9 Wheat. 288, 6 L. ed. 92.

Dedication is absolutely a question of intention. The evidence must be clear, and show a positive and unmistakable intention to abandon the property to the public.

Hogue v. Albina, 10 L. R. A. 673, 20 Or. 182; *Holdans v. Cold Spring Trustees*, 21 N. Y. 474; *Smith v. Portland*, 80 Fed. Rep. 734; *Dovaston v. Payne*, 2 Smith, Lead. Cas. Hare & W's notes, p. 155; *Buswell, Limitations & Adverse Possession*, § 251; *Angell, Limitations*, 6th ed. § 398; *Langworthy v. Myers*, 4 Iowa, 42; *Ellicott v. Pearl*, 35 U. S. 10 Pet. 441, 9 L. ed. 487; *Evins v. Burnet*, 36 U. S. 11 Pet. 50, 9 L. ed. 628; *Connecticut Mut. L. Ins. Co. v. St. Louis*, 98 Mo. 422; *Wheeler v. Stone*, 55 Mass. 313; *Irwin v. Dixon*, 50 U. S. 9 How. 11, 13 L. ed. 25.

If the land upon which the plaintiffs' wharf stands between high and low water mark is tide land, then it is expressly granted and confirmed to the plaintiffs, and becomes absolutely their property; but if it is not tide land, then the authorities upon which defendants rely, as to structures on tide lands, do not apply.

Andrus v. Knott, 12 Or. 501, decides that the shores of the Willamette river at Portland are not tide lands.

Minto v. Delaney, 7 Or. 385, holds that the riparian proprietors upon the Willamette river are entitled to the accretions which arise in the river adjacent to their lands.

The riparian proprietor has a right to build a wharf extending into the river for his own use or for the use of the public, and as far as the necessities of navigation may require.

Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018; *Parker v. West Coast Packing Co.* 5 L. R. A. 61, 17 Or. 515; *Gould, Waters*, § 179; *Dutton v. Strong*, 66 U. S. 1 Black, 23, 17 L. ed. 29; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272, 19 L. ed. 74; *Northwestern U. Packet Co. v. Atlee*, 10 Minn. 82; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 23 L. ed. 619, 2 Dill. 479; *Leigh v. Holt*, 5 Biss. 338; *Wisconsin River*

Imp. Co. v. Lyons, 80 Wis. 61; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Boorman v. Sunnucks*, 42 Wis. 283; *Diedrich v. Northwestern U. R. Co.* 42 Wis. 248, 24 Am. Rep. 899; *Stevens Point Boom Co. v. Reilly*, 46 Wis. 287, 44 Wis. 295; *Cohn v. Wausau Boom Co.* 47 Wis. 314, 322; *Walker v. Shepardson*, 4 Wis. 486, 65 Am. Dec. 324; *Grant v. Davenport*, 18 Iowa, 179; *Haight v. Keokuk*, 4 Iowa, 199; *Musser v. Hershey*, 43 Iowa, 358; *Ryan v. Brown*, 18 Mich. 196, 100 Am. Dec. 154; *Austin v. Rutland R. Co.* 45 Vt. 215; *Sloan v. Biemiller*, 34 Ohio St. 492; *Blanchard v. Porter*, 11 Ohio, 188; *Rippe v. Chicago, D. & M. R. Co.* 23 Minn. 18; *Brisbane v. St. Paul & S. O. R. Co.* Id. 114; *Morrill v. St. Anthony Falls Water-Power Co.* 26 Minn. 222, 37 Am. Rep. 399; *Ensminger v. People*, 47 Ill. 384, 95 Am. Dec. 495; *Chicago v. Laflin*, 49 Ill. 172; *Meyers v. St. Louis*, 8 Mo. App. 266; *Bainbridge v. Sherlock*, 29 Ind. 364, 95 Am. Dec. 644; *Sherlock v. Bainbridge*, 41 Ind. 35, 13 Am. Rep. 302; *Laughlin v. Lamasco*, 6 Ind. 223; *Thurman v. Morrison*, 14 B. Mon. 367; *Morrison v. Thurman*, 17 B. Mon. 257, 66 Am. Dec. 153; *Norfolk City v. Cooke*, 27 Gratt. 490; *Alexandria & F. R. Co. v. Frounce*, 31 Gratt. 761, 764; *Parker v. Rogers*, 8 Or. 187; *Bowlby v. Shively*, 22 Or. 421; *Washb. Easem.* 3d ed. p. 680.

Assuming that the land in question has been dedicated for a street, defendants have no right to appropriate and obstruct it with the approach to a bridge. The land in question belongs to the plaintiffs, subject to the public easement, if the land was dedicated, as claimed by defendants; and therefore it cannot be subjected to a new servitude, and one not contemplated by the dedication, without the consent of plaintiffs.

Church v. Portland, 6 L. R. A. 259, 18 Or. 78; *Warren v. Lyons City*, 22 Iowa, 351; *Morrison v. Hinckson*, 87 Ill. 587, 29 Am. Rep. 77; *Price v. Thompson*, 48 Mo. 361.

Lord, Ch. J., delivered the opinion of the court:

This is a suit in equity to enjoin the defendants from appropriating to public use a certain strip of land for a bridge abutment and approach thereto without compensation to its owners. The complaint, *inter alia*, alleges that the plaintiffs are the owners in fee simple and in possession of the lots therein described, having adjacent thereto several warehouses; and also of a strip of land at the foot of Burnside street, 60 feet wide, between Front street and the Willamette river, and of the wharf located thereon, extending to the navigable water of such river; that the defendants, the bridge commission, appointed and acting under the "Meussdorffer Act," propose to construct a bridge across the Willamette river from the intersection of Burnside and North Front streets, in the city of Portland, to a point opposite thereto on the east bank of said river, and have let the contract therefor to the defendant the Bullen Bridge Company, which company is about to commence the work of its construction; that the defendants propose to place the approach to and abutment for the west end of such

bridge upon said strip of land, and to appropriate the same to public use, without any compensation to its owners, and without taking any steps to acquire the title, or any right to occupy or use said land; and that, unless restrained, they will proceed with the construction of said bridge, and wholly deprive the plaintiffs of their property without compensation therefor, and also permanently obstruct the use of said wharf, and the extensions thereof north and south of the proposed site of said bridge, to their great and irreparable injury. The answer denies, on information and belief, that the plaintiffs are the owners of said property, and affirmatively alleges as a defense (1) that the strip of land in controversy is a part of Burnside street by virtue of a dedication under certain maps and plats made and filed by John H. Couch between the years 1859 and 1869, showing the extension of said street to the Willamette river; that the said John H. Couch, his wife, Caroline, and these plaintiffs, exhibited the same to intending purchasers, and sold lots and blocks with special reference to such maps and plats; that the *locus in quo* is a part of the wife's half of the John H. Couch donation land claim, and that his wife, Caroline Couch, after his death, and the plaintiffs, after her death, sold and conveyed to divers persons sundry lots and blocks and parts thereof with particular reference to said plats and maps, and thereby approved and ratified the act of John H. Couch in making and filing the same. And alleges (2) as a further defense that the *locus in quo* has been constantly used by the public as a street for more than twenty years last past, with the knowledge and consent of the plaintiffs, their ancestors, predecessors, and grantors; and that the public thereby acquired a prescriptive right to use and occupy the same as a street. The reply denies the allegations in the answer, except that the *locus in quo* is in that half of the donation land claim set apart to Caroline Couch, etc.

From this statement it will be seen that the main questions involved and to be determined are: (1) Has there been a dedication of the *locus in quo* as a public street? (2) Have the plaintiffs a right to erect and maintain, at the *locus in quo*, a wharf extending to the navigable water of the Willamette river?

To establish the first proposition the defendants introduced two plats and maps of Couch's addition to the city of Portland. The first one is a lithographic map of Portland, dated 1859, made by S. J. McCormick. It shows that Burnside street extends to the river, and thus includes the strip of land in dispute. The second map was made by John H. Couch on the 22d day of June, 1869, and purports to be an addition to Couch's addition, already laid out. It also shows that Burnside street extends to the river. On the other hand, plaintiffs have introduced two maps of Couch's addition to the city of Portland, one made by John H. Couch in 1863, and the other made by Caroline, his widow, Caroline E. Wilson, Clementine E. Lewis, Elizabeth R. Glisan, May H. Couch, George Flanders, and Maria L. Flanders, on the 15th day of November, 1872. Both of these maps

show that Burnside street terminates at the west side of Front street, and that the strip of land in controversy is private property. It thus appears, so far as the maps and plats are concerned, that the two introduced by the defendants show Burnside street extends to the river, while the two introduced by the plaintiffs show that it terminates at the west side of Front street. As to the lithographic map of 1869, there is no evidence to show, nor is it claimed, that John H. Couch or his wife signed or acknowledged or had anything to do with making it.

The point upon which the defendants mainly rely in respect to such map as showing a dedication is that it was in general use in the city, and the only public map referring to Couch's addition from 1859 to 1865, during which time John H. Couch and his wife made certain deeds in which the lots were described by reference to Couch's addition to the city of Portland. It is argued that the reference in these deeds to Couch's addition, under the circumstances, was intended to refer to such addition as platted on said map, and was therefore a recognition of it, and, in legal effect, a dedication of the streets as platted thereon. We are unable to assent to this inference. The admitted facts show that the strip of land in dispute belonged to Caroline Couch as donee of the United States, and that it was conveyed to the plaintiffs Allen & Lewis and Flanders, together with certain lots, some time in 1854, and that they are now the owners and entitled to the possession of it, unless the public has acquired an easement therein as a street. There is some evidence that there was a plat made of an addition to the city of Portland by John H. Couch in April, 1850, but there is nothing to show that the *locus in quo* was dedicated as a public street therein; and, even if there was, such plat having been made before the donation law was passed, it would not have the effect to constitute a dedication. Any person who should subsequently acquire the title from the government or its grantees had a right to revoke such dedication, and subject the property to his private use. Nor is there any evidence that Couch or his wife, prior to 1859,—the date of the McCormick map,—ever made any map on which the *locus in quo* was platted as a street. It is probable that after they acquired the title from the United States they may have continued to use such prior map, exhibiting it to intending purchasers, and selling their lots with reference to it; but there is nothing to show that Couch or his wife ever recognized the McCormick map, or that they ever saw it, or knew of its existence. In fact, it does not purport to be a map of Couch's addition to the city of Portland.

In view of these considerations, we do not think that the reference in their deeds to Couch's addition was intended to refer to their property as platted on the McCormick map. It is not this, however, but the map of 1869, upon which the defendants mainly rely as establishing a dedication of the *locus in quo* as a public street. It is claimed that all of the plaintiffs except Mr. Allen made deeds conveying lots with reference to this

map. All that can be said in support of this claim is that these parties made certain deeds, referring therein for description to the map of Couch's addition to the city of Portland. But, inasmuch as Couch had made a map in 1865, upon which the *locus in quo* was not platted as a part of Burnside street, even if we assume that the map made by him in 1869 platted it as a part of such street, there is nothing to show whether the general reference in those deeds was to the map of 1865 or 1869. Mrs. Couch, during the time that she was the owner of the land in dispute, never made any maps or plats dedicating it as a public street, nor had any of the plaintiffs. The maps and plats made by John H. Couch, after he and his wife had conveyed this land, as already stated, to the plaintiffs Allen & Lewis and Capt. Flanders, would not bind them, unless they accepted and acted upon such maps, and there is no evidence that they accepted and acted upon the map of 1869, other than the mere fact that they made certain deeds in which they described the property by reference to the map of Couch's addition to the city of Portland, which reference was as likely to be to the map of 1865, or to some prior map, of which there was some evidence, as to that of 1869.

It is sought, however, to obviate this objection by showing that some of the deeds conveyed lots and blocks that were for the first time platted on the map of 1869, or, in other words, that such deeds conveyed lots and blocks that appear on no other map; and hence it is argued that the reference in them was necessarily to the map of 1869 which, it is claimed, shows that the property in dispute was a part of Burnside street. It is true that such lots and blocks did not appear on any other map, for the reason that the map of 1869 was intended as an addition or extension of prior maps; but this affords no justification for the assumption or argument that such map, made by John H. Couch, shows a dedication of the *locus in quo* as a public street. Before, however, it can be assumed that his wife recognized the map of 1869 by joining with her husband in such deeds, as showing a dedication of her property, so as to bind or estop her, such map itself ought to show the dedication so distinctly and positively as to make the evidence of her intention to divest herself of the title entirely clear. The map itself does not purport to be anything more than a map of the extension of Couch's addition to the city of Portland. The lots and blocks laid out on it, which constitute the new addition, are designated and marked by a coloring of yellow, and all the other property except a tier of blocks adjoining such yellow portion, is left blank. This indicates that the map of 1869 was not intended to affect the prior maps. Its object was to plat a second addition, and to show its relative position to the first one. The numbering of the lots and blocks and the dedication of the streets outside of the extension were to remain as platted on the prior maps. This must be so, as it is impossible to convey any lots or blocks by reference to such map, outside of the extension, because they are left in blank.

and hence deeds referring to lots and blocks as numbered by the map of 1869 necessarily referred to it, and did not appear on any other map, because such lots and blocks composed the new addition or extension of prior plats; but, as we have shown, the other portion of such map negatives the idea that it was intended to change the map of 1865, or prior maps, or that it undertook to represent the *locus in quo* as a part of Burnside street.

This view is confirmed by the form of acknowledgment to this map, which reads, in its material parts, as follows: "That he recognized the accompanying diagram or plat as a true and correct description of lots and blocks laid out by him as an addition to the city of Portland." This, of course, means the lots and blocks laid out on this map as a new addition, indicating that the added blocks copied from prior maps were only intended to show their relative position to such new addition, and not to alter or affect the prior maps. We do not think, therefore, that any representations as to Burnside street upon that portion of the map left in blank—such portion constituting no part of the addition—can be construed as intending to make a dedication of the *locus in quo* to affect the prior maps.

The map of 1872 is the only one that Caroline Couch or the plaintiffs ever signed, and it shows that the property in question is not a part of Burnside street. This map corresponds with that of 1865, and, as we construe it, is not in conflict with the map of 1869. We do not think, therefore, that such deeds as were made of lots and blocks which appear only in the map of 1869 were a dedication of the *locus in quo*, or that they can be reasonably construed to be a recognition of any dedication thereof. In thus holding we do not controvert the principle that where a proprietor recognizes a plat in making a sale of lots he will be estopped to deny a dedication of the streets designated upon the plat embracing his property; but we do not think, in view of the facts, that such principle can be applied to the case at bar.

The second defense is dedication by user. It is claimed by the defendants that the *locus in quo* has been used by the public, with the consent of the plaintiffs, the same as other streets similarly situated have been used, for more than twenty years, and that therefore, the public have a prescriptive right to the same. A dedication of land to the public use rests on the intention or assent of the owner. As it is purely a question of intention, the evidence of it, when resting in parol, must be clear and satisfactory, and indicate a positive and unmistakable intention to devote the property to public use. All the authorities agree that the acts and conduct of the owner, when relied upon to show the dedication of his property, must be deliberate and unequivocal, manifesting a clear intention to abandon such property to the public use. The burden of showing it rests on the defendant. The security of titles requires that the evidence of dedication, when depending on parol proof, should be of such a deliberate and decisive character as to leave no doubt of the owners' intention. Hence the 22 L. R. A.

rule is well settled by numerous authorities that before there can be a valid dedication there must have been an actual intention, clearly indicated, by deliberate and unequivocal words or acts, to dedicate the property to the public. *Hogus v. Albina*, 20 Or. 185, 10 L. R. A. 673.

It appears from the testimony that some time in 1854, and soon after the plaintiffs Capt. Flanders and Allen & Lewis bought the property, they built a wharf in front thereof for ocean vessels and river craft; that it was one of the first wharves built in the city, and for many years was the principal landing for such vessels; that it has been maintained there continuously ever since, although it has been rebuilt several times, and extensions added. The wharf extends across the *locus in quo*, and out from the bank of the river about 100 feet to the navigable water of such river, and is 700 feet in length. A roadway or street was left open from the east side of Front street to the wharf, for the purpose of ingress and egress. The wharf opposite the street is two-story, and at the time it was built the plaintiffs last mentioned constructed an elevated passageway 20 feet wide on the north side of this roadway, from Front street to the upper story, and inclosed the space underneath, and used it for a stable and storehouse. This roadway or street has been used by the public and plaintiffs as a means of conducting and carrying on the business appertaining to this wharf and warehouse, and the facts indicate that it has not been used for any other purpose. The plaintiffs have at all times maintained their right to the *locus in quo*, consistent with its use as a passage or roadway to and from their wharf, and the use of it by the public for such purpose was not under a claim of right, but by their permission. The city authorities have not exercised any acts of ownership over or assumed any right to control it; nor has the city made any improvements or performed any work upon the same by way of repairs or otherwise, but the evidence shows that the plaintiffs have used and occupied such property to the exclusion of the public, except so far as was necessary for the public to use it in doing business at their wharf. The evidence also shows that the plaintiffs have asserted their ownership of the land in controversy by acts and declarations which are entirely inconsistent with any intention to abandon or dedicate it to the public use. They have used it for the storage of iron, brick, and other heavy freight; they have improved and repaired it; they have kept a gate across it for ten or twelve years; exercised the right to exclude persons or teams from it whenever they chose to do so; they have publicly and repeatedly, in connection with the use of the property, declared that it was not a public street, but a private way to their wharf and warehouse.

In *Irwin v. Dixon*, 50 U. S. 9 How. 10, 18 L. ed. 25, in which the facts are similar to the case at bar, the court says: "From the very nature of wharf property, likewise, the access must be kept open for convenience of the owner and his customers; but no one ever supposed that the property thereby became

public, instead of private. . . . No length of time during which property is so used can deprive an owner of his title. . . . While any one might be allowed to travel over this space from the warehouse to the wharf and river, when convenient, and not interfering with the owner, it would not be because it had been intended to give to the public a right of way over these premises, but because he himself intended to travel over it, and while so doing and so leaving it open, would not be captious in preventing others from traveling there."

The same principle is laid down in the *note* to *Dovaston v. Payne*, 2 Smith, Lead. Cas. Hare & W's *note*, p. 155, wherein it is said: "If, therefore, a person opens and uses a space upon his own land as a road for his own convenience and purposes, the mere fact that the community are allowed to make use of it in common with him for even twenty or thirty years will not constitute a dedication of it to the public use, especially in the face of declarations on his part inconsistent with an assent to such dedication." So that the use of the *locus in quo* by the public in the manner referred to is entirely consistent with the ownership of the plaintiffs, and therefore the public have not acquired a prescriptive right by user to the land in controversy.

The next question to be determined is as to the right of the plaintiffs to erect and maintain a wharf at the *locus in quo* extending to the navigable water of the Willamette river. The contention for the defendants is that the title to the soil under the Willamette river is in the state by virtue of its sovereignty, and that riparian owners, without a license or grant from the state, have no authority or right to maintain a wharf beyond the ordinary high-water mark. Hence they claim that if the plaintiffs have erected their wharf and extended it over the submerged soil of such river to its navigable waters without any license from the state, they have erected a purpresture, which may be abated or removed as a common nuisance. The theory of their argument is that in this country the law as to navigable fresh waters is the same as to waters moved by the tide; that, in either case, the state, by virtue of its sovereignty, is the owner of the subjacent soil of its navigable rivers, including tide lands or submerged lands contiguous to deep water; that, as such owner, it has the right to regulate the use of such lands, or to dispose of them, in any way that will not impair or injuriously affect the public interests in such rivers, especially for purposes of navigation and commerce, free from any easement of the upland owners, who can only acquire the right to extend a wharf over them by its consent, obtained by legislation, or acquired by acquiescence through local usage; and that, as a consequence, unless the plaintiffs, as riparian owners, have obtained the consent of the state to extend their wharf over the submerged soil of the Willamette river to the point of its navigability, they cannot be considered as having any right in the premises which the state is bound to respect; nor can their wharf be recognized as a legal structure, the taking or condemnation of which for a

public use would entitle them to compensation as for private property.

By the common law, in England, the title to the shore of the sea, and the arms of the sea, and the soil under tide water, is vested in the king, who has a proprietary interest therein, which he may grant or dispose of subject to the public use for navigation and commerce. "The *jus privatum*," says Lord Hall, "that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to the public use." De Jure Maris, 22. The soil so vested in the king can only be transferred subject to the public trust.

In this country the state has succeeded to the ownership and sovereignty over such lands, charged with a like public trust; and the law is now regarded as settled that the state, by virtue of its sovereignty, is regarded as the owner of lands covered by tide waters, and, as an incident of such ownership, has the right to use or dispose of them in such way as will not impair or prejudice the public interests or privileges such as fishing, navigation, and commerce. As touching this subject, *Mr. Justice Field* said: "Upon the admission of California into the Union upon equal footing with the original states, absolute property in and dominion and sovereignty over all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." *Weber v. State Harbor Comrs.* 85 U. S. 18 Wall. 65, 21 L. ed. 801.

And in *Boulby v. Shively*, 22 Or. 410, in conformity with our previous adjudications, it was held that when the state of Oregon was admitted into the Union the tide lands became its property, and subject to its jurisdiction and disposal; that, in the absence of legislation or usage, the common-law rule would govern the rights of upland proprietors, and by that law the title to such lands is in the state; that the state has the right to use or dispose of its title in such manner as it might deem best, free from any easement of such upland owners therein other than such as the state might choose to resign to them, subject only to the paramount right of navigation and the uses of commerce. The same rule has been extended to our great fresh-water lakes, which, owing to the extended commerce conducted upon them, are treated as inland seas; and also, in some of the states, to the great fresh-water rivers, which are navigable in fact, as the Mississippi, the Missouri, the Ohio, and, in the state of Pennsylvania, to all its permanent rivers; such rule depending on the law of each state as to what waters, and to what extent, the prerogative of the state over the lands under water shall be exercised. The question, as *Mr. Justice Bradley* said, is one for the several states themselves to determine. "If they choose to

resign to the riparian proprietor rights which properly belonged to them in their sovereign capacity. It is not for others to raise objections." *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 324.

So it appears that the same rule as to the ownership of and the sovereignty over lands under the navigable waters of the great lakes and fresh-water rivers applies which obtains at common law as to the ownership of and sovereignty over lands under tide waters, and that such lands are held by the same right in the one case as the other, and subject to the same trusts and limitations. *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 436, 36 L. ed. 1037.

In respect to the tide lands, the state, as owner, has provided by legislation for their sale and disposal free from any right of the upland owners therein, except such as it saw fit to recognize in them or their grantees, in consideration of the fact that prior to such legislation the tide lands had often been dealt with by the adjacent owners as private property, subject, however, to the paramount right of navigation and the uses of commerce. *Bowditch v. Shively*, *supra*.

But in respect to navigable fresh-water rivers in this state there has been no legislation for the sale or disposal of any portion of the submerged lands lying between the upland and navigable waters. Such lands, so far as any legislative action is concerned, have not been treated by the state in the proprietary way which it has asserted and applied to the tide lands; and some of the decisions of its courts recognize certain rights in the riparian owners, arising from adjacency, which do not belong to them in common with the public.

In *Minto v. Delaney*, 7 Or. 337, it was held that the river is the boundary of lands lying along the Willamette, and that accretions formed on the shore by the gradual receding of the water belong to the riparian owner; and in *Moore v. Willamette Transp. & Locks Co.*, Id. 357, that rocks and shoals along the margin of the same river belong to the riparian owner. While, therefore, the state, as the owner of the submerged lands of navigable fresh-water rivers, has not treated its proprietary interest in any portion of them as subject to sale or disposal, it has recognized certain rights in the riparian owners, not common to the public, in the shoal water in front of their land. It is common knowledge that before and after the state was admitted into the Union the riparian owners along the navigable fresh-water streams within its limits acted on the assumption that the right of wharfage was incident to their land, and built wharves in front thereof. Some of these wharves, like the plaintiff's are expensive structures, and of great advantage and benefit to commerce. Nor is this all. Upon the tidal waters, such owners, believing that the tide lands adjacent to their uplands belonged to them, built wharves over the same, and dealt with them as private property. This condition of things was recognized in the legislation referred to; and in consideration thereof, and as an act of justice, a preference was given to the riparian

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owners in the provisions for the sale of such lands. "Though the state was under no legal obligation to recognize the rights of either the riparian owner or those who had occupied these tide lands," as Boies, J., said, "still the legislature, considering the fact that these lands had been dealt with as private property, and improved sometimes by the erection of expensive structures, which were a great advantage to commerce, made what we think wise and just provisions for the protection of those who had spent their money in purchasing and improving these lands, which improvements were in many cases absolutely necessary as aids to commerce." *Parker v. Rogers*, 8 Or. 190.

All this goes to show that the custom which obtained of building wharves along the navigable rivers of the state by riparian owners was fully understood, and that there was no intention to interfere or obstruct the right to wharf across the submerged lands of nontidal or fresh-water rivers but that the act was only designed to provide for the sale of tide lands on tidal waters, the effect of which was inconsistent with any easement or right of the upland owner therein not granted to him in such act. This becomes all the more apparent by the proviso in the tide-land act, which provides "that the Willamette, Coquille and Coos rivers shall not be deemed rivers in which the tide ebbs and flows, within the meaning of this act, . . . and that the title of this state to any tide or overflowed lands upon said rivers is hereby granted and confirmed to such owner of the adjacent lands." This grant conveyed the title to all of such lands along these rivers, whether tide or overflowed, to the riparian owners, subject to the public trust. As the Willamette is a fresh-water river, and only slightly affected by the tides a short distance from its mouth, there is no tide land at Portland, as held in *Andrus v. Knott*, 12 Or. 501; and therefore it results that if the submerged or overflowed lands described in the act include such as are not affected by the tides, and lie between the upland and navigable water, they belong to such owners, subject to the paramount right of navigation and commerce.

There is a marked distinction made by such legislation between the submerged lands of fresh navigable waters, and those covered by the flux and reflux of the tide, and known as tide lands. In view of these considerations, and the tendency of our adjudications to recognize rights in the riparian owners on the Willamette river that do not belong to the public, and the custom which has prevailed from the early settlement of the country in respect to the building of wharves, it is at least reasonable to infer that the state has acquiesced in the right of the riparian owners to build wharves in aid of navigation. In fact, the absence of legislation in respect to the state's proprietary interest in the shoal water of submerged lands of the Willamette river, taken in connection with the legislation providing for the sale and disposal of tide lands, and adjudications to the effect that the grant of its proprietary interest therein is free from any easement of the ri-

riparian owner, and subject only to the public right of navigation and commerce, leads to the conclusion that it is the policy of the state, as in other states, to allow riparian owners on such rivers to build wharves in aid of navigation.

Mr. Gould says: "Riparian owners upon navigable fresh rivers and lakes may construct, in shoal water in front of their land, wharves, piers, landings, and booms in aid of and not obstructing navigation. This is a riparian right, being dependent upon title to the bank, and not upon title to the river bed. Its exercise may be regulated or prohibited by the state; but so long as it is not prohibited it is a private right derived from the passive or implied license by the public. As it does not depend upon title to the soil under water, it is equally valid in the states in which the river beds are held to be public property and in those in which they are held to belong to the riparian proprietors, *usque ad flum aqua*." Again, he says: "The legislature may authorize the extension of such structures beyond low-water mark, but, if not sanctioned by the legislature, they are illegal, so far as to interfere with or limit the right of navigation." Gould, Waters, § 176. In view of these considerations, the wharf of plaintiffs, being in aid of navigation, is a legal structure, and private property, which can only be taken for public use according to established law, and with due compensation therefor.

Passing these considerations for the present, there is another phase of the case, which seems to be decisive of the assent of the state to the building of plaintiffs' wharf. The legislative assembly, at its session held in 1862, passed the following act relating to wharves in cities: "Sec. 4227. The owners of any land in this state lying upon any navigable stream or other like water, and within the corporate limits of any incorporate town therein, are hereby authorized to construct a wharf or wharves upon the same, and extend such wharf or wharves into such stream or other like water beyond low-water mark so far as may be necessary and convenient for the use and accommodation of any ships or other boats or vessels that may or can navigate such stream or other like water. Sec. 4228. The corporate authorities of the town wherein such wharf or wharves is proposed to be constructed shall have power to regulate the exercise of the privilege of franchise herein granted; and upon the application of the person entitled to and desiring to construct such wharf or wharves, such corporate authority shall, by ordinance or other like mode, prescribe the mode and extent to which the same may be exercised beyond the line of low-water mark, so that such wharf or wharves shall not be constructed any further into such stream or other water beyond such low-water line than may be necessary and convenient for the purpose expressed in section 4227, and so that the same will not unnecessarily interfere with the navigation of such stream or other like water." Hill's Code.

In 1869, the city of Portland, under the authority of this statute, passed an ordinance 22 L. R. A.

defining the wharf limits and regulating the building of the same. Section 8 of this ordinance provides that "all wharves and piles now erected or driven beyond the lines described in section 1 of this ordinance shall be removed to conform to the above-described line, within ten years from the date of the approval of this ordinance. Provided, that if any such wharf or structure shall be at any time destroyed by the elements, or so damaged as to necessitate the rebuilding thereof, it shall be rebuilt to conform to said above-described lines."

The contention for the defendants is that the plaintiffs' wharf, having been built when the statute was passed, did not come within its purview; that the statute provides for the doing of future acts under the regulation of the corporate authorities; that it does not legalize or attempt to legalize wharves theretofore constructed; that the words "proposed to be constructed," and "desiring to construct," and "hereby authorized to construct," show beyond cavil that future, and not past, erections were what the law-makers had in mind.

The rule undoubtedly is that a statute is to be construed to operate prospectively, and not retrospectively, unless the language is so plain and direct as to preclude all question as to the intention of the legislature. The rule is founded on the principle that a construction should not be given to a statute that will take away or restrict rights, unless the intention of the legislature cannot be otherwise satisfied. A retrospective law is always subject to the limitation that it shall not be such as is termed "*ex post facto*," or as impair the obligations of contracts.

But we do not think there is any occasion to apply the principle suggested to the statute in question. There is no claim that it affects past transactions, or relates back, and gives them validity. It is not pretended that the statute has a retroactive effect, and made wharves legal structures which were erected prior to its enactment. The statute neither commands certain acts or things to be done, nor prohibits them from being done. It is a permissive statute, which allows certain things to be done without commanding them. "Under the provision of the statute," said Boise, J., "any person within an incorporated town within this state may build and maintain a wharf from his land at high water into navigable water, so far as is necessary or convenient to accommodate shipping, if he conforms to the legal restrictions imposed on him by the authorities of the town, and does not impede navigation. Such structures are erected in all commercial towns, and have been recognized as legal structures in all the states." *Parker v. Taylor*, 7 Or. 446.

The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which permission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf wa

built before or after the statute was enacted. In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent. But it is argued that the leave granted under the statute, being merely a permission or license, is revocable at the pleasure of the state; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build wharves is merely a license, and, as such, may be revoked at the pleasure of the state, after it has been acted upon, and the wharf erected. But this is not so.

As was said in *Bowley v. Shively*, *supra*, the statute does not vest any right until exercised. It is a license revocable at the pleasure of the legislature until acted upon and availed of. It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence the contention of the defendants that the Meussdorffer act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained.

Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois*, *supra*, in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the court, im-

paired the public interest in its waters, and operated, if irrevocable, as an abdication by the state of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course, the state has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our state has made such regulations, and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements, it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises. Within the principle and for the reasons suggested, it is apparent that the cases of *Runde v. Delaware & R. Canal Co.* 55 U. S. 14 How. 80, 14 L. ed. 335; *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 101; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. 9, 42 Am. Dec. 312,—do not determine the questions involved in the case at bar. The right to build and maintain a wharf, being in aid of navigation, and for the benefits of commerce, rests on a different footing and principle than a license to erect mills with dams which may impede or obstruct navigation, or canals diverting the waters of a navigable river.

Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463.

The decree must be affirmed.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire

v.

Frank C. ALMY.

(.....N. H.....)

The constitutional right of trial by jury is not violated by a statute which provides

NOTE.—The opinion and briefs in the above case seem to exhaust the authorities on the subject and leave no opportunity to add anything of value to the question.

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for the determination by the court of the degree of crime on a plea of guilty of murder.

(July 29, 1892.)

CASE RESERVED by the trial term for Grafton County for the opinion of the full court of a motion for a new trial after judgment of the court fixing the degree of the crime without granting a jury trial after plea of guilty to an indictment for murder.

Denied.

The facts sufficiently appear in the opinion.

Messrs. Alvin Burleigh and Joseph C. Story, for defendant, in support of the motion:

The defendant has a constitutional right to a trial by jury on the plea of guilty. The plea raises the issue of degree of guilt upon which the life of the accused depends.

The plea of guilty under the statutes of this state, since murder was divided into two degrees in 1836, is a confession of intentional, unlawful killing and nothing more. It is not a plea of guilty to a capital offense.

No judgment can be rendered upon such a plea. The plea raises as sharp an issue as any plea could possibly raise.

The Statute of 23 Hen. VIII., created the distinction between killing with malice prepense, which was still called murder, and without malice prepense which was called manslaughter. To the first-named offense the death penalty still attached, but manslaughter entailed imprisonment only.

State v. Pike, 49 N. H. 399, 6 Am. Rep. 538; 4 Bl. Com. 190; Hale, P. C. 466; 1 East, P. C. 218; *Com. v. Webster*, 5 Cush. 304, 52 Am. Dec. 711.

The state seeks to attach the same meaning to a plea of guilty under an indictment for murder in New Hampshire that obtained at common law, when no degrees, with different penalties attached, were recognized, and there seems to be a similar confusion of mind in some of the judicial opinions of courts in different states.

After the Statute of 23 Hen. VIII., intentional killing in hot blood or from sudden and uncontrollable passion was manslaughter. The accused could truthfully plead guilty to that offense and be sentenced to imprisonment. Under our statute intentional killing without deliberation and premeditation is not manslaughter.

Gen. Laws, chap. 282, § 7.

Manslaughter by the Statute of 23 Hen. VIII., was the same as murder in the second degree now is under our law.

Gen. Laws, chap. 282, § 1.

As the forms of indictment for murder do not in terms set up the particular degree of that crime the accused cannot as a matter of right plead guilty of the lower degree and be sentenced accordingly.

He cannot plead guilty of the actual offense committed and receive the known penalty of imprisonment, but must subject himself to the chances of a trial by the court on the question as to whether or not his neck shall be stretched unless he pleads not guilty, and yet, in view of this critical situation in which the law places the accused, the state contends that his plea of guilty leaves no issue to be tried. Such a position is contradictory. It is the right of a prisoner, competent in understanding and acting in good faith, to plead guilty instead of denying the charge.

Bishop, Crim. Proc. § 795.

The legislature cannot by indirection nor by taking several steps deprive the accused of a constitutional right which cannot di-

rectly and by a single step be taken from him.

A general plea of guilty to an indictment for murder which does not designate in terms or apt language the degree, is either held equivalent to a plea of not guilty to the higher degree or to a confession of guilt to the lower degree only.

Whart. Hom. 2d ed. § 194.

A general verdict of guilty is not a finding of guilt in the first degree.

State v. Cleveland, 58 Me. 564; *Johnson v. Com.* 24 Pa. 386; *State v. Dowd*, 19 Conn. 388; *McGee v. State*, 8 Mo. 495; *Tully v. People*, 6 Mich. 273; *State v. Moran*, 7 Iowa, 236.

In order to make the killing murder in the first degree, deliberation and premeditation must be proved, they will not be inferred from the killing, whether it be proved or confessed.

People v. Potter, 5 Mich. 1, 71 Am. Dec. 763; *State v. Mitchell*, 64 Mo. 191; *State v. Lane*, Id. 319; *State v. Testerman*, 68 Mo. 408; *Schlenker v. State*, 9 Neb. 300; *State v. Millain*, 8 Nev. 410; *O'Mara v. Com.* 75 Pa. 424; *Ake v. State*, 30 Tex. 466; *Hamby v. State*, 86 Tex. 523; *Caldwell v. State*, 41 Tex. 86; *Murray v. State*, 1 Tex. App. 417; *Hill v. Com.* 2 Gratt. 594.

The verdict must specify the degree.

Whart. Hom. 2d ed. §§ 190, 900; *Whiteford v. Com.* 6 Rand. (Va.) 721, 18 Am. Dec. 774; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 538.

That the common-law form of indictment for murder is sufficient to support a verdict of guilty in the first degree, under laws dividing murder into degrees, is combated in an argument of great force and learning by Mr. Bishop in his work on Criminal Procedure, §§ 567, 588.

Almy was found guilty of murder in the first degree, not on his own confession, by "the judgment of his peers," by "due process of law," or "the law of the land," but by the judgment of two men sitting as a court. This was in derogation of both federal and state constitutions.

"Due process of law" and "the law of the land" mean one and the same thing.

Mayo v. Wilson, 1 N. H. 55.

The judgment of his peers means trial by a jury of twelve men according to the course of the common law.

2 Kent, Com. p. 18, and note.

The law of the land means due process of law in which is included the right to contest the charge.

Greene v. Briggs, 1 Curt. C. C. 311; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728; *Jones v. Robbins*, 8 Gray, 342.

These terms do not mean all statutory enactments of the legislature, the law-making branch of the government cannot make "due process of law" by violating the ancient and fundamental principles of justice, liberty, and protection, which are embodied in the old common law of our ancestors.

East Kingston v. Twiss, 48 N. H. 61.

In discussing the term "the law of the

land" the court says in *Saco v. Wentworth*, 37 Me. 171, 58 Am. Dec. 786: "It does not mean an act of the legislature; if such was the true construction, this branch of the government could at any time take away life, liberty, property, and privilege without a trial by jury."

See also 2 Coke, Inst. 46; 1 Bl. Com. 44; 2 Kent, Com. 9; 8 Story, Const. § 1788.

A constitutional jury cannot consist of less than twelve men.

It is the right of a trial by jury which exists and is preserved.

Opinion of the Justices, 41 N. H. 551; *Copp v. Henniker*, 55 N. H. 193, 20 Am. Dec. 194; Sedgw. Stat. & Const. L. 2d ed. 487, note; *State v. Ray*, 68 N. H. 407, 56 Am. Rep. 529.

Speaking of the danger of legislative encroachments upon constitutional rights in connection with the term "the law of the land" (*Jones v. Robbins*, 8 Gray, 342), the court says, in objection to the claim, that this language meant statutory enactments of the broadest kind.

See also *State v. McOlear*, 11 Nev. 45; *State v. O'Flaherty*, 7 Nev. 157; *State v. Cohn*, 9 Nev. 189; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 587.

Article 16 of the Bill of Rights provides that "no subject shall be liable," etc.; "nor shall the legislature make any law that shall subject any person to a capital punishment (excepting for the government of the army and navy and the militia in actual service) without trial by jury."

A trial is "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause for the purpose of determining such issue."

Bouvier, Law Dict.

Trial by jury in a capital case is safely within the domain of rights that cannot be waived.

State v. Carman, 68 Iowa, 130, 50 Am. Rep. 741; *Hill v. People*, 16 Mich. 351; *Concemi v. People*, 18 N. Y. 128; *Allen v. State*, 54 Ind. 461; *Work v. State*, 2 Ohio St. 296, 59 Am. Dec. 671; *Maurer v. People*, 43 N. Y. 1; *Stokes v. People*, 53 N. Y. 164, 18 Am. Rep. 492; *Wilson v. State*, 16 Ark. 601; *Bell v. State*, 44 Ala. 898; *Williams v. State*, 12 Ohio St. 622; *People v. Smith*, 9 Mich. 193; *Neales v. State*, 10 Mo. 498; *State v. Mansfield*, 41 Mo. 470; Cooley, Const. Lim. 182, 399; Bishop, Crim. Proc. §§ 96, 112, 123; Sedgw. Stat. & Const. L. 87, 88.

Messrs. Edwin G. Eastman, Atty-Gen., and William H. Mitchell, solicitor for Grafton county, for the state:

The defendant has no constitutional right to a jury trial on his plea of guilty.

The statute in regard to degree of murder creates no new offense, and makes no change in the common-law definition of murder. It merely mitigates the punishment in certain cases, and the mitigation of punishment on a plea of guilty is not made a question for the jury by the common law, or the statute of the constitution.

Opinion of the Justices, 9 Allen, 586; *Green v. Com.* 12 Allen, 155.

It is constitutional and legal for a guilty

man to tell the truth and confess his guilt, and it is constitutional and legal for this court to believe him, and render judgment on his confession.

Com. v. Dailey, 12 Cush. 80.

A defendant in a criminal action, with the consent of the state and the court, may waive a statute enacted for his benefit.

State v. Kaufman, 51 Iowa, 578, 83 Am. Rep. 148; *State v. Worden*, 46 Conn. 849, 33 Am. Rep. 27.

It is difficult to see why a defendant may not with the consent of the court and state elect to be tried by the court.

Com. v. Dailey, *supra*; *Murphy v. Com.* 1 Met. (Ky.) 865; *Tyra v. Com.* 2 Met. (Ky.) 1.

In cases not capital it has been held that the disqualification of a juror may be waived and that by consent a verdict may be rendered by eleven jurors.

Com. v. Dailey, *supra*.

In Ohio, a statute defining the jurisdiction and regulating the practice of probate courts, which provides that upon a plea other than a plea of guilty, if the defendant do not demand a trial by jury the probate judge shall proceed to try the issue, was held to be no infringement of the constitution.

Dailey v. State, 4 Ohio St. 57; *Dillingham v. State*, 5 Ohio St. 280; *Ward v. People*, 30 Mich. 116.

Upon the question as to the right of one charged with crime to waive a trial by jury, and elect to be tried by the court when there is positive legislative enactment giving the right so to do and conferring power upon the court to try the accused in such a case, there are but few decisions. But fortunately some of the states have passed laws permitting this to be done, and we are therefore not entirely without authorities. And so far as we can learn in every case where a question has been raised the statute empowering the court to try, and the accused to waive a jury trial and elect to be tried by the court, has been decided constitutional.

Dailey v. State and *Dillingham v. State*, *supra*; *State v. Maine*, 27 Conn. 281; *Curtis v. Gill*, 34 Conn. 54; *State v. Tuller*, 34 Conn. 295; *People v. Smith*, 9 Mich. 199; *Tabor v. Cook*, 15 Mich. 322; *Ward v. People*, 30 Mich. 116; *Com. v. Dailey*, 12 Cush. 80; *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559; *People v. Goodwin*, 5 Wend. 251; *Neales v. State*, 10 Mo. 498; *State v. Mansfield*, 41 Mo. 470; Bishop, Crim. Proc. § 898; Cooley, Const. Lim. 181; Sedgw. Stat. & Const. L. 88; *Baker v. Braman*, 6 Hill, 47; *Lee v. Tillotson*, 24 Wend. 839, 35 Am. Dec. 624; *Detmold v. Drake*, 46 N. Y. 318.

The prisoner may even waive his right to a trial at the hands of a jury on the merits, by pleading guilty.

People v. Rathbun, 21 Wend. 509.

There are two answers to the claim that the state had an interest in the defendant's life and a right to have him tried by jury, and that he could not waive the state's right.

The right of jury trial was his exclusive right.

State v. Albee, 61 N. H. 423, 60 Am. Rep. 325; *Wooster v. Plymouth*, 62 N. H. 196.

If the defendant's right to a jury trial was also the right of the state, the Act of 1886 was a waiver of it.

State v. Worden, 46 Conn. 859, 33 Am. Rep. 37; *Cooley*, Const. Lim. 392.

A statute can be worded so as to exclude the jurisdiction of a court without a jury.

State v. Carman, 63 Iowa, 180, 50 Am. Rep. 741.

Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent, and must be summoned from the vicinage.

Cooley, Const. Lim. 392.

If the constitution deprived defendants of their right of waiver, they could waive none of the elements of a jury trial. They could waive no privilege secured to them by the constitution. As a result the bill of rights would be a bill of disabilities, inflicted upon accused persons presumed to be innocent, and their liberties and lives might be sacrificed by what was intended for their protection. For example, this defendant could not waive the right to be tried in Grafton county.

State v. Albee, *supra*.

He could not waive his right to refuse to furnish evidence against himself, and the hearing would be illegal and the judgment invalid because he testified that he was guilty of murder, though without premeditation.

State v. Ober, 52 N. H. 459, 18 Am. Rep. 68; *Connors v. People*, 50 N. Y. 240; *People v. Casey*, 72 N. Y. 398; *Com. v. Mullen*, 97 Mass. 545; *State v. Witham*, 72 Me. 581.

The statute in question creates no new offense.

State v. Pike, 49 N. H. 405, 6 Am. Rep. 533.

The determination of the degree of murder by the court is not a trial.

People v. Noll, 20 Cal. 164; *Craig v. State*, 16 L. R. A. 358, 49 Ohio St. 415.

Defendant by pleading guilty waived his right to trial by jury.

People v. Lennox, 87 Cal. 118.

Where a statute authorizes the court to try without jury with defendant's consent, defendant thereby waives his right to trial by jury.

Bishop, Crim. Proc. 8d ed. § 998; *Jones v. Robbins*, 8 Gray, 329; *Ward v. People*, 30 Mich. 116; *Dorst v. People*, 51 Ill. 286, 2 Am. Rep. 301; *League v. State*, 36 Md. 257; *State v. Moody*, 24 Mo. 560; *Dxiley v. State*, 4 Ohio St. 57; *Dillingham v. State*, 5 Ohio St. 290; *Com. v. Whitney*, 108 Mass. 5; *Sarah v. State*, 28 Ga. 578; *Langbein v. State*, 37 Tex. 162; *United States v. Rathbone*, 2 Paine, C. C. 578; *People v. Goodwin*, 5 Wend. 251; *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558; *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559; *Neales v. State*, 10 Mo. 498; *Harris v. People*, 128 Ill. 585; *Morgan v. People*, 136 Ill. 161.

If a prisoner consents to be tried by eleven instead of twelve jurors verdict will be permitted to stand, no statute providing for twelve.

Com. v. Dailey, 12 Cush. 80; *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148; 23 L. R. A.

State v. Sackett, 39 Minn. 69; *State v. Grosheim*, 79 Iowa, 75; *State v. Borowsky*, 11 Nev. 119; *Murphy v. Com.* 1 Met. (Ky.) 365; *Tyra v. Com.* 2 Met. (Ky.) 1; *Edwards v. State*, 45 N. J. L. 419; *State v. Potter*, 16 Kan. 80; *State v. Mansfield*, 41 Mo. 470; *Murphy v. State*, 97 Ind. 579; *Connelly v. State*, 60 Ala. 89; *Ward v. People*, 30 Mich. 116; *State v. Robinson*, 48 La. Ann. 383; *Lavery v. Com.* 101 Pa. 560; *State v. White*, 33 La. Ann. 1218; *State v. Grigge*, 34 W. Va. 78.

As to right to waiver in general, see —

Battle v. Knapp, 60 N. H. 362; *Crowell v. Londonderry*, 63 N. H. 49; *Alexander v. United States*, 138 U. S. 358, 34 L. ed. 954; *Lynch v. Com.* 88 Pa. 189, 32 Am. Rep. 445; *Com. v. Hardy*, 2 Mass. 307; *State v. Prescott*, 7 N. H. 288; *Cooley*, Const. Lim. 357; *State v. Buzzell*, 59 N. H. 65; *State v. Ober*, 52 N. H. 459, 18 Am. Rep. 68; *Com. v. Mullen*, 97 Mass. 545; *Lord v. State*, 18 N. H. 178.

Blodgett, J., delivered the opinion of the court:

In criminal proceedings a confession of the offense by the party charged by a plea of guilty is the highest kind of conviction of which the case admits (2 Hawk. P. C. chap. 81, § 1; 2 Hale, P. C. 225; 4 Bl. Com. 363); and subjects him precisely to the same punishment as if he were tried and found guilty by verdict (1 Archbold, Crim. Pr. & Pl. *110); and the effect of a confession being to supply the want of evidence (*King v. Hall*, 1 T. R. 390), it is an admission of every material fact well pleaded in the indictment, and authorizes the court having jurisdiction of the offense to proceed to judgment (4 Bl. Com. 329; 1 Chitty, Crim. L. 429; 1 Bish. Crim. Proc. 795). "Of judgments in criminal cases there are two kinds—First, such as are fixed and stated, and always the same for the same species of crime; secondly, such as are discretionary and variable, according to the different circumstances of each case. . . . The judgment against a man or woman for felony of death hath always been the same since the reign of Hen. I., viz., that he or she be hanged by the neck till dead. . . . As to judgments . . . which are discretionary and variable, according to different circumstances, I shall observe, in general, that for crimes of an infamous nature . . . it seems to be in great measure left to the prudence of the court to inflict such corporal punishment, and also such fine and lien to the good behavior for a certain time, etc., as shall seem most proper and adequate to the offense, from the consideration of the baseness, enormity, and dangerous tendency of it, the malice, deliberation, and willfulness, or the inconsideration, suddenness, and surprise with which it was committed, the age . . . of the offender, and all other circumstances which may any way aggravate or extenuate the guilt." 2 Hawk. P. C. chap. 48, §§ 1, 7, 14.

Prior to 1837 degrees of murder were unknown in this state, and, upon conviction, the invariable judgment was death. In that year, by the legislative act of January 13,

which has since been in force, the crime of murder was divided into two degrees, and transferred from the first class of crimes, in which the judgment is invariable, to the second class, in which the judgment is variable. It was recognized as a crime of different grades of enormity, deserving different penalties, and so the punishment was made more or less severe, according to certain aggravating or extenuating circumstances. See *note, State v. Dowd*, 19 Conn. 391. But the act did not create any new offense, or change the definition of murder as it was understood at common law. It merely mitigated the punishment in certain cases not of the most aggravated nature; and hence an indictment alleging murder in the same form as at common law will support a verdict of guilty of murder in the first degree under the act. *Com. v. Desmariseau*, 16 Gray, 1; *State v. Pike*, 49 N. H. 399, 405, 6 Am. Rep. 538, and authorities cited; *Craig v. State*, 49 Ohio St. 415; 16 L. R. A. 558. Such an indictment "sets forth . . . the highest grade of homicide, murder in the first degree, and thereby includes the inferior grade of murder in the second degree, in like manner as an indictment for murder at common law embraces a charge of manslaughter, which is comprehended in the allegations necessary to charge the higher offense. The only difference in the two cases is that in the latter the indictment charges two distinct offenses, but in the former, as applied to degrees of murder, only one offense is charged, but in such form that it includes the higher as well as the lower grade, to which different punishments are attached." *Green v. Com.* 12 Allen, 155, 178. Neither did the act make any change in the effect of a plea of guilty. It still confesses everything that is duly set forth, as a plea of not guilty puts in issue every fact which is comprehended within the averments of the indictment. When, therefore, this defendant pleaded guilty to the indictment charging upon him, in common-law form, killing with deliberate and premeditated malice, his plea was a confession that he was guilty of the common-law crime of murder, which the statute has not altered, and but for which a judgment of death would have been imperatively required; for, while the statute in no way detracts from the force or effect of the plea, it makes it the duty of the court to ascertain before judgment whether the extreme sentence which would otherwise follow the plea is warranted by the facts. "If any person shall plead guilty to an indictment for murder hereafter committed, the justices of the court having cognizance of the indictment shall determine the degree." For this purpose an inquiry was necessary into the circumstances of the defendant's crime, tending to show the higher or lower degree of enormity which the law recognizes, as it is necessary, when a defendant pleads guilty to an indictment for burglary, under Pub. Stat. chap. 276, § 1. He is to be imprisoned "not exceeding twenty-five years," but the court has no means of knowing whether the penalty should be twenty-five or ten years, or the lowest possible limit of a year and a day, unless some information is

22 L. R. A.

given on the subject at a hearing on the degree of enormity. But nobody, it is believed, ever supposed that such a defendant has a constitutional right to a jury trial of this question. It is not an issue in any legal sense, and nobody, it is believed, ever supposed that the accused has a constitutional right to a jury trial to determine whether he shall be fined or imprisoned, or ordered to recognize to keep the peace (chap. 278, § 20), in a case of assault, or be fined and imprisoned in the county jail, or sent to the state prison (chap. 272, § 1), for adultery. And certainly the generation which made and adopted the constitution did not understand that the kinds or amounts of punishment to be imposed by variable judgments are issues triable by jury, for the Act of February 8, 1791, "for the punishment of certain crimes," provided that a person convicted of one crime should be fined or set on the gallows, and might be imprisoned; that for another offense the convict should be set on the gallows one hour, with a rope about his neck, and one end thereof cast over the gallows, and imprisoned, bound to good behavior, and fined, and the court should order the person convicted to suffer all or part of the foregoing punishments, according to the circumstances and aggravations of the offense; for another offense the convict was to be set in the pillory, whipped, imprisoned, bound to good behavior, or fined, or suffer any or all the foregoing punishments, according to the nature and aggravation of the offense; for another the penalty was fine, imprisonment, or whipping, as the court, considering the nature and aggravation of the offense, may order; for another, sitting in the pillory, imprisonment, and fine, or any or all of these punishments, according to the nature and aggravation of the offense. See also Prov. Laws, ed. 1761, pp. 11-14. "We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature in the statutes enacted by them, and that used by the people in the great paramount law, which controls the legislature, as well as the people, is to be always understood and explained in that sense in which it was used at the time the constitution and laws were adopted." *Opinion of the Justices*, 41 N. H. 551. If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal nature and effect of a plea of guilty have been very imperfectly understood, not only by the authors of the constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law.

The necessary statutory inquiry into the circumstances of the defendant's crime has been made. His plea has been found to be warranted by the facts, and judgment has followed accordingly. In ascertaining the degree of his crime, he has been fully heard by himself, his witnesses, and counsel. Every facility has been provided him at the public expense to present before an impartial tribunal all the facts or circumstances tending in any way to mitigate or extenuate his

guilt. No want of competent intelligence to make the plea is averred, and no mistake or misapprehension as to its effect is alleged. No evidence against him is claimed to have been improperly admitted, and no evidence in his favor is claimed to have been improperly rejected. His sole complaint is that he has had no trial, in the constitutional sense of the word. But his plea precluded such a trial. "The proceeding . . . to determine the degree of the crime of murder after a plea of guilty is not a trial, nor has the defendant any right to have that question determined by a jury." *People v. Noll*, 20 Cal. 164. The only question remaining was whether there were extenuating circumstances affecting his punishment, and mitigation of punishment on a plea of guilty is not made a question for the jury by the common law or the statute or the constitution. *Opinion of the Justices*, 9 Allen, 586. "When a prisoner on his arraignment hath pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, a jury is impaneled." 3 Bl. Com. 880, 352; 4 Bl. Com. 850; 1 Archbold, Crim. Pr. & Pl. 110. And while in some states the common law has been so altered as to confer on the jury who try the general issue of guilt the power of deciding what punishment shall be imposed by a variable judgment, as well as the power of deciding the issue, and while an innovation of this kind was introduced in this state by the provision of the Act of 1837, that "every jury who shall find any person guilty of murder hereafter committed shall also find by their verdict whether it is of the first or second degree," it has not been enacted that there shall be a trial by jury to determine the punishment, when there is no issue, and no denial of any allegation of the indictment, but a general, unqualified confession of guilt by a plea of guilty. *People v. Noll*, *supra*. Nor does the constitution confer any such right. "Trial by jury," in article 16 of the Bill of Rights, is common-law language, used in its common-law sense. It means trial by twelve men, who return their unanimous verdict "upon the issue submitted to them." But while the right of every one to have his cause tried, or to be tried himself, if accused of crime, by a jury, is guaranteed and established beyond the power of the legislature to abridge it, the constitution does not compel any one to exercise the right thus secured, and there is no reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law "by which a party indicted for an offense, however grave its nature, may enter a plea of guilty thereto, if he sees fit so to do," or the other no less well-established rule that "in such a case there is no issue to be submitted to a jury on which a verdict can be founded." "The trial by jury, secured to the subject by the constitution, is a trial according to the course of the common law, and the same, in substance, as that which was in use when the constitution was formed." *East Kingston v. Towns*, 48 N. H. 64.

The constitutional rights of the defendant have not been hampered or in any way

abridged. The right of trial by jury remained to him after the Act of 1837, the same as before. The act is not only in perfect harmony with the constitution in this respect, but, by mitigating the punishment for murder in cases not of the most aggravated nature, and by giving an additional tribunal for the ascertainment of the degree, it manifestly conferred a benefit upon the defendant, instead of depriving him of a right. By pleading guilty, he voluntarily relinquished his constitutional right of trial by jury, as he would by pleading guilty to an indictment for larceny, arson, or any other crime. It was entirely for him to say whether there should be an issue and a trial or not. He knew there would be a trial if he pleaded the general issue, and he also knew that the prosecution would not accept a plea of guilty of murder in the second degree. He preferred to have no issue and no trial, but to have a hearing, under the statute, in regard to the circumstances of the admitted murder, which he claimed would affect the penalty for the single and undivided crime of which he chose to be convicted on his confession. This he might lawfully do. "The legislature have the general power to constitute new tribunals, and to provide new modes of trial for future cases, provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort, in every case where it is guaranteed by the constitution." *Opinion of the Justices*, 41 N. H. 552. "The supreme legislative power within this state shall be vested in the senate and house of representatives, . . . and shall be styled the 'General Court.'" Const. arts. 2, 3. "The general court shall forever have full power and authority to erect and constitute judicatories and courts of record or other courts, to be holden in the name of the state, for the hearing, trying, and determining all manner of crimes, offenses, pleas, processes, complaints, actions, causes, matters and things whatsoever, arising or happening within this state, or between or concerning persons inhabiting or residing or brought within the same, whether the same be criminal or civil, or whether the crimes be capital or not capital, and the said pleas be real, personal, or mixed, and for the awarding and issuing execution thereon." Id. art. 4. And, by article 5, "full power and authority are hereby given and granted to said general court, from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, . . . so as the same be not repugnant to this constitution, as they may judge for the benefit and welfare of this state and for the governing and ordering thereof and of the subjects of the same." These broad provisions are, for the purposes of this inquiry, restricted only by the declarations of the bill of rights, intended for the better security of persons accused of crimes against arbitrary and hasty public prosecutions, that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the

law of the land; . . . and that the legislature shall not "make any law that shall subject any person to a capital punishment . . . without trial by jury." Articles 15, 16.

It is only necessary, therefore, in order to determine whether the legislature transcended its power in the Act of 1837, to inquire whether it is prohibited by the constitution. As we have already seen, the right of the accused to a jury trial was not affected, and we can therefore have no doubt that the proceeding, whether it possesses the essential attributes of a trial in the common sense of the word or not, required by the act to ascertain the degree of the crime where in an indictment for murder the defendant enters a plea of guilty, is constitutional and valid. Statutes of like or similar import have been enacted in many of the states, and have never been held to be unconstitutional; on the other hand, they have been repeatedly and uniformly held to be constitutional. *Craig v. State*, *supra*; *State v. White*, 88 La. Ann. 1218; *State v. Atkins*, Id. 1253; *People v. Noll*, *supra*; *People v. Lennox*, 67 Cal. 118; *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *Re Staff*, 68 Wis. 285, 53 Am. Rep. 285; *Dailey v. State*, 4 Ohio St. 57; *Jones v. Com.* 75 Pa. 408. And see *State v. Kaufman*, 51 Iowa, 578, 33 Am. Rep. 148; *State v. Sackett*, 39 Minn. 69; *Dart v. People*, 51 Ill. 286, 2 Am. Rep. 301; *League v. State*, 36 Md. 257; *State v. Moody*, 24 Mo. 560; *Ward v. People*, 30 Mich. 116; *Sarah v. State*, 28 Ga. 576; *Harris v. People*, 128 Ill. 585.

Irrespective of the statute, however, the defendant's condition must be held to have been according to "the law of the land." The right of the accused to plead guilty upon his arraignment has been universally recognized from the earliest period in the history of criminal procedure, and from the same period the universally recognized effect of the plea has been to authorize the court having cognizance of the offense to proceed to judgment; and if, contrary alike to the express and unambiguous language of the statute and every known rule of construction, it was held that the defendant had a constitutional right of trial by jury on his plea of guilty, he waived the right by voluntarily submitting to the tribunal having jurisdiction of the offense the determination of the degree of his guilt, and must abide the consequences. "A party may waive a constitutional, as well as a statute, provision made for his benefit." *Lee v. Tylotson*, 24 Wend. 337, 35 Am. Dec. 624, 626, and *note*. "In our bill of rights jury trial is a liberty re-

served by the people, and excepted out of their grant of governmental powers. . . . It is a private right of the subject, and not a public right of the state" (*Wooster v. Plymouth*, 62 N. H. 193, 196); and it has always been so understood here (*Dartmouth College Trustees v. Woodward*, 1 N. H. 129; *State v. Albee*, 61 N. H. 423, 427, 429, 60 Am. Rep. 325). It is one of the rights not surrendered by the people when they formed themselves into a state, and by its reservation they exempted themselves from the authority of the government they created to abridge it. The purpose was to secure to suitors and persons accused of crime, as individuals, the right and privilege of having their causes heard and determined by a jury, "as a protection of the subject against the government, and of the weak subject against the powerful subject. . . . It is a security, not for the sovereignty, the independence, or the public property of the state, but for private life, private liberty, and private property, against all power, public and private." *Wooster v. Plymouth*, *supra*. The prohibition, in article 16 of the Bill of Rights, of "any law that shall subject any person to capital punishment . . . without a trial by jury," must therefore be interpreted as a protection of the accused, and a security for his exclusive benefit, and, as such, he may avail himself of it, or waive it, at his own election. *Jones v. Robbins*, 8 Gray, 329, 339, 341. And we fail to find in that article, or any other provision of the constitution, any language which precludes or denies to the accused the power or option to waive a jury without authority of statute. But this question is not presented by the case, and consequently will not be discussed. It is enough that the legislature, in the exercise of the power with which it is invested by the constitution, has provided, at the option of the accused, a mode of trial in capital cases without the intervention of the jury, and that the defendant has availed himself of the option.

While the defendant's objection was too late, and gives him no rightful standing here (*Sawtelle v. State*, 66 N. H. —; *Alexander v. United States*, 188 U. S. 858, 84 L. ed. 954), his case has nevertheless been considered as if the objection had been seasonably made, and we are constrained to hold, without doubt or difference of opinion, that the judgment against the defendant was and is in all respects legal and valid.

Motion for a new trial denied.

Doe, Ch. J., and Allen, J., did not sit.

WYOMING SUPREME COURT.

PEOPLE of the State of Wyoming, *ex rel.*
Warren RICHARDSON, Sr.,

v.

Harry B. HENDERSON.

(.....Wyo.....)

1. Appointive as well as elective officers are within Const., art. 6, § 16, providing that officers shall hold until their successors are qualified.
2. The power of the executive and judicial departments in a state government is a grant not a limitation, while the powers of the legislative department are absolute except as restricted and limited by the constitution.
3. The executive does not have any inherent power of appointment of officers.
4. Upon the appointment of an officer to fill a vacancy "until the next meeting of the legislature," under a statute making no further provision as to the incumbency, the meeting of the legislature does not create another vacancy in the office within the meaning of Const., art. 4, § 7, authorizing the governor to fill a vacancy when there is no other provision made therefor, since art. 6, § 16, provides that every officer shall hold "until his successor is qualified."

(January 16, 1894.)

PETITION for a writ of quo warranto to determine by what right respondent was exercising the office of state examiner. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. W. R. Stoll, for relator:

Laws of 1890-91, chap. 84, § 6, is as follows: "In case of vacancy in the office of state examiner by death, removal, or otherwise, the governor shall fill the same by appointment until the next meeting of the legislature."

Whenever a vacancy exists, for any reason whatever, under the terms of this section, the governor shall fill the vacancy by appointment, until the next meeting of the legislature.

There was no common-law rule upon the subject.

Throop on Public Officers, § 825, stating the common-law rule under the American cases to be that public officers hold over until the choice and qualification of their successors is not supported by the authorities cited.

With the single exception of *People v. Oulton*, 28 Cal. 44, all of the cases cited by Throop, in so far as they have any application whatever to this question, were decided on the terms of constitutions or statutes providing that officers shall hold over until their successors are elected and qualified.

People v. Oulton, *supra*, was examined and declared unsound in *People v. Bull*, 46 N. Y. 65, 7 Am. Rep. 802.

In *Philips v. Wickham*, 1 Paige, 594, 2 L.

ed. 765, the chancellor says: "There are undoubtedly, some common-law officers who are to be elected or appointed periodically, but who, from the necessity of the case, continue to exercise their functions until others are elected or appointed to fill their places. I am not aware," he continues, "of any general principle of the common-law which authorizes all civil or corporate officers to hold over after the expiration of the time for which they were elected until their places are supplied by others."

In *People v. Tieman*, 30 Barb. 197, the court says: "I know of no common-law rule by which a public officer appointed or chosen for a specific term, can hold office beyond that term, upon the failure of the proper body to appoint or elect a successor."

See also *Christian v. Gibbs*, 58 Miss. 814.

If the official term of a public officer is limited by law or constitutional provision to a given term of years without the right expressly or impliedly given, of holding until his successor is chosen and qualified, then in case of the failure to choose a successor, a vacancy must occur, which may result in serious public inconvenience and injury. McCrary, Elections, § 814; *People v. Tieman*, *supra*.

McCrary declares that in the United States an officer has an implied right to hold over until his successor is elected and qualified unless the contrary appears to be the plain requirement of the statute, citing —

State v. Wells, 8 Nev. 109; *Cordell v. Frizell*, 1 Nev. 180; *Walker v. Ferrill*, 58 Ga. 512.

State v. Wells, *supra*, explicitly follows, without elaboration or argument, *People v. Oulton*, 28 Cal. 44.

Cordell v. Frizell, *supra*, does not sustain the proposition in support of which it is cited by McCrary.

Neither does *Walker v. Ferrill*, *supra*, sustain the proposition in support of which it is cited by McCrary.

It is said in *State v. Harrison*, 118 Ind. 484: "Whether or not, as a general principle of the common law, officers are entitled to hold over beyond their prescribed terms without some express provision, is not settled upon authority."

People v. Oulton, *supra*, is the only California case which decides that in the absence of constitutional or statutory provisions an officer has an implied right to hold over until his successor is elected and qualified. All other California cases were decided on the terms of constitutional or statutory provisions authorizing the officer in question to hold over until his successor was elected or qualified.

People v. Fitch, 1 Cal. 519; *People v. Wells*, 2 Cal. 204; *People v. Mott*, 3 Cal. 502; *People v. Reid*, 6 Cal. 289; *People v. Baine*, *Id.*

NOTE.—The above case re-enforces the line of decisions which denies that the power of appointment of officers is inherent in the executive. It agrees with *State v. Boucher* (N. Dak.) 21 L. R. A. 539; *Fox v. McDonald* (Ala.) 21 L. R. A. 529; and *State* 22 L. R. A.

v. George (Or.) 16 L. R. A. 787, in opposition to *State v. Denny* (Ind.) 4 L. R. A. 65; *State v. Denny* (Ind.) 4 L. R. A. 79; and *Evansville v. State* (Ind.) 4 L. R. A. 93.

See also 28 L. R. A. 732; 29 L. R. A. 113; 36 L. R. A. 127; 38 L. R. A. 373; 43 L. R. A. 408.

509; *People v. Migner*, 7 Cal. 519; *People v. Langdon*, 8 Cal. 1; *People v. Addison*, 10 Cal. 1; *People v. Whitman*, 10 Cal. 46; *People v. Cozneau*, 20 Cal. 504; *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407; *People v. Tyrrell*, 87 Cal. 475.

The only rule sustained by authorities is that stated in *People v. Bull*, 46 N. Y. 65, 7 Am. Rep. 302, as follows: "One holding an office, the incumbent of which is, by its tenure, to be annually or periodically appointed or elected, and with no restrictive provision as to the term, may hold over until his successor is elected and qualified."

In *Henderson's Case* there is "a restrictive provision as to the term" for which he was appointed.

It may be true that Henderson has since the 10th of January, 1893, been a *de facto* officer, and his acts are valid as against himself and for the protection of third parties and the public. But he has not been a "legal incumbent" of the office. His occupancy of the office has not been such as to preclude a "vacancy" such as the governor is authorized to fill.

State v. Howe, 25 Ohio St. 598, 18 Am. Rep. 321.

The following cases, *State v. Murphy*, 23 Fla. 188, and *State v. Boucher* (N. Dak.) 21 L. R. A. 539, have reviewed, *in extenso* the principles involved in the cases which arise under statutes containing various provisions as to the subject of vacancies in public offices; and are instructive in that there has been an exhaustive examination and discussion of authorities.

State v. Boucher, *supra*, is an authority which directly sustains the contention of the relator.

Messrs. Lacey & Van Devanter and R. W. Breckons for respondent.

Groesbeck, Ch. J., delivered the opinion of the court:

This proceeding is instituted in this court to determine the title to the office of state examiner, and the cause is submitted on an agreed statement of facts; the original jurisdiction of this court, under the constitution, in quo warranto as to state officers, being invoked. The relator and respondent have each all the legal qualifications required of an incumbent of the office. Shortly previous to the 20th day of December, 1892, Joel Ware Foster was the duly appointed, constituted, qualified, and acting state examiner, and had resigned the office, and ceased to exercise its duties. On that day, Amos W. Barber, then the acting governor of the state, executed and delivered to Harry B. Henderson a commission to fill the vacancy in said office occasioned by the resignation of said Foster, to hold the office until the next meeting of the legislature of the state and under such appointment and commission said Henderson duly and regularly qualified as such officer, and has discharged the duties of said office ever since, and has received and used the emoluments pertaining thereto. The next session of the legislature occurring after the appointment of the defendant convened January 10, 1893, and adjourned *sine die*, Febru-

ary 18, 1893, and during the session of the legislature the senate thereof, while in session, on the 10th day of January, 1893, adopted the following resolution: "Whereas, Harry B. Henderson, was duly appointed and commissioned on December 20, 1892, by Amos W. Barber, the then acting governor of the state of Wyoming, as state examiner, to fill the vacancy occasioned by the resignation of Joel Ware Foster: Now, therefore, be it resolved by the senate that the said appointment of the said Harry B. Henderson to the office of state examiner be and the same is hereby advised, consented to, and confirmed." On February 1, 1893, during the session of the legislature, John E. Osborne, the governor of the state, transmitted to the senate, which was then in session, his nomination of John Stone for the office of state examiner; and on February 12, 1893, the senate adjourned *sine die*, without having taken any final action on said nomination, without confirming the same, and without either giving or refusing to give its advice and consent to the appointment of said Stone to the office. On March 8, 1893, after the adjournment of the legislature, and during the interval between the regular sessions thereof (the next ensuing regular session being in 1895), Gov. Osborne executed and delivered a commission to said John Stone, attempting to appoint him to the office of state examiner "*vice* Harry B. Henderson, term expired," to hold the office until the next meeting of the legislature. This commission was not attested by the secretary of state, nor was the great seal of the state affixed thereto. Stone never qualified or attempted to qualify as state examiner, and never entered upon or attempted to discharge the duties of the office, but thereafter, and on March 23, 1893, he resigned said office, or attempted to resign the same. On August 22, 1893, and during the time intervening between the regular sessions of the legislature, Gov. Osborne executed and delivered to the relator, Warren Richardson, Sr., a commission purporting to appoint the relator to the office of state examiner "for the unexpired term of Harry B. Henderson, whose said office of state examiner became vacant on the 10th day of January, A. D. 1893." The words quoted are recited in the commission, which contains the further recital that said Richardson, the relator, was appointed from the date of the commission; that is, "from the 22d day of August A. D. 1893, until the next meeting of the legislature of the state of Wyoming." This commission was not attested by the secretary of state under the great seal of the state. The senate never gave its advice and consent to the appointment of the relator as state examiner, and no nomination of relator for said office was ever made by the governor to the senate, and no nomination or appointment of the relator to said office was ever confirmed by the senate. Upon receipt of the commission, the relator accepted the same, and has ever since been willing and desires to enter upon the duties of the office of state examiner, but has never qualified and has never given any bond as such officer. The defendant, Henderson, has at all times refused, and still

refuses, to recognize any right of the relator to the office of state examiner, and claims the right to hold said office, and excludes the relator from the rights, privileges, and emoluments thereof. There has been no session of the legislature of the state since the adjournment on February 18, 1893. The term of office of Amos W. Barber as acting governor expired on the 2d day of January, 1893, and the term of John E. Osborne as governor commenced on said 2d day of January, 1893, at which time he entered upon the discharge of his duties as such governor, and has ever since that date been the legally elected, qualified, and acting governor of the state.

The foregoing statement is a sufficient review of the submitted facts for the determination of the questions involved. Counsel for defendant insist that, as the relator has never qualified, he is not entitled to the office, and has no standing in this court, and is not entitled to any relief, and that, as no reason or excuse is shown for the absence of the attestation of the secretary of state and the great seal of the state from the commission of the governor to relator, the commission is not fully executed, and would not be a sufficient warrant or authority for the assumption of the office by the relator, even if he were otherwise legally entitled to the same. These questions we do not care to pass upon at this time, as it is manifest that, if we should hold that these positions were well taken by the respondent, the greater questions of public interest involved in the case would be postponed. We prefer to decide the main questions involved,—the right of Henderson, the respondent, to hold over beyond the next meeting of the legislature ensuing after his appointment, and the authority of the governor to appoint his successor during the recess of the senate.

Provision is made for the office of state examiner in section 14 of article 4 of the Constitution of this state: "The legislature shall provide for a state examiner, who shall be appointed by the governor and confirmed by the senate. His duty shall be to examine the accounts of state treasurer, supreme court clerks, district court clerks, and all county treasurers, and treasurers of such other public institutions as the law may require and (he) shall perform such other duties as the legislature may prescribe. He shall report at least once a year, and oftener, if required, to such officers as are designated by the legislature. His compensation shall be fixed by law." This mandate to the legislature was promptly obeyed by the enactment of a statute by the first state legislature entitled "An Act Providing for the Office of State Examiner, Defining His Powers and Duties, Prescribing His Bond and Fixing His Compensation," approved January 10, 1891. Sess. Laws 1890-91, chap. 84. The following sections of the Act are quoted as applicable to the case at bar: "Section 1. The office of state examiner is hereby created. Sec. 2. Such examiner shall be appointed by the governor by and with the consent of the senate. He shall hold his office for four years and until his successor in office is appointed and shall have qualified." "Sec. 6. In case of vacancy in

the office of state examiner, by death, removal, or otherwise, the governor shall fill the same by appointment until the next meeting of the legislature. The appointee to fill such vacancy shall execute the same bond and take the same oath as herein described, and shall have the same powers and duties as a state examiner appointed by the governor by and with the advice and consent of the senate."

Much space in the brief of counsel for the relator is devoted to the discussion of the rule of the common law as to the right of an incumbent of an office to hold over beyond his term, and until the qualification of his successor. It attacks the position, evidently taken in *Throop on Public Officers* (at section 325), that the common-law rule, or the rule in the absence of any constitutional or statutory provision, according to the weight of American cases, is that public officers hold over until the choice and qualification of their successors. The authorities cited in support of the proposition are discussed at length, particularly the position taken in *People v. Oulton*, 28 Cal. 44, which is condemned in the brief of counsel for relator as against the current of authority. At page 562, 19 Am. & Eng. Encyclop. Law, the matter is treated of in the following language: "Although there is authority for the proposition that an officer's functions cease immediately upon the expiration of his term of office, the doctrine supported by the preponderance of opinion is that, in the absence of any express or implied prohibition an officer holds over after the expiration of his term, until a successor is duly chosen and qualified. To this general rule some of the authorities make an exception in the case of judicial officers, and possibly, also, of members of the legislature, and the executive. In most of the states, all doubt is removed by constitutional or statutory provisions that when an officer is elected or appointed for a fixed term the office shall not, on the expiration of the term, become vacant, but the incumbent shall continue to hold until his successor is elected and qualified. In these jurisdictions, consequently, the governor cannot, on the expiration of a term of office, appoint a new officer, but the former incumbent is entitled to hold over until a duly qualified successor presents himself." The Supreme Court of the United States seems to be of a contrary opinion, as it says in the case of *Badger v. United States*, 93 U. S. 601, 23 L. ed. 992: "By the common law, as well as by the statutes of the United States and the laws of most of the states, when the term of office to which one is elected or appointed expires his power to perform its duties cease." It was held in that case that the constitution and laws of Illinois prescribed a different rule, or, as is said in the opinion, "The system of the state of Illinois seems to be organized upon a different principle;" and the court accordingly held that a certain township officer in Illinois continued in office, and was not relieved from his duties and responsibilities as a member of the board of auditors of the township by his resignation, which had been tendered to and accepted by the proper authority, until his successor was chosen and qualified.

Counsel for relator sums up his position in the case in his brief as follows: "There is nothing in the Wyoming constitution or statutes authorizing Henderson [the respondent] to hold over after the expiration of his term, and until his successor is nominated by the governor and confirmed by the senate. On the authorities, there is no common-law rule authorizing him to do so."

It is unnecessary to ascertain or apply the common-law rule in the case at bar, as our constitution regulates the matter generally in a sweeping provision embodied in article 6, which counsel for relator seems to overlook. Section 16 of the article reads as follows: "Every person holding any civil office under the state, or any municipality therein shall, unless removed according to law, exercise the duties of such office until his successor is qualified, but this shall not apply to members of the legislature, nor to members of any board of (or) assembly, two or more of whom are elected at the same time. The legislature may by law provide for suspending any officer in his functions, pending impeachment or prosecution for misconduct in office." This provision of the fundamental law is applicable to appointive as well as elective officers. It applies to the respondent, Henderson, as he undoubtedly held a "civil office under the state," and was not one of the excepted officers mentioned,—a member of the legislature or a member of any board or assembly,—unless some other provision of equal dignity can be found, that will modify the section quoted, or make it inapplicable to him.

It may be contended that upon the expiration of his term to fill the vacancy resulting from the resignation of Foster, his predecessor in the office,—that is, upon the meeting of the legislature which occurred some twenty days after his appointment,—right to hold the office or fill the vacancy expired by limitation of the statute, and then the governor had the right to appoint for the remainder of the unexpired term of Foster, the original incumbent, under the provision of section 7 of article 4 of the State Constitution: "When any office from any cause becomes vacant, and no mode is provided by the constitution or law for filling such vacancy, the governor shall have power to fill the vacancy by appointment." The statute creating the office of state examiner, *supra*, makes no express provision as to how the vacancy, if it can be termed a vacancy, shall be filled after the legislature meets, either by the governor or by the governor and the senate acting concurrently by appointment and confirmation. It is also silent as to the term of the successor of the appointee of the governor to fill the vacancy in the recess of the legislature. Is this one of the cases where the governor may appoint to fill a vacancy in the office? Did the temporary and provisional appointment of Henderson, the respondent, continue only until the legislature met? And did his right to the office terminate then, or was he continued in office by virtue of the constitutional provision providing that any person holding a civil office under the state, not being a member of the legislature or a member of a board or assembly, two or more of whom are

elected at the same time, shall exercise the duties of such office until his successor has qualified? If the office of state examiner became vacant upon the expiration of the limited period or term of Henderson, the appointee to fill the vacancy temporarily, then he had no right to exercise the duties of the office, and, in the absence of any constitutional or statutory provision for filling the vacancy thus occurring, the governor could appoint under the authority conferred upon him by section 7 of article 4 of the Constitution. The legislature has the right to determine what shall constitute a vacancy, whether the office be filled by an incumbent or not. This is frequently done by statutes providing for special elections where an officer elect dies or refuses to qualify or resigns before the commencement of his official term, and some statutes may be found empowering some officer or board to fill the vacancy thus created by law. *Johnson v. Mann*, 77 Va. 265. Without some statutory regulation of the matter a vacancy can only exist in an office where there is no lawful incumbent occupying it. An office cannot be said to be vacant while any person is authorized to act in it, and does so act. *People v. Van Horne*, 18 Wend. 518; *Tappan v. Gray*, 9 Paige, 507, 4 L. ed. 794.

In the recent case of *State v. Murphy*, 33 Fla. 138, it was held that where county commissioners are appointed by the governor by and with the advice and consent of the senate, and their term of office fixed at two years, and the governor recommended to the senate certain persons as county commissioners, but the senate adjourned *sine die* without taking action on these nominations, the governor had the power to fill the offices by appointment, as vacancies existed then, notwithstanding a constitutional provision similar to ours, which was considered only to prevent an hiatus in the office until the appointing power acted. The opinion seems to be based upon certain constitutional and statutory provisions, modifying or neutralizing a general provision of the constitution of Florida that "all state, county and municipal officers shall continue in office after the expiration of their official terms until their successors are duly qualified." This decision is certainly the most favorable one that can be cited on behalf of the relator, but we are not satisfied with the reasoning of the majority opinion. Upon principle and reasoning, the dissenting opinion of *Mr. Justice Mabry* seems to be the better view, and the one in consonance with the greater number of authorities. Under our constitution, the governor is not clothed with an absolute power of appointment of state officers. Nearly all of such officers are to be elected by the people, but some of them the constitution expressly requires to be appointed by the governor with the consent of the senate, such as geologist, engineer, trustees of the university, and the state examiner. The legislature may provide for such other state officers not enumerated in the constitution as are deemed necessary (art. 4, § 11), and it seems that in the creation of such officers the governor may be vested by law with the sole power of appointing them, dispens-

ing with the consent of the senate. Such, however, has not been the habit of the state or territorial legislatures in creating new officers, as such officials are generally required by the statutes to be appointed by the governor by and with the advice and consent of the senate, except only in cases of vacancies. The power lodged with the governor to fill vacancies in any office is restricted to cases where the constitution and statutes are silent as to the mode of filling them, and is not a plenary power. The executive is not vested with the sole appointing power, except as to a few offices, and certainly he does not have any inherent power of appointment, as such power, in the states of the Union, is not essentially executive. The sovereign power is in the people, and not in their rulers. The power of the executive and judicial departments is a grant, not a limitation, while the powers of the legislative department are absolute, except as restricted and limited by the Constitution which the people have adopted. *State v. Boucher* (N. Dak.) 21 L. R. A. 539. This is elementary, and too familiar to need elaboration, that, while the judiciary and the executive have only enumerated powers, the sway of the legislative department is supreme, except as controlled by the limitations imposed by the organic law. The power of the governor to appoint to office must spring from some constitutional grant, or some legislative grant not forbidden by the constitution, and the power bestowed by the constitution upon the executive to fill vacancies in public offices is one only to be exercised where there is no constitutional or statutory provision for filling the vacancy. Although the act before us is silent as to filling the office after the expiration of the time allotted to the appointee to fill a vacancy in the office of state examiner, the constitution is not. He holds a civil office under the state, and continues to exercise its duties until his successor is qualified. This successor must be one appointed by warrant or authority of law, and not in the absence of it. There would be no sense in the position that a vacancy could be created by an attempt to fill a vacancy, nor in the view that one appointee to fill a vacancy could be succeeded by another to fill the same vacancy, where the provisional appointment is made from the same source. The vacancy is already filled by the governor's appointment and there is no reason why the appointee should be displaced by one appointed by a succeeding governor. Such a succession in office is not contemplated by the constitution or by the statute. In the statute under consideration, it is plainly to be seen that the object in limiting the power of appointment to fill a vacancy in the office until the next meeting of the legislature was not intended to confer the power to fill it beyond that time upon the executive, but it was evidently intended that the successor to the provisional appointment should be selected by the original source of appointing power, the governor and the senate acting concurrently and in harmony with each other. Construing the act reasonably, the purpose in limiting the tenure of office of the appointee to fill the vacancy 22 L. R. A.

until the assembling of the legislature was to have the office, not the vacancy, filled by the governor and the senate. There is no provision for filling the office for the unexpired term of the original and regularly appointed incumbent, and in the absence of such a provision the new appointment by the governor, with the assent of the senate, it seems, would hold his office for the full term, and not for the unexpired term. Throop, Pub. Off. §§ 320, 321, and cases there cited.

The appointment of the relator by the governor, as disclosed by his commission, was "for the unexpired term of Harry B. Henderson, whose said office became vacant on the 10th day of January, 1893." This recital in the commission is of no weight in determining the question before us, but it illustrates the difficulties in the way of determining a vacancy in an office filled by an incumbent. If the office became vacant on the 10th day of January, 1893, the first day of the session of the second state legislature, and the first day of the next meeting of the legislature ensuing after the appointment of Henderson by Acting Governor Barber, the vacancy occurred for no other reason than the expiration of Henderson's term, and if his term expired on that day there was no portion of his unexpired term to fill. There is no provision of our constitution and no provision of statute declaring when a vacancy occurs in any office, except in the general election law of the state, chap. 80, Sess. Laws 1890, which declares at section 45, when elective offices become vacant, "on the happening of either of the following events to the incumbent before the end of his term of office, namely: his death, his resignation, his becoming insane or *non compos mentis*, his ceasing to be an inhabitant of the territory [state], or, if the office is local, his ceasing to be an inhabitant of the district, town, ward or precinct for which he was elected; his conviction of an infamous crime or of any offense involving a violation of official oath, his removal from office, his refusal or neglect to take his oath of office, or to give or renew his official bond, or to deposit or file such oath or bond within the time prescribed by law, and the decision of a competent tribunal declaring his election void." These provisions are confined to vacancies in elective offices, but even if we could enlarge their scope, and include appointive offices, which is doubtful, there is nothing in them which would aid the relator here. It seems that no provision is made for special elections to fill vacancies in elective offices, except where there has been no choice at a general election of any officer, not a precinct officer, or when the rights of a person elected to the office of member of the council (senate) or member of the house of representatives shall cease, by death or otherwise, before the commencement of or during the term for which he shall have been elected. Sess. Laws 1890, chap. 80, § 8. As to vacancies occurring in other elective offices, by statute, the board of county commissioners have power to appoint, as to county and precinct offices, and the governor, as to state offices, either by force of some statute, or under the provisions of section 7 of article 4

of the Constitution. Our statutes are not only barren of any provision determining that a vacancy shall exist in a public office when the term of office ends, but we have an express constitutional provision, applying to all civil offices under the state, and of any municipality therein, except members of the legislature and certain boards or assemblies, continuing the incumbent of an office in the discharge of his duties until the qualification of his successor, and this provision must control any statutory provision. The official may not evade the responsibilities thrust upon him by this constitutional provision, even by resignation. His successor must present himself, duly qualified, before the incumbent can release himself from the inexorable requirements of the constitution that he has sworn to support. Such cases may indeed be rare, but they may occur. The mandate of the constitution precludes an interregnum in the office, and was doubtless intended to prevent inconvenience in the public service, by keeping filled all the public offices for the dispatch of the public business. The successor who is competent to relieve the incumbent must have the right to the office, and be the proper and legal successor of the incumbent. He must be elected or appointed at the proper time by the proper authority, either by the people themselves, or by some one or more of their duly appointed and accredited agents; otherwise, he cannot oust the incumbent. Under the Utah statutes, where an election was not held at the time prescribed by law for county collector, an election at another time was held invalid, and the incumbent was held entitled to hold over until the election or appointment and qualification of his successor; and Paine on Elections (sec. 227) was quoted with approval in the opinion: "That if there was a vacancy, in any just sense, after the expiration of the term, and before the election and qualification of a successor, the statute itself fills the vacancy, by providing that the incumbent shall hold until the election and qualification of a successor, and that a failure to elect a successor to an office at the expiration of its term does not create a vacancy to be filled by appointment. . . . The incumbent holds over for an indefinite period, if no successor is elected and qualified." *People v. Hardy*, 8 Utah, 68. In *People v. Lord*, 9 Mich. 227, the incumbent of the office of probate judge died after his re-election, and before his qualification. Under the provisions of the constitution of Michigan, the governor is to appoint a person to fill the vacancy in that office to continue until a successor is elected and qualified, who is to hold his office for the unexpired term. The governor appointed one to fill the vacancy for the old term, and at the expiration of such term appointed another to fill the vacancy for the new term. The court held the first appointment valid, and that it continued until the vacancy was filled by a special election called pursuant to law, and that the second appointment for the vacancy occurring in the new term was invalid, as prohibited by the constitution, the first appointee evidently holding until a successor was elected and qualified. The rule in this case was followed 22 L. R. A.

in a later Michigan case (*Lawrence v. Hanley*, 84 Mich. 399), where a county auditor elected died before he had qualified and entered upon the duties of his office, and the governor appointed one to fill the vacancy. It was held, as to this office, that the governor had no power to appoint, and that the incumbent held over until his successor was elected at a special election provided by law. In Indiana, one elected a township trustee at the regular election for township officers died before the vote was announced. An attempt was made to elect his successor at a succeeding general election, without authority of law to do so, and also to appoint a successor by the county board. The election and appointment were held void, as there was no authority of law for either, and the incumbent of the office was continued in office; there being no vacancy until the qualification of a successor elected by the same electoral body or constituency which elected the incumbent, at a time authorized by law. *Kimberlin v. State*, 180 Ind. 120, 14 L. R. A. 858. In *State v. Harrison*, 113 Ind. 434, a president of the several boards of trustees of the benevolent institutions of the state was elected by the legislature for a term of four years. The act provided that, if a vacancy should occur in the office when the legislature was not in session, the governor should appoint, the appointment to hold good until the next session. The term of the officer first elected expired during the session of a legislature held four years after his election, but that body adjourned without electing a successor to the incumbent. The governor, being of the opinion that the failure of the legislature to elect a successor "produced a vacancy" in the office, appointed another to fill the office. In a contest for the position by the incumbent and the governor's appointee, the court held that the incumbent held over, under the provisions of the Indiana constitution, and that there was no vacancy, as the incumbent held his office by virtue of the constitutional provision continuing him in office until his successor should be elected and qualified. In this case it was held that the constitutional provision applied as well to officers elected by the legislature as to those chosen by the people. It was further said in the opinion that "the word 'vacancy,' as applied to an office has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the constitution or law with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event." The cases cited are: *Storking v. State*, 7 Ind. 326; *Collins v. State*, 8 Ind. 344; *Akers v. State*, Id. 484; *State v. Bemenderfer*, 96 Ind. 874; *Goeman v. State*, 106 Ind. 203; *Butler v. State*, 20 Ind. 169; *People v. Tilton*, 37 Cal. 614; *Com. v. Hanley*, 9 Pa. 513; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50. The court further says: "Of course, it is not to be understood that an office cannot become vacant, as respects the appointing

power, so long as it remains in the actual physical occupancy of some one who asserts a claim thereto. An office is legally vacant unless the occupant has an unexpired right or title, founded in the constitution or law, precisely as a house is vacant of a lawful tenant in case the lessee, without any provision authorizing him to hold over, refuses to surrender at the expiration of his term."

The California cases are much in point. Although the earlier decisions held to the contrary, the law of that state is now settled, by repeated decisions, that the incumbent holds over until his successor is appointed and qualified in the mode provided by law, and that the expiration of his term does not in itself create a vacancy. *People v. Tyrrell*, 87 Cal. 475, approving *People v. Tilton*, 37 Cal. 614; *People v. Bissell*, 49 Cal. 407. Some of the cases in that state are based upon a provision of the Political Code which declares that "every officer must continue to discharge the duties of his office, although his term has expired, until his successor has qualified."

In the case of *People v. Bissell*, *supra*, the court held that an incumbent of the office held until his successor in the office, inspector of gas meters, was appointed by the governor and confirmed by the senate, and that Parkinson, appointed by the governor alone, without the assent of the senate, was not his successor. Wallace, *Ch. J.*, says in his opinion: "So long as Bissell, therefore, continues to discharge the duties of his office pursuant to the requirements of section 879 of the Code, even though his term of office has expired, there is no vacancy in the office, in the absolute sense, nor in any sense which would authorize the governor to fill it without consent of the senate first had. Such a vacancy would only be caused by the resignation or death of the incumbent, or some other event by which the duties of the office were no longer discharged at all, in which case, and in order to prevent a failure of public service, the governor might appoint during a recess of the senate." Rhodes, *J.*, concurring, said that by virtue of the section of the Code the incumbent would continue to discharge the duties of his office until his successor was qualified, and that "it results from this that there was no vacancy in the office, which the governor was authorized to fill by appointment." In the case of *People v. Tilton*, 37 Cal. at page 624, the court says, after reviewing at length the California cases: "The law, therefore provides in express terms for filling the office by the old incumbent from the date of the expiration of the term until a successor is elected and qualified in the mode provided by law." And again: "But till a successor is elected the office is temporarily filled by the party designated by the law, and there is no vacancy, within the meaning of the constitution, and no occasion for calling into exercise the extraordinary power of the governor, which was only given by the constitution in order that the public interest might not suffer for want of a party authorized to discharge the duties pertaining to a public office. If a vacancy occurs, then, by the lapse of the term, 22 L. R. A.

the law provides how it shall be filled till a successor is elected and qualified; and that is by the old incumbent, and not by an appointment by the governor." Other cases lay down the same doctrine. They have gone over the same ground, and it is not necessary to review them. Among them are *Smoot v. Somerville*, 59 Md. 84; *State v. Rareside*, 32 La. Ann. 934; *Brady v. House*, 50 Miss. 607; *State v. Pagan*, 42 Conn. 32; *State v. Davis*, 45 N. J. L. 390; *State v. Bryson*, 44 Ohio St. 457; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *Borton v. Buck*, 8 Kan. 307; *People v. Osborne*, 7 Colo. 605; and the recent and well-considered case of *State v. Boucher* (N. Dak.) 21 L. R. A. 589.

The case of *State v. Lusk*, 18 Mo. 338, has been much cited, even since it was overruled by the more recent cases of *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206, and *State v. Thomas*, 102 Mo. 85. In *State v. Seay* the statute regulated the matter of the vacancy by providing for the qualification of an officer elect before the commencement of his term. The officer elect died two days before his term began, but after he had qualified, and it was decided that this created a vacancy which the governor might fill by appointment. The decision was based upon the peculiar provision of the Missouri statute, and upon the fact that upon the expiration of the incumbent's term his successor had been elected and qualified. In *State v. Thomas* it is said, in the course of the opinion: "The fact that the incumbent remains clothed with official authority, in furtherance of a wise provision of public policy and of public law, cannot enlarge the boundaries of his official term, or arrest the operation of the power of appointment or of election. Of course, these remarks are subject to the conditions that the law has provided for filling the office in one of the modes mentioned, and that, therefore, the election or appointment cannot be classed as voluntary."

A careful reading of the numerous decisions of the American courts on the question is convincing that the doctrine is too well entrenched to be dislodged at this time, that where a constitutional or statutory provision exists, permitting or commanding an incumbent of an office to continue in the discharge of his duties until his successor is qualified, it must be construed as controlling and the expiration of the official term cannot be deemed a vacancy, unless there is some legal successor appointed or elected by some competent authority to take the place of the incumbent. His holding over may be a mere prolongation of the term (*Carr v. Wilson*, 32 W. Va. 419, 8 L. R. A. 64), or be considered a contingent extension (*People v. Whitman*, 10 Cal. 88), or as adding an additional, contingent, and defeasible term to the original fixed term (*State v. Harrison*, 113 Ind. 441). It excludes the possibility of a vacancy, and consequently the power of appointment, except in case of death, resignation, ineligibility, or the like. *Gosman v. State*, 106 Ind. 203, and cases cited.

Frequent reference is had to the case of *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50, by courts entertaining opposite views.

The usual quotation from the opinion is the following language: "It must be obvious, also, that, when once accepted, no vacancy can be said to exist in the office till the term of service expire, or till the death, removal, or resignation of the person appointed." No one can seriously question the correctness of this statement, but it seems it has been warped, in many instances, from its true meaning. Of course, no vacancy can occur in an office filled by an incumbent "till the term of service expire," but the question that has been a prolific source of inquiry is whether or not a vacancy exists after the term of service expires. It may not be amiss to see what the decision was in this leading case: Johnston was appointed collector at the annual March meeting of the town of Hillsborough and signified his acceptance of the office, but did not take the oath of office. Nothing further was done upon the subject until the ensuing month of May, when the tax list of the town was presented to Johnston for collection. He declined receiving it unless the selectmen would furnish him an indemnity bond for the nonresident taxes, it then being so late as to endanger the legal recovery of them. This indemnity was refused, and the selectmen, under the impression that the conduct of Johnston amounted either to a resignation or nonacceptance of the office, proceeded to appoint another collector, who was Wilson, one of their own number. The oath was administered to him, and he commenced the collection of taxes. As some doubts arose concerning the legality of Wilson's appointment, the town, at a meeting in November of the same year, called for other purposes passed a vote to ratify the doings of the selectmen in respect to Wilson's appointment. No new warrant was given to him, and no new oath was administered. He seized and sold thereafter certain property of Johnston as a distress for the payment of his taxes for the year. The court held that under the statute the selectmen could only fill a vacancy where the town had neglected or refused to choose a collector, and such collector could only collect the county and state taxes, not the town taxes. The town had not neglected to fill the office. It was also held that the appointment of the selectmen, as it was void, could not be ratified by the town at the November meeting, because the meeting was called for a different purpose, and the town was not legally "warned," in the quaint language of the law, and, further, that Wilson had never taken the oath after this November meeting. At the close of the opinion, however, it seems to be clearly intimated that the old incumbent of the office of collector would hold over as Johnston had not been sworn, and as Wilson had not been legally appointed and sworn. The court says: "It is therefore manifest that those town officers, once chosen and sworn, are the only ones qualified to perform official duties until new ones are sworn, as well as 'chosen in their room.' The town is thus never destitute of officers duly qualified; and it cannot be reasonable or necessary that, while the offices are already filled by persons duly qualified,

others, not duly qualified, should be enabled to perform the duties of them."

In the case of *Re Johnson County Comrs.* (Wyo.) 82 Pac. Rep. 854, this court held that "an old office is vacated by death, resignation, or removal. An office newly created becomes *ipso facto* vacant in its creation." In that case the statute creating the office of judge of the fourth judicial district provided for a temporary appointment by the governor to fill the office. The syllabus to the case, which was not prepared by the court, is misleading. The statute conferred, in express terms, the authority upon the governor to fill the office provisionally by appointment; and as the legislature is untrammelled as to that office, in this respect, by any constitutional provision, the power conferred upon the governor was by the act itself, which was held constitutional, and not by the terms of the constitutional provision requiring the governor to fill a vacancy in a public office where no mode is provided by the constitution or the law for filling the same. The vacancy in an office, which may be filled by the governor, under the constitution, arises in cases of emergency, where there is no person in an office, of lawful capacity to act therein,—such an occasion as resignation, disqualification, death, or the like, and where there is no provision either in the constitution or in any statute for filling the same. It would seem to apply where there was no officer in the position, or, it may be, where he is disqualified to act, and does not act, and there is no method pointed out by law to fill the place. It has no reference to the case of an incumbent in an office, whose term, however limited, has expired, and who is awaiting his successor, for his right to the office has not terminated and cannot terminate under the constitution until his successor appears, endowed with the necessary qualifications that shall entitle him to it, chief among which must be his appointment by competent authority at the proper time. Until that event happens, the office is filled by an incumbent who exercises the duties of the office under constitutional authority, and there is no vacancy.

It appears that the senate did not act upon the nomination of Stone by Gov. Osborne, possibly because it desired to have Henderson continue in the office. This is shown by the action of the senate confirming him. This was ineffectual, as the appointment of Acting Governor Barber was not made to the senate, but until the legislature met. At that time, a new appointment was necessary and proper, as is conceded, but such appointment could then have been made only by Gov. Osborne, by and with the advice of the senate. Our conclusions are that the respondent is lawfully and constitutionally authorized to discharge the duties of the office of the state examiner, and that there has been no vacancy in the office, which the governor could fill by his appointment without the consent of the senate.

The finding and judgment will be for the defendant.

Conaway and Clark, JJ., concur.

WISCONSIN SUPREME COURT.

STATE of Wisconsin, *ex rel.* WISCONSIN TELEPHONE CO., *Appt.*,JANESVILLE STREET R. CO., *Respnt.*

(.....Wis.....)

1. An electric railroad company using strong currents of electricity on wires which are not insulated, which directly cross telephone wires which are insulated, may be compelled to place guard wires where they will prevent the contact of the telephone and railway wires in case of the breaking of poles or the falling of wires on account of storms or otherwise,—especially where there is an ordinance requiring such guard wires, which the telephone company has complied with.

2. An ordinance requiring guard wires for electric wires “whenever it shall be necessary to cross” other electric wires applies to wires already erected, since it provides a remedy for an existing evil.

3. Mandamus is the proper remedy to compel an electric railway company to place guard wires where they will prevent dangerous contact of its uninsulated wires with the insulated wires of a telephone company as required by ordinance.

(January 30, 1894.)

APPEAL by relator from an order of the Circuit Court for Rock County denying a writ of mandamus to compel defendant to place guards over its electric wires. *Reversed.*

The facts are stated in the opinion.
* *Messrs. Fethers, Jeffries & Fifield*, with *Messrs. Miller, Noyes & Miller*, for appellant:

The ordinance passed October 10, 1892, to regulate the stringing of wires, is valid, and is a reasonable exercise of the police power of the city of Janesville.

The presumption is always in favor of the reasonableness of the ordinance, and unless it is unreasonable on its face, or is proved to be so by proper evidence, the ordinance will be upheld.

1 Beach, Pub. Corp. 512; 1 Dill. Mun. Corp. §§ 819 *et seq.*; *Com. v. Patch*, 97 Mass. 221.

It seeks only to compel the defendant to so use and maintain its property as not to interfere with the proper enjoyment by others of the rights which they and the public generally have in the streets of Janesville and in the property which they may possess. This is clearly an exercise of the police power.

Cooley, Const. Lim. 572.

The reasonableness of regulations, such as those contained in the ordinances in question, has been established by numberless precedents.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 62

Am. Dec. 625; *Tiedeman, Pol. Powers*, pp. 597-599; *People v. Squire*, 107 N. Y. 593; *Western U. Tele. Co. v. New York*, 3 L. R. A. 449, 88 Fed. Rep. 552; *American Rapid Tele. Co. v. Hess*, 18 L. R. A. 454, 125 N. Y. 641; *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 82; *State v. Madison Street R. Co.* 1 L. R. A. 771, 72 Wis. 612.

The municipality may add to or alter its regulations of street railways in the exercise of its police powers at any time.

State v. Hilbert, 72 Wis. 184; *Fitts v. Cream City R. Co.* 59 Wis. 323; *Keasbey, Electric Wires*, p. 88; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Mutual U. Tele. Co. v. Chicago*, 16 Fed. Rep. 309; *State v. East Orange*, 41 N. J. L. 127; *Western U. Tele. Co. v. Philadelphia (Pa.)* Jan. 23, 1898; *American U. Tele. Co. v. Harrison*, 81 N. J. Eq. 627; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87, 16 Am. Rep. 611; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 64 L. ed. 893.

The petition states a cause of action in the relator.

Marbury v. Madison, 5 U. S. 1 Cranch, 187, 2 L. ed. 60; *People v. Chicago & A. R. Co.* 180 Ill. 175; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428.

Mandamus is the proper remedy.

Marbury v. Madison, *supra*; *Rez v. Barker*, 3 Burr. 1266; *Scott & Jarnagin, Telegraphs*, § 78; *High, Extr. Legal Rem.* § 320; *People v. Boston & A. R. Co.* 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. R. Co.* 67 Ill. 118; *Ohio & M. R. Co. v. People*, 121 Ill. 483; *Indianapolis & O. R. Co. v. State*, 37 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Olavson v. Chicago & G. S. R. Co.* 95 Ind. 152; *Cummins v. Evansville & T. H. R. Co.* 115 Ind. 417; *Uniontown v. Com.* 84 Pa. 293; *Howe v. Crawford County Comrs.* 47 Pa. 361; *Reg. v. Luton Roads Trustees*, 1 Q. B. 860; *Cambridge v. Charlestown Branch R. Co.* 7 Met. 70; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269; *State v. Northeastern R. Co.* 9 Rich. L. 247, 67 Am. Dec. 551; *State v. Wilson*, 17 Wis. 688; *State v. Richter*, 37 Wis. 275; *State v. Wood County Supra*. 41 Wis. 23; *State v. Chicago, M. & N. R. Co.* 12 L. R. A. 180, 79 Wis. 259; *People v. Rochester & S. L. R. Co.* 14 Hun, 371; *People v. Rochester & S. L. R. Co.* 76 N. Y. 294.

It cannot be said that the relator in this case has another adequate remedy at law. To be adequate, the remedy must practically compel the performance of the act in question.

High, Extr. Legal Rem. § 17; *Porter Twp. Overseers v. Jersey Shore Overseers*, 82 Pa. 275.

It is no bar to the allowance of the writ that the relator might have an action for damages or for penalties.

State v. Chicago, M. & N. R. Co. supra; *Potwin Place v. Topeka R. Co.* 51 Kan. 609; *State v. Jacksonville Street R. Co.* 29 Fla. 590.

NOTE.—The great rapidity with which electric wires are multiplying in the streets and elsewhere makes decisions like that above very important. The above case clearly shows the law as to precautions against the danger of crossing wires, some of which are charged with dangerous currents.

For other decisions as to the regulation of such 22 L. R. A.

wires and the prevention of danger therefrom, see *Electric Imp. Co. v. San Francisco (C. C. N. D. Cal.)* 13 L. R. A. 131; *Clements v. Louisiana Electric Light Co. (La.)* 16 L. R. A. 43; *Rutland Electric Light Co. v. Marble City Electric Light Co. (Vt.)* 20 L. R. A. 321.

Messrs. Jackson & Jackson, for respondent:

The ordinance authorizing the street railway company to lay and operate its tracks in the streets of the city of Janesville was a grant in the nature of a contract.

And when accepted by the railway company and the terms imposed fully complied with and performed they become a contract between the city and the railway company.

Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 715, 4 L. ed. 678; *The Binghamton Bridge Case*, 70 U. S. 8 Wall. 51, 18 L. ed. 137; *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.* 32 Barb. 358; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Milbau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 1; *Burlington v. Burlington Street R. Co.* 49 Iowa, 144, 31 Am. Rep. 145; *State v. Jersey City*, 49 N. J. L. 808; *Houston v. Houston City Street R. Co.* 83 Tex. 548; *Booth, Street Railway Law*, § 40; *People v. Chicago W. D. R. Co.* 18 Ill. App. 125; *State v. Noyes*, 47 Me. 189; *State v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361; *City of Kansas v. Corrigan*, 86 Mo. 67.

After the street railway had accepted the grant and constructed and put in operation its road, the terms and the conditions of the grant could not be changed by the common council without the consent of the street railway company.

Milbau v. Sharp, *supra*; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244; *People v. Chicago W. D. R. Co.* 118 Ill. 113; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.* 32 Barb. 358; *State v. Jersey City*, *supra*; *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *Booth, Street Railway Law*, § 40; *Houston v. Houston City Street R. Co.* and *Burlington v. Burlington Street R. Co.* *supra*; *Coast Line R. Co. v. Savannah*, 30 Fed. Rep. 646; *Horr & Bemis*, Mun. Pol. Ord. § 241.

The rights granted to and vested in the railway by the Ordinances of 1885 and 1891 were and are property rights, and cannot be injuriously affected by any amendment or a repeal of the ordinances granting them nor by an independent ordinance, without the consent of the railway company.

Des Moines v. Chicago, R. I. & P. R. Co. 41 Iowa, 569; *Horr & Bemis*, Mun. Pol. Ord. § 241.

Neither statutes nor ordinances are to be given a retroactive effect, unless such is the intention of the legislature or council clearly expressed in the statute or ordinance.

Cooley, Const. Lim. 62, 63; *State v. Atwood*, 11 Wis. 422; *Seamans v. Carter*, 15 Wis. 548, 82 Am. Dec. 696; *Austin v. Burgess*, 36 Wis. 186; *Finney v. Ackerman*, 21 Wis. 268; *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291; *Watkins v. Haight*, 18 Johns. 188; *Butler v. Palmer*, 1 Hill, 324; *Johnson v. Burrell*, 2 Hill, 238; *McMannis v. Butler*, 49 Barb. 176; *Vanderpool v. La Crosse & M. R. Co.* 44 Wis. 652; *Hall v. Banks*, 79 Wis. 229; *Sutherland*, Stat. Constr. § 463; *Cooley*, Const. Law, 370; *Smith*, Const. Law, § 533.

The proceeding by mandamus is an "extraordinary remedy."

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State v. Manitowoc, 52 Wis. 423; *State v. New Orleans & N. E. R. Co.* 42 La. Ann. 11.

It is an arbitrary and harsh remedy.

State v. New Orleans & C. R. Co. 37 La. Ann. 589; *State v. New Orleans & N. E. R. Co.* *supra*; *Merrill*, Mandamus, § 12.

The writ will only be issued where there is a specific legal right, to be enforced, or a positive duty to be performed.

State v. Washington County Suprs. 2 Pinney, 552; *State v. Larrabee*, 3 Pinney, 166; *State v. Manitowoc*, 52 Wis. 423; *Dement v. Rokker*, 126 Ill. 174; *Burnsville Turp. Co. v. State*, 3 L. R. A. 265, 119 Ind. 332.

The relator must be entitled to the precise specific legal right that he claims.

State v. Elwood, 11 Wis. 18; *Elizabeth v. Essex County Common Pleas Ct.* 49 N. J. L. 626; *People v. Hawkins*, 46 N. Y. 9.

The writ will not be issued where the right claimed by the relator is doubtful.

Wood, Mandamus, 17; *State v. Washington County Suprs.* 2 Pinney, 552; *State v. Hastings*, 10 Wis. 518; *Life & F. Ins. Co. of N. Y. v. Wilson*, 33 U. S. 8 Pet. 291, 8 L. ed. 949; *Reside v. Walker*, 52 U. S. 11 How. 272, 13 L. ed. 693; *Knox County Comrs. v. Aspinwall*, 65 U. S. 24 How. 376, 16 L. ed. 785; *Bayard v. United States*, 127 U. S. 246, 32 L. ed. 116; *People v. Contracting Board*, 27 N. Y. 378; *People v. Booth*, 49 Barb. 81, 82 How. Pr. 17; *State v. Jacobus*, 26 N. J. L. 135; *State v. Warren Foundry & Mach. Co.* 32 N. J. L. 439; *Burnsville Turp. Co. v. State*, and *Elizabeth v. Essex County Common Pleas Ct.* *supra*; *People v. Chenango County Suprs.* 11 N. Y. 563; *State v. Hawkins*, *supra*; *People v. Greene County Suprs.* 64 N. Y. 600; *People v. Wayne County Circuit Judge*, 19 Mich. 286; *People v. Presque Isle County Suprs.* 36 Mich. 377; *People v. Campbell*, 72 N. Y. 496.

It was not intended by the ordinance to require the railway company to construct and maintain a guard wire four feet above the trolley wire.

At the time of the adoption of the ordinance there were electric light wires, telegraph wires, telephone wires, and wires transmitting electric energy from generators to motors in various factories and shops in the city of Janesville, and the street railway wires. All of the wires are mentioned in the section except the street railway wires. The section refers by name to all of these wires except the street railway wires, which were then in use and had been for more than three months. The omission of the street railway wires is significant.

The maxim, *expressio unius est exclusio alterius*, applies.

Hare v. Horton, 5 Barn. & Ad. 715; *Broom*, Legal Maxims, 505; *State v. Hastings*, 10 Wis. 525; *Farrall v. Shea*, 66 Wis. 561; *Morey v. Farmers Loan & T. Co.* 14 N. Y. 302.

Where a statute is so vague as to convey no definite meaning to those who are to execute it, it is inoperative.

Drake v. Drake, 15 N. C. 110; *State v. Partlow*, 91 N. C. 550, 49 Am. Rep. 652.

Any safeguard that protects will be sufficient. The exercise of the discretion of the company in determining what the safeguard shall be, will not be controlled by the court by mandamus.

People v. Highway Comrs. 118 Ill. 239; *State v. Washington County Supra.* 2 Pinney, 552. The ordinance is penal in its character, and is to be strictly construed.

Stone v. Lannon, 6 Wis. 497; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352; *Crumbley v. Bardon*, 70 Wis. 385; 1 Beach, Pub. Corp. 517; *St. Louis v. Goebel*, 32 Mo. 295; *Pacific v. Seifert*, 79 Mo. 210.

The writ will not be issued where there is a remedy at law.

State v. Sheboygan County Supra. 29 Wis. 79; *Shipley v. Mechanics Bank*, 10 Johns. 484; *Ex parte Nelson*, 1 Cow. 417; *People v. Brooklyn*, 1 Wend. 318, 19 Am. Dec. 502; *People v. New York*, 10 Wend. 395; *People v. The Judges of Duchess Co. P.* 20 Wend. 653; *Ex parte Osterlander*, 1 Denio, 679; Wood, Mandamus, 18; *Louisville & N. A. R. Co. v. State*, 25 Ind. 177.

If the ordinance can be so construed as to require the street railway company to erect and maintain a guard wire four feet above its trolley, the ordinance is unreasonable, and for that reason is invalid, and should not be enforced.

Eldred v. Leahy, 31 Wis. 546; *Dunham v. Rochester Trustees*, 5 Cow. 462; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Hudson v. Thorne*, 7 Paige, 261, 4 L. ed. 148.

A city may, when granting the right of way, attach any condition not in conflict with its delegated powers; but it cannot thereafter impose new obligations or duties which are not necessary for the public safety and convenience.

Booth, Street Railway Law, § 231; *Electric R. Co. of Grand Rapids v. Grand Rapids*, 84 Mich. 257.

Regulations that unnecessarily destroy vested rights and impose unnecessary burdens, cannot be imposed, under the guise of the exercise of police power, where there is no real demand for such regulations.

Austin v. Murray, 16 Pick. 121.

The object of a writ of mandamus is to prevent a failure of justice.

People v. Greene Supra. 12 Barb. 217.

The writ will not be issued where compliance with it will be attended with hardship.

Moses, Mandamus, 16.

It must not be oppressive or burdensome.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; *Northern Liberties Comra. v. Northern Liberties Gas Co.* 12 Pa. 318, cited in note, 11 Am. Rep. 54; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642.

It must be reasonable.

Hayes v. Appleton, 24 Wis. 542; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576; *Dunham v. Rochester Trustees*, *Austin v. Murray*, *Toledo, W. & W. R. Co. v. Jacksonville*, *Hudson v. Thorne* and *Ex parte Frank*, *supra*; Dill. Mun. Corp. 3d ed. § 319.

The writ of mandamus is simply a discretionary writ, and may be granted or refused, in the discretion of the court or judge to whom the application for it is made.

Moses, Mandamus, 18; Wood, Mandamus, 17; *Ex parte Fleming*, 4 Hill, 581; High, Extr. Legal Rem. § 9; *People v. Contracting Board*, 27 N. Y. 878; *People v. Booth*, 49 Barb. 82, 32 How. Pr. 17.

The discretion of the circuit court in granting

ing or refusing the writ will not be reviewed on appeal unless there is an abuse in the exercise of this discretion.

Pomeroy v. State Bank of Indiana, 68 U. S. 1 Wall. 692, 17 L. ed. 638; *Miller v. McLeod*, 94 Mich. 627; *Dawson v. Parson*, 51 N. Y. S. R. 980.

Orton, Ch. J., delivered the opinion of the court:

This is an appeal from an order of the circuit court sustaining the demurrer of the respondent to the relation of the appellant, and quashing the alternative writ of mandamus. The material facts set out in the relation are briefly as follows: The relator, the telephone company, obtained its right from the state to do business in the city of Janesville, and to erect and maintain poles, cross arms, and wires over and through the streets, ways, and alleys of said city, and operated telephone wires and erected poles in the streets, ways, and alleys, with the permission, consent, and approval of said city, from 1879 until the present time, at a great expense, and has now 151 telephones in said city and suburbs. The main trunk lines of the poles and wires have been and are now maintained upon East, Main, and Milwaukee streets. All the rights, right of way, and easements that it had previously enjoyed as a telephone company were confirmed by an ordinance of said city, dated October 10, 1892, a copy of which is attached hereto, and marked "Exhibit 1," and the company has since exercised and enjoyed the same, and all the said lines and poles have been where they are now for years, with a few exceptions, and where they should be. The relator has complied with the statutes of the state, and paid its license fee, and has a license to do business as a telephone company. The defendant is a corporation by the laws of the state, and obtained its rights to operate a street railway in said city by horse power by ordinances of said city, dated October 8 and November 25, 1885, and operated the same on the same streets upon which the relator had its poles and wires, among others East, Main, and Milwaukee streets. By an ordinance of the city, dated December 15, 1891, the former ordinances were so amended as to give the defendant the right to use "electrical power" in operating its street railway, and on a single or double track, with all necessary curves, turnouts, switches, poles, brackets, and wires. The defendant has erected its poles, wires, and overhead wires over and above the streets already occupied by the relator in the manner aforesaid, and, among others, East, Main, and Milwaukee streets, in said city. The defendant company is compelled to use very strong conductors of electricity to run its cars, and it uses main and trolley wires, which are not insulated, while the wires of the relator are insulated, and though good and sufficient, can only use feeble and delicate currents of electricity in telephoning. The currents used by the defendant are exceedingly dangerous to property and persons, by setting fires to buildings, and by injuring persons coming in contact therewith. The poles of the relator

are liable to break, and the wires to break, and fall, by the force of storms, and cannot be prevented; and, when the wires do fall, they make direct crosses with the wires of the defendant, and the high-tension currents of electricity used by the defendant pass in the wires of the relator, and destroy its instruments and other property, and endanger the health of its employes and others, and are liable to set fires in the city. If the defendant had constructed its railway system properly, it would have placed "guard wires" at not less than four feet above its trolley wires, and in that manner prevented such serious consequences by restraining and carrying off the high-tension currents safely. Such guard wires, so placed and maintained, are the approved method of avoiding or preventing the threatened mischief. The defendant is required to apply such safeguards by an ordinance of the city, dated October 10, 1892. The relator has complied with said ordinance, and the defendant has failed to do so. This is the substance of the relation.

We are of the opinion that the facts set out in the relation are sufficient to entitle the relator company to the remedy asked for: (1) The telephone company occupied the streets of the city with its poles and wires, and was in the safe and successful prosecution of its business, under the authority of law, and "by the permission, consent, and approval" of the city of Janesville. (2) The defendant company afterwards sets its poles and extends its wires along the same streets, so that its lines frequently cross the lines of the relator, and in such near contact as to endanger the persons in its employment, and its property, and threaten the destruction of its business. Has the defendant the right to do this, if it is in its power to prevent the threatened mischief? By the common maxim that one person has no right to use his own to the injury of another, and by the common principles of elementary law, it would seem that it had not. The defendant has intruded upon the established business of the relator in such way as to endanger it and the persons engaged in it, when, by the adoption of such a simple safeguard, and the only practicable one, such danger can be avoided, and the business of both subsist together. Ought not the defendant to be compelled to adopt such safeguard? These facts are admitted by the demurrer. The learned counsel of the respondent insists that the relator had not such priority of its business, by any right. It is averred in the relation that it was established according to law, and prosecuted "by the permission, consent, and approval" of the city. That would clearly give the relator a right, and that right and its enjoyment were prior to any right of the defendant. The relator's wires are up in the streets, bearing sufficient electrical power to make telephonic communications, and the defendant crosses them in many places with its wires, bearing electrical power sufficient to propel the cars upon its street railway, and the first storm that comes may blow down the poles and wires of the relator, and its wires come in contact with the wires of the

defendant, where they cross each other, and become charged with its dangerous currents of electricity, set fire to the buildings in which the telephone instruments are used, and injure other property, and the persons employed in the "Exchange" and other places, so as to endanger or destroy the business of the relator. Ought not the defendant to be compelled to adopt the above safeguards to prevent this threatened mischief, or to withdraw its lines from the vicinity of the relator's wires? The company that caused the mischief ought to repair it.

Section 7 of the Ordinance of the city dated October 10, 1892, imposes this duty upon the company using this "electrical power system" in all cases, and requires it to apply such safeguards under a penalty. But much more is it the duty of such company when it is an intruder upon the already established business of another company. The electric force is the most powerful and dangerous agency of nature, and, even when restrained or controlled by the most perfect machinery and appliances, its high-tension currents are extremely dangerous in many directions. If a municipal corporation has not the inherent provisional or police power to pass ordinances to regulate or restrain the use of such a dangerous agency within the corporate limits, it certainly cannot have such power for any purpose. It is claimed that said ordinance has only future operation or effect. In application to the case, section 7 of said Ordinance provided: "Whenever it shall be necessary to cross . . . telephone line or lines or any wires used," etc. Has it not been necessary for the defendant company to cross these telephone lines or wires of the relator since the passage of the ordinance, and is it not now necessary to do so? Then the ordinance, by its terms, is applicable to this case. The ordinance is made to regulate existing things, and things which continue to exist, as the wires of the defendant cross the wires of the relator. Whenever, at any time, wires so cross, this safeguard must be applied. The ordinance has a present and future effect. It is said these wires crossed before the ordinance was passed. That is true, and they have continued to cross ever since, in violation of the ordinance. The ordinance does not prohibit the crossing of such wires. It provides the remedy for it as an existing evil, and requires safeguards to be so placed as to avoid the danger to persons and property. It is not retroactive in any sense. First. The ordinance is reasonable, because it requires that to be done which in law and good conscience the defendant ought to do for the protection of the relator, whose established business it has endangered and disturbed. Second. It is clearly sustained under the police power of the city. "The test is whether it is designed and tends to protect some public or private right from the injurious act of the company; as when it prohibits the running of the cars of one company on any street so near the depot of another railroad as to interfere with safe and convenient access to the latter road." Tiedeman, Pol. Powers, 597-599. The statute of New York, requiring telegraph, tele-

phone, and electric wires to be placed underground in streets in certain cities (Laws 1885, chap. 499), was upheld in *People v. Squire*, 107 N. Y. 598; *Western U. Tele. Co. v. New York*, 88 Fed. Rep. 552, 8 L. R. A. 449. The right and authority in a city "to regulate, control, and prohibit the location, laying, use, and management of telegraph, telephone, and electric light and power 'wires and poles' . . . in order to guard and secure the public safety and convenience," is upheld in *Wisconsin Teleph. Co. v. Oshkosh*, 62 Wis. 32. Ordinance to regulate street railways is upheld in *State v. Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771; and in *State v. Hilbert*, 72 Wis. 184.

Cities can regulate the placing of electric wires in the streets. *Keasbey, Electric Wires*, 88; *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Mutual U. Tele. Co. v. Chicago*, 16 Fed. Rep. 309; *State v. East Orange*, 41 N. J. L. 127; *Western U. Tele. Co. v. Philadelphia* (Pa.) 12 Atl. Rep. 144; *American U. Tele. Co. v. Harrison*, 81 N. J. Eq. 627; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87, 16 Am. Rep. 611; *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898.

There can be no question, at this late day, but that our municipal corporations may make all reasonable regulations for the location and use of electric wires in the street, and require all reasonable safeguards for the same. The question is virtually so settled in this state by our own decisions. The relator is entitled to sue out the writ of mandamus to compel the defendant to properly place such guard wires as the proper safeguard in such a case to protect its rights and safety. The relator is especially interested in the defendant's performance of this public duty. It is admitted to be true that such guard wires so placed are the very best and most approved method of safeguard in such case. This, then, is a clear legal right to be enforced by mandamus. *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. ed. 428; *People v. Chicago & A. R. Co.* 180 Ill. 175.

There is no adequate remedy in such a

case, except by the writ of mandamus, to compel the respondent company to do what it is clearly right for it to do, and that the relator has the right to compel it to do. The penalty enforced would not cure the mischief. *Rea v. Barker*, 3 Burr. 1266; *Scott & Jarnagin, Telegraphs*, § 78; *High, Extr. Legal Rem.* § 320; *People v. Boston & A. R. Co.* 70 N. Y. 569; *Haines v. People*, 19 Ill. App. 354; *People v. Chicago & A. R. Co.* 67 Ill. 118; *Ohio & M. R. Co. v. People*, 121 Ill. 483; *Indianapolis & C. R. Co. v. State*, 87 Ind. 489; *State v. Demaree*, 80 Ind. 519; *Uniontown v. Com.* 84 Pa. 293; *Hovee v. Crawford County Comrs.* 47 Pa. 361; *Reg. v. Luton Roads Trustees*, 1 Q. B. 860; *Cambridge v. Charlestown Branch R. Co.* 7 Met. 70; *Railroad Comrs. v. Portland & O. O. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *State v. North-eastern R. Co.* 9 Rich. L. 247, 67 Am. Dec. 551; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *State v. Wilson*, 17 Wis. 687; *State v. Richter*, 37 Wis. 275; *State v. Wood County Suprs.* 41 Wis. 28; *State v. Chicago, M. & N. R. Co.* 79 Wis. 259, 12 L. R. A. 180; *Porter Trp. Overseers v. Jersey Shore Overseers*, 82 Pa. 275.

It is said that no such damages have yet accrued. The relation very clearly shows that such damage is imminent and threatening, and the danger is all the time present. This might be sufficient ground for an injunction to restrain the defendant from crossing the wires of the relator with its wires,—a much more violent remedy. The relator does not seek to prohibit such crosses, but only to make them safe. The relator is conducting its telephone business under constant fear and apprehension. Must it wait until the full extent of the apprehended consequences have been realized? The remedy sought is clearly the proper one. The demurrer of the respondent to the relation, and the motion to quash the writ, should have been overruled.

The order of the Circuit Court is reversed, and the cause remanded with direction to overrule the demurrer and the motion to quash the writ, and for further proceedings according to law.

NEW HAMPSHIRE SUPREME COURT.

J. D. COLBURN

v.

Town of GROTON.

(.....N. H.....)

1. Whether or not the payment by defendant of the claim of a third person was an admission of liability so as to be provable in the case, or was a mere purchase of peace which cannot be proved, is a preliminary question of fact for the presiding justice.

NOTE.—The above not only decides an interesting question of evidence but contains in the opinion a valuable discussion of the authorities on the subject.

22 L. R. A.

2. The exclusion of evidence of payment of a third person's claim as an admission of liability is not ground for reversal where it does not appear that it was against the evidence to hold that it was a mere purchase of peace.

3. Evidence that travelers were accustomed to warn each other to avoid meeting others at a spot in a highway where an accident occurred is not admissible in an action against the town to recover for injuries caused by the accident.

(March 15, 1890.)

EXCEPTIONS by plaintiff to rulings of the Grafton County Court made during the trial of an action brought to recover damages for

personal injuries alleged to have resulted from defendant's neglect to keep a highway in repair, which resulted in a verdict in favor of defendant. *Judgment on the verdict.*

At the time of the accident Mrs. Estes was riding in the vehicle with plaintiff and received injuries, and plaintiff offered to show that the town had settled her claim for damages. This evidence was excluded. Plaintiff offered to show that there was a custom among travelers to give warning to others to avoid meeting at the place where the accident occurred. This evidence was excluded.

Further facts appear in the opinion.

Mr. S. B. Page for plaintiff.

Messrs. Fling & Chase, for defendant:

Selectmen have no authority, *ex officio*, to make any settlement with the traveler. If this be sound, how could the fact of their doing so be any admission against the town of its liability? The doctrine of *Coffin v. Plymouth*, 49 N. H. 178, makes it hazardous for towns to attempt to negotiate or make any settlement or buy their peace.

The law encourages settlements. Why should it not make it safe to settle cases of the kind under discussion and without prejudice.

Grimes v. Keene, 52 N. H. 330.

Doe, Ch. J., delivered the opinion of the court:

In a criminal case, when the defendant's confession is offered as evidence, it is necessary to inquire whether it was made under the influence of hope or fear, and for the purpose of gaining some benefit or avoiding some harm connected with the criminal charge. If not made for that purpose, it is held to be voluntary, and is evidence. The purpose of the confession is a question of fact. This distinctly appears in *State v. Wentworth*, 37 N. H. 196, 218-220, and other cases in which the reported decisions contain a full examination of the evidence bearing on the question. In *State v. Howard*, 17 N. H. 171, 181-185, the court says: "We are by no means satisfied that judges, in their anxiety to preserve all the rights of the accused, have not gone further in excluding confessions than the principle required them to do. . . . The principle of admission and exclusion is well settled, and founded upon a most satisfactory basis. Confessions obtained by the hope of favor, or by fear of punishment are inadmissible. It is the hope of escape from temporal punishment which excludes, and the hope must be derived from the inducements. . . . The evidence is rejected because the inducements may have led to a false statement, and the confession is therefore not entitled to credit, and not because the public faith is pledged by means of the promise. . . . It is in the application of this principle that the difficulty lies; that is to say, in determining whether hopes have been held out, or fears excited, in the particular case. In the present instance the defendant was told that he had better tell the truth. It has been supposed that a party accused might, from such a declaration, understand that it would be better for him to confess himself guilty. . . . But why should any one so understand, if he

was in fact innocent? . . . We do not intend to pass upon this question at this time. Our object is to show how slight, to say the most, is the probability that a declaration of this kind excites any hopes that should cast a suspicion upon the truth of the confession which follows it. . . . The hope here—assuming that hope was excited by the declaration of the magistrate that he had better tell the truth—must have been of the slightest possible character, and the circumstances which intervened between that time and the period when he made the confession which was admitted can leave no shadow of doubt whether the last confession was made through some lingering belief, arising from the declaration of the magistrate, that if he still continued to confess he might find favor.

The evidence is very strong upon this point. . . . We have no hesitation in sustaining the ruling. If anything could have extinguished the faint glimmer of hope which might possibly have existed in the first instance, these circumstances must have been effectual for that purpose. In considering the probable reason for this last confession, we must not lay out of the case the other circumstances which intervened between that and the first. "The probable reason for" a confession cannot be a question of law. "In the earlier cases there has been much conflict upon this subject, resulting in some degree from failing to recognize the question to be largely one of fact alone, to be determined upon a consideration of all the circumstances of the case, instead of which, some of the cases seem to have given to particular expressions a technical character, and to have excluded the confessions where, upon a consideration of all the circumstances, it would not have been found, as matter of fact, that the confessions were made under the influence of hope or fear held out by another. . . . Whether the confession . . . was voluntary or not is purely a question of fact,—as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown, so as to allow the introduction of secondary evidence of its contents. In this and the like cases, the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies, so far as the question is one of fact. If, however, upon the evidence reported by the judge, it clearly appears that there was error in his finding upon the matter of fact, it may be corrected, as in other cases where a verdict is against evidence." *State v. Squires*, 48 N. H. 364, 369, 370.

When it is said that the admissibility of a confession is a "matter resting wholly in the discretion of the judge, upon all the circumstances of the case" (1 Greenl. Ev. § 219), the meaning is not that he has arbitrary power but that the question is one of fact. "Judicial discretion," in its technical legal sense, is the name of the decision of certain questions of fact by the court." *Darling v.*

Westmoreland, 52 N. H. 401, 408, 18 Am. Rep. 55. "Whether the confession made to Leavitt was made in consequence of inducement held out by Leavitt was a question of fact to be decided by the judges who presided at the trial; and their finding upon this question is a finality, as much as the verdict of a jury upon a question of fact." *State v. Pike*, 40 N. H. 899, 407, 6 Am. Rep. 533. "The law is too well settled in this state to be considered an open question. We do not interfere with the verdict of a jury, to set it aside as against evidence, unless we are well satisfied that it has been procured through corruption, or manifest mistake in the consideration and application of the evidence, and that substantial justice has not been done." *Lisbon v. Bath*, 21 N. H. 819, 835; *Wendell v. Safford*, 12 N. H. 171, 178; *Gould v. White*, 26 N. H. 178, 188; *Clark v. First Cong. Soc. in Keene*, 45 N. H. 331, 334; *Houston v. Clark*, 50 N. H. 479, 483; *Jewell v. Grand Trunk Railway*, 55 N. H. 84, 95; *Fuller v. Bailey*, 58 N. H. 71; *Smith v. Richards*, 29 Conn. 232, 244; *Hamaker v. Eberley*, 2 Binn. 506, 510, 4 Am. Dec. 477; *Wilkinson v. Greely*, 1 Curt. C. C. 63; *M' Lanan v. Universal Ins. Co.* 28 U. S. 1 Pet. 170, 183, 7 L. ed. 98, 104; *New York Cent. & H. R. R. Co. v. Praloff*, 100 U. S. 24, 31, 25 L. ed. 531, 534; *Shoemaker v. United States*, 147 U. S. 282, 305, 306, 37 L. ed. 170, 187.

When a case is tried by the court, a motion to set aside the finding on the ground that it is against the evidence "stands upon the same footing as if there had been a verdict of the jury." *Burnham v. McQuesten*, 49 N. H. 446, 454. Whether the fact found by the court at the trial term is that the defendant is guilty, as in *Burnham v. McQuesten*, or that the defendant's confession was voluntary, as in *State v. Squires*, a motion for a new trial on the ground that the finding was against the evidence raises a question of fact to be decided by a court upon due consideration of the proof.

"The term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt. . . . The rules of evidence are in both cases the same. . . . A distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace, for, as Lord Mansfield observed, it must be permitted to men to buy their peace without prejudice to them if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant being sued for £100, should offer the plaintiff £20, this is not admissible in evidence, for it is irrelevant to the issue. It neither admits nor ascertains any debt, and is no more than saying he would give £20 to be rid of the action. But, in order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or at least that they were made under the faith of a pending treaty, and into which the party

might have been led by a confidence of a compromise taking place. . . . It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But if it is an independent admission of a fact, merely because it is a fact, it will be received." 1 Greenl. Ev. §§ 170, 192.

"An offer by a party to pay a sum of money by way of compromise of an existing controversy is not to be used as evidence against him. But an admission of particular facts, made during a treaty for a compromise, may be given in evidence as a confession. . . . The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain, and easily understood. Such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid of the controversy." *Sanborn v. Neilson*, 4 N. H. 501, 508, 509. "A distinct admission of a fact during an attempt at compromise may be given in evidence, though an offer made for the purpose of effecting a settlement cannot be, and the reason for the distinction is very satisfactory." *Hamblett v. Hamblett*, 6 N. H. 333, 348. "The reason is that such admissions are in no way necessary to a treaty for a compromise, which is a mere attempt to buy a peace, and are supposed to be made like other admissions, and for some one of the various causes which induce them. But the law protects a party seeking to purchase his peace by denying to his adversary the benefit of any inferences, that might be derived from an attempt to do so, that the cause of action which he seeks to compromise has some foundation in truth." *Rideout v. Newton*, 17 N. H. 71, 73. That case was assumed on a note for \$50 purporting to be signed by the defendant and one L. The question was whether the note was signed by the defendant. Subject to exception, the plaintiff was allowed to prove the following facts: The defendant and L. had been connected in business to some extent. When the writ was served on the defendant, L. not being present, the plaintiff demanded payment of other claims which he had against L., amounting to some one or two hundred dollars. The defendant "asked a person present to advise him as to the propriety of compounding with the plaintiff for the whole, and was advised, if this note was a genuine one, to offer the plaintiff a sum to settle the whole, but, if the note was a forgery, not to pay a cent." The defendant offered \$25, and, on being told that was not enough, he offered \$50, and then \$75. The plaintiff's contention was, not that the mere offer of a sum in settlement was evidence of an admission that the defendant signed the note, but that, in view of the advice he asked and received, it was highly probable he made the offer because the note was genuine. "The defendant," says the court, "upon being advised to make an offer provided his signature to the note was genuine, but not otherwise, proceeds to make the offer. It is said that this offer may be shown, because it is highly probable, from the advice

he received, that he would not have made it unless the signature was so. But . . . such a reason would extend to the admission of any other offer of compromise, because such offers are more apt to be made in cases in which the party making them is conscious that the cause of his adversary is well founded than in the opposite cases. The fact that he acted upon advice which he had sought may add a very little to the force of such an inference as is contended for, but too little, altogether, to make the case an exception to the highly salutary, well-defined, and established rule." For this reason the verdict was set aside.

When a defendant offers to pay a certain sum in settlement, his statement that he is too poor to pay more is not sufficient evidence of an intention to admit his liability. *Downer v. Button*, 26 N. H. 338, 344. *Perkins v. Concord Railroad*, 44 N. H. 228, was an action for injuries received by a passenger in a collision on the defendants' road. The testimony of another passenger, who was injured in the same collision, that the defendants admitted their liability for injuries caused by the collision, was held competent on the ground (page 225) that "the liability to pay damages in consequence of the accident appears to have been the matter distinctly admitted to the witness, as stated by him in evidence." The decision is an application of the rule that a distinct admission of a fact is not rendered inadmissible by being made during a settlement. The preliminary question always is, not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. On that question the time and circumstances may be material evidence. "The rule is strictly held in this state that an offer to compromise is not to be shown, on account of the tendency such a practice would have to discourage the settlement of disputes. But it is at the same time held, with equal clearness, that any independent admission, though made in the course of negotiations for a compromise, may be shown." *Plummer v. Currier*, 52 N. H. 287, 296; *Harrington v. Lincoln*, 4 Gray, 568, 567; *Durgin v. Somers*, 117 Mass. 55, 61; *Draper v. Hatfield*, 124 Mass. 58, 56; *Egans v. Smith*, 5 T. B. Mon. 363, 17 Am. Dec. 74. In *Sanborn v. Neilson*, 4 N. H. 501, before cited, the defendant's rejected offer, made during a negotiation for an adjustment of the plaintiff's claim, was held to be evidence, because it followed and was based upon the defendant's express admission of the alleged tort. Upon the testimony, the fact could be found that the offer was intended to include a repetition of the admission in an indirect form. This view is presented in the case put (page 509) as an illustration: "If A. sue B. for \$100, and B. offer to pay \$20, this offer shall not be received as evidence, because it may have been made merely for the sake of peace, where nothing was due. But in such a case, if B. admit expressly that \$20 are due, and offer to pay that sum, . . . both the admission and the offer are evidence." See *Snow v. 22 L. R. A.*

Batchelder, 8 Cush. 518, 516, 517. His offer is evidence when made for one purpose, and is not evidence when made for a different purpose. In both cases, his decisive intent is a fact to be found by weighing competent proof. "Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence. But, now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows, and can testify directly, what that purpose or understanding was." *Delano v. Goodwin*, 48 N. H. 203, 205, 97 Am. Dec. 601; *Norris v. Morrill*, 40 N. H. 395, 401, 402; *Graves v. Graves*, 45 N. H. 328; *Hale v. Taylor*, Id. 405.

The questions of law and fact are the same, whether an admission is claimed to have been made by a payment or by a rejected offer. If a plaintiff and his horse and wagon were injured in a collision with a cart driven by the defendant, and the expense of repairing the wagon was paid by the defendant, whose subsequent offer to pay a certain sum for the injury of the horse was rejected, the question might arise whether the accepted payment and the rejected offer were evidence in an action for the plaintiff's personal injury. Payment, or an offer of payment, may be made to a plaintiff, or to another person having a claim so far like the plaintiff's that the defendant's admission of liability would be applicable to both. The payment or offer is evidence of his liability, when it is an admission of liability. When a pauper has been supported by a town, or the town has paid for his support, and the act was an admission of liability and not a purchase of peace, it is evidence of the fact which the town intended to admit. The legal principle applicable to a great variety of cases is that intent is the test. An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be, and made it as, an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability. "If the object be to buy peace, it is plain such an offer carries with it no evidence of the justice of the demand; and it would have a tendency to prevent amicable adjustments, if such offers were to be used against the party making them." *Marsh v. Gold*, 2 Pick. 285, 290.

As his object could not be a matter of law, and he knows what it was, he may testify directly on that point. Confusion has arisen from reported cases in which the line between law and fact has not been clearly drawn. In *Abbott v. Andrews*, 180 Mass. 145, the question whether an offer of the plaintiff was an admission of a fact, or a mere effort to avoid controversy, was dealt with as a question of fact depending upon his purpose in making the offer, and the sense in which it was understood by both parties. But the result reached upon the examination of the evidence of purpose and understanding was not expressly stated to be a conclusion of fact.

In *Sanborn v. Neilson*, before cited, the alleged cause of action which the defendant

had confessed was a criminal offense. The plea of "Not guilty" presented for trial the question that would be presented by the same plea to an indictment for the same act. If a retracted or executed offer of compensation was induced by a fear of a criminal prosecution and a hope of escaping or lessening the consequences, it would not be evidence in the criminal case. If induced by a fear of litigation and a hope of buying peace, without an intent to admit guilt, it would not be evidence in the civil case. There is no difference in the nature of the cases on which it could be held that the motive was a question of fact in one of them, and that the motive and intent were questions of law in the other.

When the evidence of intent is "conflicting, and the result doubtful," the question whether an offer of payment was an admission of liability may be submitted to the jury, with instructions that they are "to ascertain the meaning of the party making it, and . . . inquire and consider what were the views and intention of the defendant in making it; that if, viewing it in this way, they should find that" it "was intended by him as an admission of a fact, then it" is "to be considered by them as evidence; otherwise, they" will "lay it out of the case." *Bartlett v. Hoyt*, 83 N. H. 151, 154, 165, 166; *Field v. Tenney*, 47 N. H. 513, 515, 521; *Hall v. Brown*, 58 N. H. 93, 94, 98; *Carr v. Ashland*, 62 N. H. 665, 668. The same course may be taken with his payment of a claim like the plaintiff's presented by a third person. *Eustman v. Amoskeag Mfg. Co.* 44 N. H. 143, 145, 154, 82 Am. Dec. 201. The question that may be submitted to the jury is not a question of law, when it is decided by the court. If it is submitted to the jury, and they return a special verdict, finding the payment was or was not an admission of liability, the verdict on this point is set aside, when it is against the evidence. A finding of the same fact by the court is set aside for the same cause.

In *Coffin v. Plymouth*, 49 N. H. 173, the plaintiff, Mrs. Coffin, claimed damages of the town for a personal injury caused by the overturn of Mr. Clark's wagon, in which she was riding in a highway. Clark claimed damages of the town for the breakage of his wagon on the same occasion, spoke to the selectmen, or some of them, several times about it, and finally notified the chairman of the board that he should sue the town unless his claim was adjusted on or before a specified day. Thereupon, he was asked what was the least sum he would take to settle the matter, and he offered to take what he was obliged to pay for repairing the wagon, \$25, which the first selectmen paid, protesting, at the time, that the town was not liable. Subject to exception, the payment of Clark's claim was received as an admission of liability. The whole of the reported decision on this subject is: "A majority of the court are of opinion that the evidence excepted to was properly admitted." No reason is given, and the only authority cited is *Perkins v. Concord Railroad*, 44 N. H. 223, which is not in point. In that case the ground of the decision

was that liability was "distinctly admitted to the witness, as stated by him in evidence." In *Coffin v. Plymouth*, liability was distinctly denied. The validity of Clark's claim was a matter of opinion. However confident the defendants' belief that they were not liable, they might well act upon the assumption that the result of a trial was doubtful. Under the circumstances, the payment of a sum less than the irrecoverable expense of defending the threatened suit was conclusive evidence that the object of the payment was to buy a peace that would cost less than litigation. In the trial of *Coffin's Case*, there was no error of law, and the defendant's exception raised no question of law. The verdict could not be set aside without a motion based on an allegation that the finding of the court at the trial was in fact against the evidence. No such motion was made, and it does not appear that attention was called, at the law term, to the question of fact, which was the only question on which cause could be shown for a new trial. Whether the preliminary question of fact is decided by the judge, or submitted by him to the jury, "no exception lies, so far as the question is one of fact. If however, upon the evidence reported by the judge, it clearly appears that there was error in his finding, or in the finding of the jury, upon the matter of fact, it may be corrected, as in other cases where a verdict is against the evidence." *State v. Squires*, 48 N. H. 364, 369, 370.

In *Grimes v. Keene*, 52 N. H. 330, 334, it is said that payment of a claim for damages caused by the same accident is an admission, more or less strong, that the highway, at the point in question, was defective, and the town in fault for its being so; that such an admission is necessarily to be implied from the acknowledgment and payment of the claim, for without the defect there could have been no claim. "If payment of a claim against the town by the selectmen is an admission of the liability of the town, an unqualified offer to pay must be equally so." *Gray v. Bollingsford*, 58 N. H. 253, 254. "The town have offered to pay him \$25. . . . But this is no proof that they owe him anything." *Sikes v. Hatfield*, 13 Gray, 847, 853. The amount paid or offered may be one of the circumstances to be weighed on the preliminary question, but the law does not make it the test. An entire claim may be paid to avoid a lawsuit, the payer intending to admit nothing but his desire for peace, the claimant understanding that nothing else is admitted, and both parties believing that the payer is not liable, or having no opinion on the subject. In such a case as *Coffin v. Plymouth*, a finding that the payment of an entire claim of \$25 was anything more than a purchase of peace would be against the evidence. The proposition that an admission of liability is necessarily to be implied from the payment of a claim, or an offer to pay it, is contrary to the fact. "Compromise" generally signifies a settlement in which there is concession on both sides. Used in that sense, the word does not describe all cases in which peace is bought without an admission of liability, and is not an adequate statement of

the law. In the present case the preliminary question of fact for the presiding justice at the trial was whether the defendants' payment of Mrs. Estes' claim in settlement of her suit was an admission of liability, or a mere purchase of peace. As it does not appear that a decision of that question of intent in favor of the defendant would be against the evidence, the exclusion of the payment is not a cause for a new trial.

In *Aldrich v. Monroe*, 60 N. H. 118, the plaintiff's omission of a usual precaution, of

which he might be found to have had knowledge, was held to be evidence on the question whether he used reasonable care. In this case the warnings given by travelers, which the plaintiff offered to prove, were hearsay evidence of opinions concerning the sufficiency of the road at the place of the accident, and were rightly excluded.

Judgment on the verdict.

Clark, J., did not sit; Bingham, J., dissented; the others concurred.

OHIO SUPREME COURT.

NEWARK MACHINE CO., *Plff. in Err.*,
v.

KENTON INSURANCE CO. of Kentucky.

(50 Ohio St. —.)

1. A valid contract of insurance may be made by parol, when not forbidden by statute, or a provision of the company's charter which has been brought to the knowledge of the other contracting party; and, as in other cases of parol contracts, the assent of the parties to the terms of the agreement may be shown by their acts and the attending circumstances, as well as by the words they have employed.

2. When nothing is said in the negotiations about special rates of insurance, or special conditions of the policy, it will be pre-

*Headnotes by the COURT.

NOTE.—Validity of oral insurance contract.

There seems to have been some doubt and contrariety of opinion as to the validity of a parol contract of insurance. The last decision on the subject in some of the states even now indicates that such a contract would not be upheld, but the great weight of authority is that such contracts are valid.

In *Bell v. Western M. & F. Ins. Co.*, 5 Rob. (La.) 423, 39 Am. Dec. 542, the court assumes that the contract of insurance must always be in writing.

And in *Courtney v. Mississippi M. & F. Ins. Co.*, 12 La. 233, it decides that a parol contract of insurance is invalid.

In considering the question of reforming a policy to make it correspond to the alleged contract, the court said: "It is doubtless true that an insurance company cannot ordinarily insure by parol." *Bishop v. Clay F. & M. Ins. Co.* 49 Conn. 167.

In an early Missouri case it was stated that it would seem to be the settled opinion that a policy of insurance must be in writing. *Plahto v. Merchants & Mfrs. Ins. Co. of St. Louis*, 38 Mo. 243.

In *Lindauer v. Delaware Mut. Safety Ins. Co.*, 18 Ark. 461, the court seems to be opposed to the validity of parol insurance.

By the Georgia code, the insurance and all changes in it must be in writing, and in order to permit the court to relieve one who has acted on a parol agreement it must appear that the act was in pursuance of the contract, on the faith of it, and induced by it. *Simonton v. Liverpool, L. & G. Ins. Co.* 51 Ga. 76.

In *Cokerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 143, it is stated that all insurance must be in writing.

But in *Amazon Ins. Co. v. Wall*, 31 Ohio St. 633, 27 Am. Rep. 533, it is stated that that decision was virtually overruled in *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345, 15 Am. Rep. 612.

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sumed that those which were usual and customary were intended.

3. In determining whether there has been a delivery of a policy, effect will be given to the intention of the parties, and when the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent.

4. An agent authorized to make contracts of fire insurance and issue policies may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice; and such waiver may be express or implied.

5. Where, under an arrangement with

In *Smith v. Odlin*, 4 Yeates, 463, the judges refused to decide whether a parol insurance was valid or not.

In *Kaines v. Knightly, Skinner*, 55, it seems to be admitted that the insurance might be made by parol, but it is decided that if it is put in writing, evidence is not admissible to vary its terms by showing a different parol agreement.

In *Perkins v. Washington Ins. Co.*, 4 Cow. 645, the company was held liable on a contract made by an agent for a fire occurring before the issuance of the policy, although there does not appear to have been more than a parol contract, accompanied by a receipt for the premium.

For the purposes of demonstrating that a waiver of a condition in a policy may be by parol, the court in *Viele v. Germania Ins. Co.*, 26 Iowa, 2, 36 Am. Dec. 83, stated that the better opinion seems to be that the contract itself may be oral only.

In *Rhodes v. Railway Pass. Ins. Co. of Hartford*, 5 Lana. 71, it is held that a valid contract of insurance could be made by parol, but, if not under the circumstances of that case, there was a valid agreement to insure which would be enforced with the same effect in favor of the insured as though insurance had been actually effected.

In discussing the validity of a [parol] promise to renew a policy, the court, in *Home Ins. Co. v. Adler*, 71 Ala. 516, said that a parol insurance is valid.

In *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495, where the question was as to whether or not a contract had been made, the court states that whatever doubts may formerly have been entertained as to the validity of parol contracts of insurance made by insurance corporations, authorized by their charters to make insurance by issuing policies, it is now settled that they are valid.

A contract of insurance can be made by parol unless prohibited by statute or other positive regula-

the insured by which his insurance was to be kept up to a specified amount by renewals or new policies, it was the custom of the agent to charge the premiums as policies were issued, or renewed, and have periodical settlements with the insured, when the premiums would be paid, a credit for a premium so charged, to the next period of settlement, may be implied.

(October 31, 1893.)

ERROR to the Circuit Court for Licking County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Kibler & Kibler*, for plaintiff in error:

The principal questions in this case are covered by the decision by this court in the case of—

Germania F. Ins. Co. of N. Y. v. Shoemaker, 22 Ohio L. J. 815.

In view of that case the court below erred in saying that the verdict was against the evidence.

Dibble v. Northern Assur. Co. of London, 70 Mich. 1.

Prepayment of the premium can be waived. *Krumm v. Jefferson F. Ins. Co.* 40 Ohio St. 225; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 845, 15 Am. Rep. 612; *Little v. Charter Oak L. Ins. Co.* 88 Ohio St. 110, 11 Am. & Eng. Encyclop. Law, pp. 308, 309.

The policy could be accepted or ratified by

the insured after the date of its issue, and it would be good when ratified and accepted, as the proof showed it was on July 8, 1884, and before the fire.

The proof was not only that the Norwich \$5,000 was canceled, and that the agent of the plaintiff in error consented to the cancellation, but that plaintiff in error made no claim and was paid nothing upon the Norwich \$5,000 policy.

Von Wien v. Scottish Union & Nat. Ins. Co. 118 N. Y. 84.

It was a question for the jury whether there was a delivery of the policy.

It is sometimes a question whether or not delivery of the policy has been made. But, of this, the manual delivery of the policy is not decisive. It depends rather upon the intention of the parties as manifested by their acts or agreements, for whatever the parties have agreed to as regards delivery, or whatever their conduct shows to have been considered as a delivery, controls.

11 Am. & Eng. Encyclop. Law, p. 285, and cases cited; and see the rule as laid down in *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, 78 U. S. 18 Wall. 222, 20 L. ed. 617; and in *Hardwick v. State Ins. Co.* 20 Or. 547.

The question was, What was the intent of Murphy as to the delivery of the policy? And he may testify to it.

Stewart v. State, 19 Ohio, 302, 58 Am. Dec. 426; *White v. Tucker*, 16 Ohio St. 468; *Bidinger v. Bishop*, 76 Ind. 245; *Seymour v. Wilson*, 14 N. Y. 567; *Danforth v. Carter*, 4 Iowa, 230; *State v. Temple*, 38 Vt. 88; *Delano v. Goodwin*,

tion. Relief F. Ins. Co. v. Shaw, 94 U. S. 574, 24 L. ed. 291; *Humphrey v. Hartford F. Ins. Co.* 9 Rep. 106.

A parol contract of fire insurance is valid. *Strohn v. Hartford F. Ins. Co.* 38 Wis. 630.

A parol contract of marine insurance is valid. *Northwestern Iron Co. v. Aetna Ins. Co.* 23 Wis. 160, 99 Am. Dec. 145; *Northwestern Iron Co. v. Aetna Ins. Co.* 26 Wis. 78.

It is not necessary that any writing whatever should have been executed. *Palm v. Medina County Mut. F. Ins. Co.* 20 Ohio, 520.

And that is the rule generally recognized.

First Baptist Church Trustees v. Brooklyn Fire Ins. Co. 19 N. Y. 305; *Sanborn v. Fireman's Ins. Co.* 16 Gray, 448, 77 Am. Dec. 412; *Stickley v. Mobile Ins. Co.* 87 S. C. 56; *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163, 9 Rep. 75; *Hamilton v. Looming Mut. Ins. Co.* 5 Pa. 839; *Lingenfelter v. Phoenix Ins. Co. of Hartford, Conn.* 19 Mo. App. 262; *Salisbury v. Hekla F. Ins. Co. of Madison*, 32 Minn. 460; *Westchester F. Ins. Co. v. Earle*, 38 Mich. 143; *Walker v. Metropolitan Ins. Co.* 66 Me. 371; *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *American Horse Ins. Co. v. Patterson*, 28 Ind. 17; *McKay v. O'Neil*, 22 N. S. 846.

There may be parol insurance to protect the applicant between the date of the application and the issuance of the policy. *Patterson v. Benjamin Franklin Ins. Co.* 81 Pa. 454; *Kelly v. Commonwealth Ins. Co.* 10 Bosw. 82.

A usage that a parol contract if made is considered invalid will be repugnant to law and void. *Emery v. Boston Marine Ins. Co.* 138 Mass. 396.

Insurance is not within the statute of frauds. *Howard Ins. Co. v. Owens*, 14 Ky. L. Rep. 361; *Walker v. Metropolitan Ins. Co. supra.*

A contract of insurance for one year, including its date, is not made void by the provision of the statute of frauds in reference to contracts not to be 22 L. R. A.

performed within one year. *Sanborn v. Fireman's Ins. Co. supra.*

A contract of insurance is not within the statute of frauds so as to prevent its being changed by parol. *Phoenix Ins. Co. v. Spiera*, 87 Ky. 286.

The statute of frauds does not avoid an undertaking to insure against a loss by fire of goods in possession of a carrier for transportation, as being an undertaking to answer for the default or miscarriage of another. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 81 Ala. 711.

Validity of parol contract assumed.

In many cases it is assumed that a valid parol contract might be made for the purpose of deciding some further question without directly expressing any opinion upon it. *Audubon v. Excelsior Ins. Co.* 27 N. Y. 216; *Hallock v. Commercial Ins. Co.* 26 N. J. L. 266; *Markey v. Mutual Ben. L. Ins. Co.* 118 Mass. 198; *Pittou v. Fire Ins. Assn.* 20 Fed. Rep. 766; *Const. v. Allegheny Ins. Co. of Pittsburgh*, 3 Wall. Jr. 813, 1 Am. L. Reg. N. S. 116; *Kohne v. Insurance Co. of N. A.* 1 Wash. C. C. 99; *Rames v. Home Ins. Co. of N. Y.* 94 U. S. 621, 24 L. ed. 236; *Piedmont & A. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Wainer v. Milford Mut. F. Ins. Co.* 11 L. R. A. 538, 158 Mass. 335; *Fleming v. Hartford F. Ins. Co.* 43 Wis. 616; *Taylor v. Phoenix Ins. Co. of Hartford*, 47 Wis. 366; *Strohn v. Hartford F. Ins. Co.* 37 Wis. 623, 19 Am. Rep. 777; *McCully v. Phoenix Mut. L. Ins. Co.* 18 W. Va. 782; *Flint v. Ohio Ins. Co.* 8 Ohio, 501; *Tyler v. New Amsterdam F. Ins. Co.* 4 Robt. 151; *McCann v. Aetna Ins. Co. of Hartford*, 3 Neb. 193; *Brownfield v. Phoenix Ins. Co.* 35 Mo. App. 54; *Johnson v. Connecticut F. Ins. Co.* 84 Ky. 470; *Bennett v. Connecticut F. Ins. Co.* 27 Ohio L. J. 15.

The validity of a parol contract was assumed in a case where the question was as to the authority

48 N. H. 208, and see, generally on this subject, 22 Cent. L. J. 271; *Larimore v. Wells*, 29 Ohio St. 13; *Kinney v. Folkerts*, 78 Mich. 687.

Mr. R. D. Marshall, for defendant in error:

An offer by one party imposes no obligation upon another until accepted by him, according to the terms in which the offer is made.

May, Ins. § 50.

If there has been no payment of the premium and no delivery of policy, the contract is *prima facie* incomplete, and he who claims under it must show that it was the intention of the parties that it should be operative, notwithstanding these facts.

May, Ins. § 56.

To constitute a valid contract of insurance, the minds of the parties must meet as to the premises and the risk; as to the amount insured; as to the time risk shall continue; and as to the premium.

First Baptist Church Trustees v. Brooklyn F. Ins. Co. 28 N. Y. 153.

There was no cancellation of the policy of the Norwich Union.

May, Ins. §§ 67, 69.

Williams, J., delivered the opinion of the court:

The facts of the case, as shown by the record, and about which there is no controversy, are substantially as follows: On the 30th day of June, 1884, the plaintiff, a corporation, owned and was operating a large manufacturing plant in the city of Newark,

and had been the owner and operator of it for several years. The defendant, a fire insurance company, then had an established agency in Newark, in the charge of H. D. Murphy, who was also the agent of a number of other fire insurance companies, among them the Norwich Union Company. He was a regularly commissioned agent of these companies, and was provided by them with blank applications, and policies duly signed by the proper officers, to be filled up and countersigned by him as agent, and delivered in the course of the business of his agency, and also with registers in which to keep a record of the business, and blanks for making reports of the same to the respective companies. He had, during the existence of his agency, issued a large number of policies of different companies represented by him, to the plaintiff, insuring its buildings, machinery, and stock against loss or damage by fire, one of which was a policy on the stock for five thousand dollars in the Norwich Union, issued a short time prior to June 30, 1884. There was an understanding between the managing officer of the plaintiff and Murphy, that the latter should keep the insurance of the plaintiff up to a certain amount, either by renewals, or new policies in good companies represented by him, and his course of dealing with the plaintiff under that understanding was to charge up the amount of the premiums to the plaintiff when policies were issued, or renewed, and have periodical settlements, usually once a month, when the premiums would be paid. The Norwich

of the agent to make the contract. *Angell v. Hartford F. Ins. Co.* 59 N. Y. 171, 17 Am. Rep. 322.

It seems to have been assumed that a parol contract might be made in *Suydam v. Columbus Ins. Co.* 18 Ohio, 459.

Charter or statutory provisions.

Of course the provisions of the charter or statute may preclude the right to make parol insurance, and such contracts would then be unenforceable. Statutes similar in language, but which are somewhat indefinite in terms have been differently construed by different courts.

If the charter of a mutual company provides that no one shall become a member until he has deposited his premium note, no parol contract, without the deposit of such note, can render the company liable. *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 383.

Under rules of the company that no policy shall be binding until the premium is paid, a promise by the treasurer to an applicant for insurance that he will see that the premium is paid, if anything should happen, will not render the company liable. *Buffum v. Fayette Mut. F. Ins. Co.* 8 Allen, 380.

And a similar ruling was made in *Mulrey v. Shawmut Mut. F. Ins. Co.* 4 Allen, 116, 81 Am. Dec. 639.

In *Somerset County Mut. F. Ins. Co. v. May*, 2 W. N. C. 43, an equally divided court affirmed a judgment in favor of the applicant, where the one taking the application failed to notify the applicant of the rejection of the application, although a by-law of the company required the approval of two directors to every application in order to bind the company.

There can be no original and binding contract by parol, if the charter provides that all conditions shall be printed or written on the face of the policy, and the by-laws require that the president shall

sign all contracts, and that all applications shall be in writing. *Henning v. United States Ins. Co.* 47 Mo. 425, 4 Am. Rep. 332.

But this decision has been modified if not wholly departed from by subsequent decisions from the same state. See *Baile v. St. Joseph F. & M. Ins. Co.* 73 Mo. 371; *Linsenfelter v. Phoenix Ins. Co. of Hartford, Conn.* 19 Mo. App. 253.

It has been held that—

A provision in the charter of a corporation that the contract shall be in writing or print and under the seal of the corporation does not prevent the making of a binding oral contract to issue a policy. *Franklin F. Ins. Co. v. Colt*, 37 U. S. 20 Wall. 560, 22 L. ed. 423.

A statute that insurance companies can make valid policies of insurance only by having them signed by the president and countersigned by the secretary does not prohibit the making of a valid oral agreement to insure. *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co. of N. Y.* 60 U. S. 19 How. 318, 15 L. ed. 636, affirming *Union Mut. Ins. Co. v. Commercial Mut. M. Ins. Co.* 2 Curt. C. C. 524.

A provision of a charter that all conditions of the policies issued by the company shall be printed or written on the face of the policy and that certain named officers shall sign the policies or contracts made by order of the directors, will not prevent the company from making a valid oral contract. *Henning v. United States Ins. Co.* 2 Dill. 23.

A provision that in the absence of the president policies shall be signed by two directors does not prevent the making of parol contracts. *Emery v. Boston Marine Ins. Co.* 138 Mass. 398.

A statute requiring all policies to be signed does not prevent parol insurance. *Walker v. Metropolitan Ins. Co.* 56 Me. 371.

A provision of the charter that policies shall be

Union not desiring to carry so large an insurance on the plaintiff's stock, a few days prior to the 30th of June, 1884, directed Murphy to reduce its risk to \$2,500. He, thereupon, on the 30th day of June, 1884, filled up, for that amount, one of the blank policies which that company had furnished him, duly signed by its proper officers, and countersigned it as agent, and at the same time filled up, for the same amount, one of the blank forms of policy with which the defendant company had supplied him, duly signed by its officers, and countersigned the same as its agent, ready for delivery. He made the customary entries of the issuing of the policies, in the registers of the respective companies, and in that of the Norwich Union an entry also of the cancellation of the five thousand dollar policy, in place of which the two policies he had so filled up were intended to be substituted. On the 2d day of July, 1884, he forwarded to the defendant, at its home office, in Covington, Kentucky, what is called a daily report, in which he gave the number of the policy he had written for the plaintiff, its date, amount, and duration, the rate and amount of the premium, a description of the property insured, and other particulars of the risk. This report was received at the home office July 3, 1884. The premium on the five thousand dollar policy had been fully paid by the plaintiff, and when the entry of its cancellation was made the policy had run but a short time. The unearned or return premium was carried to the credit of the plaintiff on the books of the

agent, and the amount of the premiums due on the two new policies was charged to the plaintiff, by the agent, in accordance with his previous custom. At the next regular settlement between the plaintiff and the agent, which was made July 7, 1884, there was due him from the plaintiff, on account of premiums on various policies, the sum of \$438.55, which amount included the balance due on the policy of the defendant. The amount due on the account was then paid by the plaintiff. When the policy of the defendant was written, and the cancellation entered of the Norwich Union policy, the latter was in the possession of F. S. Wright, cashier of the First National Bank of Newark, as collateral. Wright was also vice-president of the plaintiff, and looked after its insurance. On the 30th day of June, 1884, after writing and executing the two new policies, and entering the cancellation of the one for which they were intended to be substituted, the agent called at the bank to see Mr. Wright, take up the policy so held by him, and deliver the new ones in its place. Wright was absent, and the agent failed to see him. He called several times within the next day or two with like results, and did not see Wright until the evening of July 8, 1884, after the bank had closed. The agent then informed Wright that, at the request of the Norwich Union Co. he had canceled its policy for \$5,000 which Wright then held, and issued to the plaintiff in its place, two other policies for \$2,500 each, which he proposed to deliver, and take up the canceled policy.

signed by the president and countersigned by the secretary does not prevent the making of parol insurance. *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

A charter requirement that all policies of insurance must be signed, countersigned, and sealed does not prevent a parol agreement to insure. *Davenport v. Peoria Marine & F. Ins. Co.* 17 Iowa, 276.

A requirement that the policies and contracts of insurance shall be in writing does not prevent a parol contract of insurance. *Security F. Ins. Co. of N. Y. v. Kentucky Marine & F. Ins. Co.* 7 Bush, 81, 8 Am. Rep. 301.

Permission to contract in writing, signed and countersigned, does not prohibit a parol contract. *Cooke v. Etina Ins. Co. of N. Y.* 7 Daly, 555.

But on the other side it has been held that under a charter providing that the policies must be signed and countersigned no parol insurance was valid. *Spitzer v. St. Marks Ins. Co.* 6 Duer, 6; *Sandford v. Trust F. Ins. Co.* 1 N. Y. Legal Obs. 214.

Contract to insure.

¹ Notwithstanding the slight conflict of opinion there is general agreement that an agreement to insure property need not be in writing to bind the insurer. *Ruggles v. American Cent. Ins. Co.* 114 N. Y. 415; *Fish v. Cottenet*, 44 N. Y. 538; *Campbell v. American F. Ins. Co. of Philadelphia*, 73 Wis. 100; *Balle v. St. Joseph F. & M. Ins. Co.* 73 Mo. 371; *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347; *People's Ins. Co. v. Paddon*, 8 Ill. App. 447; *Hartford F. Ins. Co. v. Wilcox*, 37 Ill. 180; *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711; *Home Ins. Co. v. Adler*, 77 Ala. 242.

In *Sandford v. Trust F. Ins. Co.*, 11 Paige, 547, 2 L. ed. 231, the chancellor said he was not prepared to

say that there could not be a parol agreement for insurance, capable of enforcement in equity.

At common law a promise to make a policy of insurance is not required to be in writing. *Commercial Mut. M. Ins. Co. v. Union M. Ins. Co. of N. Y.* 60 U. S. 19 How. 318, 15 L. ed. 638, affirming *Union Mut. Ins. Co. of N. Y. v. Commercial Mut. M. Ins. Co.* 2 Curt. C. C. 524.

A parol agreement to execute an open policy to cover certain described property is valid. *Hening v. United States Ins. Co.* 2 Dill. 28.

A mutual company may make a valid parol contract to insure. *Van Loan v. Farmers Mut. F. Ins. Asso.* 90 N. Y. 230.

A contract for insurance is not within the statute of frauds of Indiana. *Peoria Marine & F. Ins. Co. v. Walser*, 23 Ind. 78.

A contract to insure for three years, the insurance to begin within one year, is not within the statute of frauds. *Wiebeler v. Milwaukee Mechanics Mut. Ins. Co.* 30 Minn. 464.

In *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645, 72 Am. Dec. 379, the court said: "The bargain for insurance is treated as binding prior to the issuance of the policy, when there is a completed contract," without laying stress on whether the contract was in writing or not.

In considering the question of power to reform a policy, the court says a contract to insure may be by parol. *Phoenix Ins. Co. of N. Y. v. Ryland*, 1 L. R. A. 648, 69 Md. 437.

Agreements to insure enforced.

In some cases agreements to insure have been enforced, without anything in the case to show whether the contract was in writing or not. *Carpenter v. Mutual Safety Ins. Co.* 4 Sandf. Ch. 408, 7 L. ed. 1152; *Hebert v. Mutual L. Ins. Co.* 13 Fed. Rep. 307.

Wright replied, that was all right, all he wanted was to have it so that the amount was the same, and he (the agent) could call at the bank any time when it was open, and make the exchange, and if he (Wright) was not in, the person in charge would make the exchange for him. There appears to have been no reason why the exchange was not made at the time of the interview on the evening of July 3, except that the bank was then closed. No claim was thereafter made by the plaintiff to the canceled policy; nor was there any question, at the trial, of Wright's authority to act for the plaintiff, or of that of the agent, Murphy, to act for the defendant. The property was totally destroyed by fire on the 5th day of July, 1880. At that time the new policies had not been actually delivered, or the old one taken up. Immediately after the fire, the defendant was notified of it by telegram from the agent, who received from the defendant the following response: "Yours received. Have telegraphed you for list of companies on stock with us. The list sent to Cincinnati made no mention of Kenton, and we were willing to be ignored. George C. Coker, Secretary." It was admitted on the trial, that proof of the loss was duly made and filed with the defendant; that Wright then had no interest in the claim, and, if the plaintiff was entitled to recover, the amount of the recovery should be \$2,500 with interest from September 30, 1884.

It does not appear that the names of the companies in which the new policies had

been written, were mentioned in the interview between Wright and the defendant's agent, nor the rate or amount of the premium, nor the duration or conditions of the policies; and it is claimed by the defendant that there was, therefore, no mutual assent of the parties to either of those terms, and so, no completed contract of insurance between them. It is undoubtedly true that those are essential elements of a contract of insurance, and if there was not a meeting of the minds of the parties upon them, the contract was not consummated, and no risk attached. But it is equally true that the agreement need not be expressed in words; it may be implied from the circumstances, and conduct of the parties.

If the case of *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 143, in which it was held that a policy of insurance, to be valid, must be in writing, was not virtually overruled by the case of *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 845, as it was said to have been by Okey, J., in the case of *Amazon Ins. Co. v. Wall*, 81 Ohio St. 633, it has been so qualified by these subsequent cases as to limit the rule it announced to policies in their strict technical sense, and leave unaffected by it parol contracts of insurance.

It is now well settled that a policy is only evidence of the contract, and the latter may be shown by parol, when the policy has not been written, or is withheld, unless such contract is forbidden by statute, or a provision of the companies' charter which is brought to the notice of the other contracting party.

The issuance of a policy may be enforced. *Woody v. Old Dominion Ins. Co.* 31 Gratt. 322.

Specific performance may be compelled of an agreement to insure. *Gerrish v. German Ins. Co.* 55 N. H. 355; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Hartford F. Ins. Co. v. Parrish*, 73 Ill. 166; *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441.

The assured need not compel an execution of the policy, but may proceed immediately for the amount of the injury. *Rockwell v. Hartford F. Ins. Co.* 4 Abb. Pr. 179.

Agreement to renew or extend the policy.

A parol agreement to renew an existing policy is enforceable. *Springer v. Anglo-Nevada & Assur. Corp.* 38 N. Y. S. R. 543; *Post v. Aetna Ins. Co.* 43 Barb. 361; *Scott v. Home Ins. Co.* 53 Wis. 238.

An agreement to renew from year to year until notice shall be given of the termination of the agreement is not within the statute of frauds. *First Baptist Church Trustees v. Brooklyn F. Ins. Co.* 19 N. Y. 305.

An agreement to renew a policy which expires about ten months after the agreement is made, is not void as not to be performed within a year, although it provides for the renewal each year afterwards so as to constitute a permanent risk. *First Baptist Church Trustees v. Brooklyn F. Ins. Co.* 18 Barb. 69.

But it has been held that—

A promise to renew will not support an action, unless the premium was paid or tendered. *Crogham v. Underwriters' Agency of N. Y.* 53 Ga. 109.

An agreement to renew a policy which is to expire in the future will not support an action for the loss in case the policy is not issued, and the property is subsequently burned. *Idaho Forwarding Co. v. Fireman's Fund Ins. Co.* 17 L. R. A. 586, 8 Utah, 41.

22 L. R. A.

An agreement that an existing policy shall cover the interest of a new owner may be made by parol. *Pratt v. New York Cent. Ins. Co.* 64 Barb. 589.

A valid parol agreement may be made to indorse an additional risk on a policy, which provided that no risk shall be binding until indorsed thereon. *Emery v. Boston Marine Ins. Co.* 138 Mass. 398.

A written policy may, by parol, be made to cover additional property. *Kennebec Co. v. Augusta Ins. & Bkg. Co.* 6 Gray, 204.

A parol confirmation of the policy to a new owner of the property is valid. *Wood v. Rutland & A. Mut. F. Ins. Co.* 31 Vt. 552.

A parol agreement to an assignment of a policy is valid. *Amazon Ins. Co. v. Wall*, 31 Ohio St. 633, 27 Am. Rep. 533.

Contract not fully completed.

A receipt for the premium may be sufficient to evidence the contract. *Lightbody v. North American Ins. Co.* 23 Wend. 18.

If, after an agreement to insure, the policy is made out and left in the possession of the agent for a month, the question is for the jury whether or not a reasonable time had expired, and if so whether or not reasonable exertions had been made to give notice that the policy was ready for acceptance and payment expected; and if such is found to be the case the contract may be treated as at an end. *Baxter v. Massachusetts Ins. Co.* 18 Allen, 520.

Parol superseded by written contract.

An oral contract cannot be relied on as having been made before the loss occurred, if a written one was executed, delivered, and paid for afterwards. *Merchants Mut. Ins. Co. of New Orleans v. Lyman*, 82 U. S. 15 Wall. 664, 21 L. ed. 246.

English decisions.

In *Mead v. Davidson*, 3 Ad. & El. 303, 4 Nev. & M. 701, 1 Harr. & W. 156, in holding the com-

Ostrander, Ins. §§ 18, 14; Richards, Ins. § 140; *Relief Fire Ins. Co. of N. Y. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Dayton Ins. Co. v. Kelly*, *supra*; *Palm v. Medina County Mut. F. Ins. Co.* 20 Ohio, 529, 537. And, as in other cases of parol contracts, the terms of the agreement, and the assent of the parties to them, may be shown by their acts, and the attending circumstances, as well as the words they have employed. There was, in this case, no express agreement in regard to the property to be insured by the new policies. The property was not mentioned in the interview between the defendant's agent and Wright. But, as it was agreed the new policies were to be exchanged for the canceled policy, it must have been as clearly understood as if it had been expressly stated, that they were to cover the property included in the canceled policy. So, in regard to the rate and amount of the premium, and form and conditions of the policy. It is not claimed that the conditions of the defendant's policies, or its rate of insurance are different from those of like companies; and, it is generally known that the form and conditions of fire policies in use by good companies do not differ substantially, and the rates of insurance are established, and uniform on the same classes of property. And where nothing is said, in the negotiation for insurance, about special rates or conditions, it may be presumed that those which were usual and customary, were intended. In Richards on Insurance, 2d ed. section 42, it is laid down, as a general rule, that "whether the con-

tract of insurance is closed by parol or by a preliminary binding receipt, the legal presumption is that the usual policy is to follow." And in the preceding section, the same author says, that it is not necessary that all the particulars of a contract should be made the subject of express stipulation, "for it may well be understood, in the absence of express declaration to the contrary, that the usual form of policy is acceptable to both parties." It was held by the Supreme Court of Minnesota, in *Salisbury v. Hekla Fire Ins. Co. of Madison*, 32 Minn. 460, that, "upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued, the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases." And in *Eames v. Home Ins. Co. of N. Y.*, 94 U. S. 629, 24 L. ed. 301, *Mr. Justice Bradley*, says: "It is sufficient if one party proposes to be insured, and the other party agrees to insure, and the subject, the period, the amount and the rate of insurance is ascertained or understood, and the premium paid if demanded. It will be presumed that they contemplate such form of policy, containing such conditions and limitations as are usual in such cases, or have been used before between the parties. This is the sense and reason of the thing, and any contrary requirement should be expressly notified to the party to be affected by it."

Upon the facts of the present case, there can be but little doubt that the contract of insurance made by the defendant through its

pany liable on a policy executed after the loss of the ship had been reported, the court said: "Equity would have compelled the execution of the policy in accordance with the agreement which had been previously made."

But under 80 Vict., chap 23, no marine insurance is valid, unless contained in a stamped policy. *Ionides v. Pacific F. & M. Ins. Co.* L. R. 6 Q. B. 674, 41 L. J. Q. B. 58, 25 L. T. N. S. 490, L. R. 7 Q. B. 517, 41 L. J. Q. B. 190, 26 L. T. N. S. 738, 21 Week. Rep. 22.

So an agreement to execute a marine policy cannot be enforced. *Fisher v. Liverpool Marine Ins. Co.* L. R. 8 Q. B. 469, 42 L. J. Q. B. 224, 28 L. T. N. S. 387, 22 Week. Rep. 13.

The above statute and decisions do not seem to apply, however, to fire policies.

In *Morocco Land & Trading Co. v. Fry*, 11 Jur. N. S. 76, 11 L. T. N. S. 618, 18 Week. Rep. 310, the court refused to compel the execution of a policy in accordance with the insurer's slip.

But in *Christie v. North British Ins. Co.*, 3 Shaw & D. 360, it is intimated that insurance might be effected without the delivery of a policy; but it is held that the agent's statement that the applicant might hold himself insured would not support an action as upon a policy, whether it would support another kind of action or not.

In *Mackie v. European Ins. Co.*, 21 L. T. N. S. 108, 17 Week. Rep. 367, the company was held liable on a binding receipt for the value of property burned before the policy issued.

So it has been held that the binding slip on an unstamped instrument may constitute a fire contract. *Thompson v. Adams*, L. R. 23 Q. B. Div. 361.

In *Jones v. Provincial Ins. Co.*, 16 U. C. Q. B. 477, an action brought to recover the amount alleged to be due for a fire loss was held not to be maintainable because no policy had issued. The court intimated that no insurance could be effected by 22 L. R. A.

parol; but that there might be an action for failure to deliver the policy, or in equity to compel specific performance.

The date of the issuance of the slip and not that of the policy is to be regarded in determining the question of concealment. *Lishman v. Northern M. Ins. Co.* L. R. 10, C. P. 179; *Cory v. Patton*, L. R. 7 Q. B. 304.

Presumption as to powers of agent.

An agent of an insurance company is presumed, in favor of third parties, to have power to bind the company by parol contracts for insurance. *Bauble v. Aetna Ins. Co.* 2 Dill. 156; *Taylor v. Germania Ins. Co.* 2 Dill. 223.

But the authority of an agent to make parol contracts of insurance will not be presumed. *Aetna Ins. Co. v. North Western Iron Co.* 21 Wis. 453.

Cases not in point.

There are cases in which the question of the validity of parol insurance has been raised but which have gone off on other points so as to leave that question undecided.

In *Putnam v. Home Ins. Co.*, 123 Mass. 324, 25 Am. Rep. 93, the question was as to the authority of the agent to make a temporary parol contract which would bind the company.

For the purposes of determining the priority between two policies the date of the parol contract must be considered. *Hubbard v. Hartford F. Ins. Co.* 33 Iowa, 325, 11 Am. Rep. 123.

There are many cases in which suits have been held not maintainable on the ground that no contract had been perfected between the parties. Of this class of cases the following are examples. *Myers v. Liverpool & L. & G. Ins. Co.* 121 Mass. 333; *Sargent v. National F. Ins. Co.* 36 N. Y. 623; *O'Reilly v. London Assur. Corp.* 101 N. Y. 575. H. P. F.

agent, with the plaintiff, was complete in all its terms. The plaintiff had previously arranged with the agent to keep its insurance up to a certain amount, in good companies for which he was authorized to act. This arrangement virtually left the selection of the companies to the discretion of the agent; and, acting under it, he had written the policy of the defendant and the new policy of the Norwich Union Company, each for \$2,500, and duly countersigned both ready for delivery to the plaintiff, and entered the cancellation of the policy which Wright had in his possession, before the interview of July 3. The policy of the defendant was then complete, containing a description of the property, the amount, commencement, and duration of the risk, the rate and amount of the premium, and all the terms and conditions usual in such policies. This policy, and the new policy of the Norwich Union, the agent proposed to Wright to exchange for the canceled policy, without condition or qualification. The proposition was immediately assented to, and accepted, without any qualification or condition whatever. The terms of the contract of insurance thus proposed by the defendant, through its agent, were definite and certain in every particular; they were those set forth in the policy. The acceptance was as broad as the proposition, and was therefore an acceptance of all the terms and conditions of the policy as it was written. That the plaintiff chose to accept the proposition, unqualifiedly, without further inquiry or examination, affords the defendant no ground for claiming the contract was, on that account, incomplete. The only reason the exchange was not then made was, that the canceled policy was locked up in the bank. The parties evidently regarded the exchange as complete; and thereafter, the agent was a mere custodian of the policy in question, for the plaintiff, and the actual handing of it over was not essential to the risk. Effect will be given to the intention of the parties; and what their conduct shows they considered a delivery, must control, in determining whether it was made. *Biddle*, Ins. § 149; *Dibble v. Northern Assur. Co. of London*, 70 Mich. 1; *Bodine v. Exchange F. Ins. Co. of N. Y.* 51 N. Y. 117, 10 Am. Rep. 566; 11 Am. & Eng. Encyclop. Law, p. 285.

It is quite evident the agent considered the policy of the defendant in full force. He reported it as such to the company; and that the latter so treated it, even after the fire, is shown by its telegram to the agent, inquiring what companies were "on stock with us." The policy was on the stock of the plaintiff in its manufactory. The manual surrender by Wright, of the policy in his possession, was not, we think, necessary to effect its cancellation. His assent to the cancellation made by the agent was sufficient. It then ceased to be of any force, and was so treated by the parties.

The only other ground upon which it is claimed the defendant is not liable is, that the premium was not paid until after the loss occurred. Murphy was the duly commissioned agent of the defendant, authorized to make contracts of insurance, collect pre-

miums, and issue and renew policies; and, to that end, was furnished by the defendant with printed forms of policies, signed in blank by the president and secretary of the company, to enable him, without conference with them, to countersign and issue the policies in behalf of the company. It is well settled that such an agent is the general agent of the company, and may, in his dealings with those he insures, waive payment in cash, of the premiums, and, indeed, any of the conditions of the policy, except when a restriction upon his authority is in some way brought to the knowledge of the insured. In a recent and valuable work on insurance, it is said, that a fire policy "does not ordinarily make the payment of the premium a condition precedent to the validity of the contract, and a general agent may of course extend credit to the insured, or not, as he chooses. The general custom where credit is given, is for the agent to do so on his own responsibility. But in case the agent should make default in accounting to the company the policy will nevertheless be valid. And though the policy provide that it shall not take effect until the premium is paid in cash, the general agent has power to waive the premium, and will be held to have waived it if he delivers the policy without enforcing payment." *Richards*, Ins. 2d ed. § 95. And in section 98 of the same work, that author says: "An agent of a life company who is intrusted with the business of closing the contract by delivering the policy is held to have an implied authority to determine how the premium then due shall be paid, whether by cash, or, as is sometimes done, by giving credit, in which case the agent becomes the creditor of the insured, and the debtor of insurer. In that event, though the agent subsequently defaulted and the money never reached the company, the policy would still be binding. By the weight of authority the agent is held to have this discretionary power, although the policy in terms denies it; but this is based upon his possession of the document for purposes of delivery, and his instructions to deliver it, and consequently his power does not extend to subsequent premiums or premium notes." *Bodine v. Exchange F. Ins. Co. of N. Y.* 51 N. Y. 117, 10 Am. Rep. 566. The authorities on this subject are extensively collected in that very convenient, and almost indispensable work, *The American and English Encyclopedia of Law*, vol. 11, page 833. The waiver of the payment of the premium in cash is an act within the exercise of the agent's general authority to issue policies and collect the premiums, and such waiver may be either express or implied. And when, as in the case before us, it has been the custom of the agent, under an arrangement with the insured by which the latter's insurance should be kept up to a certain amount by renewals or new policies, to charge the insured with the premiums as policies were issued or renewed, and have periodical settlements, when the premiums would be paid, a credit for a premium so charged, to the next period of settlement may be fairly implied.

We see no reason, upon the facts of this case, why the plaintiff should not recover, as it did in the court of common pleas.

The judgment of the Circuit Court is therefore reversed, and that of the Common Pleas affirmed.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

GEORGIA PACKING CO. *et al.*

v.

Mayor and Council of MACON.

(.....Fed. Rep.)

1. A license tax of \$500 per annum imposed on every person selling in a city any meat which is not from animals of his own raising, unless he rents a stall in a public market, while the rent of such stall is \$150 per year and the market regulations are so restricted and burdensome as to preclude the reasonable conduct of a wholesale business there, is unconstitutional in respect to wholesale dealers in meat brought from other states, by reason of the necessarily resulting discrimination against them, although the ordinances on the subject on their face purport to apply to vendors irrespective of the places from which it comes,—especially where neither sales nor inspection of meat are restricted to the market, and the regulations are clearly made for the purpose of revenue and not merely to prevent the sale of uninspected meat.

3. The enforcement of city ordinances which attempt an unconstitutional interference with interstate commerce may be restrained by injunction from a federal court.

(August 2, 1896.)

SUIT to enjoin defendants from enforcing against complainants the provisions of a city ordinance regulating the sale of dressed meats. *Judgment in favor of complainants.*

Statement by Speer, J.:

The complainants are wholesale and retail butchers in the city of Macon, in this district. They supply meats to the people of Macon and the surrounding country, dealing exclusively in dressed meats. They do not slaughter. Five sixths of the meats they furnish their customers are cattle reared in western states, killed and dressed there, and shipped in refrigerating cars to Macon. These are of a better quality than the meats obtained in the country contiguous to Macon, and the complainants state for that reason would naturally be regarded with more favor by the public, if the complainants had the equal protection of the laws; but complainants insist that this is not the case, for that the mayor and council of the city of Macon are depriving them of the equal protection of the laws, and of due process of law, and of the right they have to conduct their business conformably to law. The gravamen of the complaint is that on the second day of June, 1888, certain market regulations were

enacted for Macon; market hours were prescribed, as follows: In winter from daylight until ten o'clock. In summer from 8 A. M. to 9 A. M. By the municipal law, winter begins October 1, and summer, April 1; but on Saturdays the market house is open from 8 o'clock P. M. to 8 o'clock P. M. in winter, and 9 o'clock in summer. These regulations further provide that it is unlawful to sell or offer for sale any meats on the streets or elsewhere in the city of Macon during said market hours, and heavy penalties are prescribed for a violation of this rule. Stalls are rented in the market, but none for a sum less than \$150 per annum, but although a butcher may rent a stall, yet his business is practically destroyed for the ordinance provides that no person shall be permitted to buy more at the market than is necessary for the use of his or her family, except during the last hour of the market hours, and further that no person shall sell, or contract to sell, to any one, any article of produce or meat which is to be delivered after market hours, outside of the market building. Not only, therefore, is complainants' business cut off elsewhere during the market hours, but even as renters of stalls they claim they are so hindered and limited as to prevent them from selling meats in any considerable amount to those who are willing to buy. It is further provided by the market ordinances that all persons, not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon, at any time during the day or night, shall pay a license tax of \$500 per annum, said license to be paid in advance; provided, this section shall not apply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves after market hours. By this last clause we may safely presume it is meant that it shall not apply to farmers bringing into the city for the purpose of sale, after market hours, the flesh of any animal raised by themselves.

It is further provided that after the expiration of market hours every person having any product or article for sale shall remove the same from the market place. On account of this last provision, the complainants complain that they are forced to haul their meats to and from the market at great trouble, expense, and annoyance. That on account of the restrictions and hindrances above mentioned, although the market hours constitute the principal portion of the day when the people have ordinarily been accustomed to make their purchases of meat, yet the sales at the market do not constitute one half of the sales at retail made after market hours at the complainants' respective places of business elsewhere in the town, so that a large part of their capital and time are wasted

NOTE.—The opinion in the above case very fully presents the subject of license taxes as affecting interstate commerce in meat, and illustrates it by a striking instance of an unlawful attempt to restrict such trade.

during market hours. That the ordinance further provides "that a license shall be imposed on butchers or others who have no stall in the market and who shall sell from any shop or wagon (other than nonresidents selling meats of their own raising); and no license shall be issued for less than five hundred dollars." This, it is alleged, is a discrimination in favor of the producers, of meat raised in the country tributary to Macon, and against meat producers who make their products in the western markets, and ship them for sale to Georgia.

The license tax, exclusive of the market ordinance, for the year 1893 upon wholesale dealers in meat, selling to the trade only, is \$25.

Complainants aver that the wholesale meat trade in Macon handles western meats only. There is not enough meat produced in the country around Macon to create a wholesale business, and the tax operates to put a burden upon interstate commerce and to give an undue advantage to dealers in meats raised near Macon. If the complainants should not rent a stall in the market house under these ordinances, they must pay a license of \$500, even though they sell only after the market hours are over, while farmers from the surrounding country may retain meats brought into the city without any license whatever. The market ordinance, undertaking to prevent the sale of meat on the streets of the city of Macon outside of market hours expressly recognizes such sales. It is not, therefore, an ordinance intended to prevent the selling of meats on any particular street or in any particular locality. Nor does it provide for the inspection of meats elsewhere than at the market, and in point of fact the officials of the city have at no time undertaken to inspect meats elsewhere than in the market house. It is, then, not an ordinance, made for the protection of health, or for the inspection of meats, or for compelling the sale of meats in a particular locality, which might be done under the exercise of the police power; but that under the guise of police regulation, it is an ordinance wholly for the collection of a revenue. That as such it is in violation of the constitution of the state of Georgia and of the United States, in that it prescribes a cheaper license tax for those who sell in the market and at their regular place of business, than for those who sell at their regular place of business, and no tax at all for farmers selling in the city after market hours, while handlers of western meats, not stall holders, must pay a tax of \$500 to sell in the city after market hours. The constitution of the state of Georgia provides that "all taxation shall be uniform upon the same class of subjects." The Constitution of the United States provides that "the citizens of the different states shall be entitled to the equal protection of the laws."

One of the complainants, W. L. Henry, has already been arrested for offering wholesome western meats for sale at his place of business and selling during market hours, and was tried before the recorder of the mayor and council of the city of Macon, on the charge that he had sold meat at his said place

of business during the aforesaid market hours, and was fined \$25 and costs. This was appealed to the supreme court of the state which court held that the ordinance was valid. The mayor and council of the city of Macon threaten to continue to arrest and fine complainants every time they undertake to sell, or offer for sale, during market hours, any meats, at their said places of business.

Complainants further aver that they will each be damaged in very large amounts, exceeding the sum or value of \$2,000, exclusive of costs.

The bill prays that the court will grant a writ of injunction perpetually enjoining and restraining the defendants, their clerks, attorneys, agents, servants, and employes from enforcing or endeavoring to enforce against complainants any penalty provided in said ordinances for selling or offering for sale any of said meats at their respective places of business or elsewhere in the city of Macon, otherwise than at said market house, or from selling their meats at any time during said market hours; and be further enjoined from collecting or attempting to collect the license fee fixed by said ordinances for the sale of meats elsewhere than in said market house; and further from interfering with complainants for selling at any time during market hours such meats as they may have to offer for sale, to all persons who may there desire to buy, and that said market ordinances may be decreed to be unconstitutional and void. They ask for a provisional injunction *pendente lite*.

The mayor and council of the city of Macon demur to the bill for want of jurisdiction in this court upon the ground that all the parties are citizens of the state of Georgia, and further, because it does not appear that a question is raised depending upon the violation of any part of the Constitution of the United States; and they answer that they have the right to regulate the selling of meat in the city of Macon, and to confine the sales thereof to the market house in said city during market hours. They further answer that they have the right to fix a license for the sale of meats and other articles in said city. They deny that the effect of the licenses so fixed by them in any way violates the Constitution or the statutes of the United States.

No preliminary injunction was granted, and the facts not being in dispute, the court has taken under advisement the matters presented by the bill, the answer, and the demurrer.

Mr. Marion Erwin for complainants.
Mr. R. W. Patterson for defendants.

Speer, J., delivered the following opinion:

It will be observed from the averments of the bill that there is no attempt to prohibit the sales of meats elsewhere than in the market house of the city. The ordinances in question, therefore, are not directed towards the avoidance of the green grocers and butcher shops. It cannot, we think, be denied that it is within the power of the city to fix one or more localities for the sale of meat. This

may be done to facilitate inspection but since by permission of the city a very large amount of the meat is sold at the butcher shops, and places of business, elsewhere than in the market, it is evident that the prohibition of sales during market hours at such places is not intended to prevent sales of un-inspected meat. It is true it appears, in point of fact, that the city authorities do not inspect meats except at the market house, yet the ordinance authorizes them so to do. After providing that "no person shall sell any article not wholesome for food," it provides that "the clerk and inspector shall seize any such article he may find in the market and cause it to be destroyed, and the offender shall be punished, etc." The meaning of the word "market" in this sense cannot be market house, but in its broadest sense relates to and embraces all articles of food offered for purchase or sale in the city. The city law, therefore, expressly authorizes the maintenance of butcher shops at any place in the city, and further provides for the inspection of meats at such places. It cannot then be satisfactorily argued that these regulations are made, either to compel the concentration of the meat business at the market house or to facilitate the inspection of meats. If in order to facilitate inspection, the ordinance had expressly forbidden the sales of meats in the city, elsewhere than at the market house, it might not have been difficult to sustain its constitutionality, even though it might have gravely interfered with interstate commerce. Such an ordinance would seem to be within the legitimate police powers of the city. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 894; *Butchers Union, S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 748, 28 L. ed. 585. But the ordinance not being of this character, the argument in its support based upon that theory must logically fail. *vide* opinion of *Mr. Justice Harlan* in *Minnesota v. Barber*, 136 U. S. 329, 34 L. ed. 461, 3 Inters. Com. Rep. 185. *vide* also *Spellman v. New Orleans*, 45 Fed. Rep. 8; *Ex parte Kieffer*, 40 Fed. Rep. 399.

It is not disputed that the business conducted by the complainants is almost entirely that of selling meats raised in the western states. These meats are transported to Macon and stored and offered for sale by means of refrigerating apparatus. Complainants thus engaged must in obedience to the ordinance rent a stall in the market and pay \$150 therefor. They must, if engaged as wholesale dealers, also pay a license tax of \$25 for the privilege of carrying on their business. From these burdens, one who deals in meats produced in the surrounding country is wholly exempt. Not only is this true, but in the most important hours for that purpose, during the day, the complainants are denied the right of making sales of any amount, for the reason that their places of business elsewhere than in the market house must be closed, and in the market house they are permitted to sell to any one person no more than enough for consumption in one day, while this is true, the producers of meat in this state may sell before and after market hours any amount they please, without the imposi-

tion of any tax or license charge whatever. It cannot be denied that the effect of this discrimination operates severely against the sale of meat produced in other states, and whatever may be the power of the city government to discriminate between the producers of meat in the surrounding country, and those who sell the same meat in the city, they have no power to make a regulation which operates in favor of home products and against the production of other states, and such regulations are in contravention of the Constitution of the United States. Nor does it matter how such regulations are denominated or how they are expressed. In the case of *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347, it was declared by the Supreme Court that a license tax, required for the sale of goods is in effect a tax upon the goods themselves; and further that the statute of Missouri which required the payment of a license tax from persons who deal in the sale of goods, wares, and merchandise, which are not the growth, produce, or manufacture of the state, by going from place to place to sell the same in the state and requires no such license tax from persons selling in a similar way goods which are the growth, produce, or manufacture of the state, is in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states. They hold further that this power protects property, "which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation until it has mingled with or become a part of the general property of the country, and protects it even after it has entered a state from any burdens imposed by reason of its foreign origin." The decision itself was pronounced by that venerable and illustrious jurist, *Mr. Justice Field*, who for years has devoted his undoubted genius to an unswerving defense of what he has deemed to be the rights of the states against encroachments of the national authority. It will not be denied he declares that that portion of commerce with foreign countries and between the states which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. The depressed condition of commerce and the obstacles to its growth previous to the adoption of the constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question. "It was regulated," says *Chief Justice Marshall*, in delivering the opinion in *Brown v. Maryland*, "by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress indeed, possessed the power of making treaties; but the inability of the federal government to enforce them became so apparent as to render that power in a great degree useless. Those who felt

the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control of this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress." 25 U. S. 12 Wheat. 446, 6 L. ed. 688. He continues: "The power of the state to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one state and injurious to the interests of other states and countries, which existed previous to the adoption of the constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the states." What a state may not do, it may not authorize a city to do. *Mr. Justice Miller* in his luminous and valuable lectures on the Constitution, upon exhaustive consideration of authority expresses the same conclusions. *Miller, Const.* §§ 9, 433-473.

In the case of *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, the Supreme Court passed on this state of facts: The state of Virginia had enacted a statute which provided that all flour brought into the state and offered for sale therein shall be reviewed, and have the Virginia inspection marked thereon, and imposing a penalty for offering such flour for sale without such review or inspection. The court held this to be repugnant to the commerce clause of the constitution, because it is a discriminating law, requiring the inspection of flour brought from other states when it is not required for flour manufactured in Virginia.

In the case of *Brimmer v. Rebman*, 188 U. S. 78, 84 L. ed. 862, 8 Inters. Com. Rep. 485, *Mr. Justice Harlan* delivering the opinion of the court remarked: "Undoubtedly a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon congress, or infringe on those granted and secured by that instrument. But it may not under the guise of exerting its police powers enact inspection laws and make discriminations against the products and industries of some states in favor of the products and industries of its own or other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the constitution to compete in the markets of Virginia upon terms of equality with the owners of like meats from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any regulation which, in terms or by its necessary operation

denies this equality in the markets of the state is, when applied to the people and the products or industries of other states, a direct burden upon commerce among the states and therefore void." Of this case we may say, in the language of *Justice Bradley*: "The decision in the case is so directly apposite to the present that it is unnecessary to prolong the discussion or to cite further authorities." *Voight v. Wright, supra*.

It is clearly evident that the local regulations of the city of Macon, imposing a tax of \$500, or \$150 and other restrictions on the selling of western meats and nothing of the kind on the sale by producers of their own meats raised in this state, by its necessary operation, denies to the former equality in the markets of his state and is a direct burden upon the commerce among the states and is therefore void. See also *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527. The language of the ordinance is: "All persons not renting a stall at the market for the sale of meat, and who shall sell any kind of meat on the streets of the city of Macon at any time during the day or night, shall pay a license tax of \$500 per annum, such license to be paid in advance: Provided this section shall not supply to farmers bringing into the city for the purpose of sale the flesh of any animal raised by themselves after market hours," and the Tax Ordinance of 1893, as follows: "Be it ordained by the mayor and council of the city of Macon and it is hereby ordained by authority of the same, that the following licenses and special taxes shall be levied and collected in the city of Macon for the year 1893: Butchers and others who have no stall in the market and who shall sell from shop or wagon, other than nonresidents selling meats of their own raising, and no license shall issue for less than five hundred dollars." It is true, the tax ordinance excepts from its verbal operation "nonresidents selling meats of their own raising," but since it is evident that only persons who can avail themselves of this privilege are nonresidents who live in the immediate vicinity of Macon, it effectually excludes meat producers from all the other states.

Nor is this conclusion to be avoided merely because this enactment purports to apply alike to the vendors of meat in this state as well as to meats produced in other states, for "the burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Brimmer v. Rebman, supra*.

The case of *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470, which seems to hold a contrary doctrine, has been overruled in later decisions. See *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 134; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649.

It follows also that the wholesale tax for the business of meat selling within the city of Macon is void, the evidence showing that this business depends entirely upon the sale

of western meats, there being no pretense of imposing a tax on home-made meats sold in bulk.

For the foregoing reasons the defendants must be enjoined from collecting these taxes. Because their regulations are also unconstitutional as imposing an unlawful restriction upon commerce between the states, they must be restrained from enforcing or endeavoring to enforce the penalties provided in the ordinances for selling or offering for sale their meats at their regular places of business, or elsewhere in the city of Macon, otherwise than at the market house, and from selling their meats at any time during market hours, as prohibited in said ordinances, and from

collecting or attempting to collect from complainants the license fee fixed by such ordinances, for the sale of meats elsewhere than in the market house; and must be further enjoined from preventing the complainants, who have rented stalls at the market house, from selling at the market house as much of their meats as they may have the opportunity to sell to any and all persons who may there desire to buy. That in so far as the said market ordinances are intended to support these restrictions they are unconstitutional and void.

Let the demurrer be overruled, and the answer be declared insufficient.

TEXAS SUPREME COURT.

David M. WADKINS *et al.*, *Appts.*,

v.

Carey WATSON *et al.*

(.....Tex.....)

Statutory authority to a married woman to convey her separate property by joining with her husband will not extend to an implied covenant of warranty so as to make such deed, at least in the absence of an express covenant, operate on an after-acquired interest in the property, when she owned only an undivided portion at the time of the conveyance.

(December 4, 1893.)

NOTE.—Effect of covenants of married women and their estoppel by deed or mortgage.

Liability on covenant.

A married woman is not liable on her covenants in a deed or mortgage made jointly by herself, and husband in the absence of statute imposing such liability. *Benton County v. Rutherford*, 33 Ark. 640; *Wadleigh v. Gilnea*, 6 N. H. 17, 23 Am. Dec. 706; *Nicholson v. Hemsley*, 3 Harr. & MoH. 400; *Aldridge v. Burison*, 3 Blackf. 201; *Whitbeck v. Cook*, 15 Johns. 490, 8 Am. Dec. 372; *Sawyer v. Little*, 4 Vt. 414; *Fletcher v. Coleman*, 2 Head, 384; *Foster v. Wilcox*, 10 R. L. 443, 14 Am. Rep. 693; *Porter v. Bradley*, 7 R. L. 539; *Dean v. Shelly*, 57 Pa. 428, 98 Am. Dec. 235; *Falmouth Bridge Co. v. Tibbatts*, 16 B. Mon. 688; *Lyon v. Metcalf*, 12 Iowa, 33; *Strawn v. Strawn*, 50 Ill. 33; *Colcord v. Swan*, 7 Mass. 291; *Shelton v. Deering*, 10 B. Mon. 406; *Den v. Crawford*, 8 N. J. L. 109.

And the same was stated in *Nunnally v. White*, 3 Met. (Ky.) 593, but was not the question decided.

And the same was stated in *Barker v. Circle*, 60 Mo. 256, but the court held in that case that she had not acquired a paramount title but simply the legal title after she had conveyed the equitable title by deed of trust, and in such a case the trustee took all her estate and the subsequent deed to her inured to the vendee under her deed of trust.

And *Beal v. Beal*, 79 Ind. 280, holds that while 1 Ind. Rev. Stat. 1876, p. 383, provides that a wife is not bound by the covenant in her deed, yet if she and her husband convey by warranty her land and take a note for the purchase money when she had no title to part of the same, she is estopped from taking advantage of her own wrong and there is a failure of consideration for the note.

But in *Wotton v. Hele*, 3 Saund. 180, 1 Mod. 291, which was a transfer by fine and recovery, it was held that a warranty by husband and wife annexed

QUESTIONS certified by the court of Civil Appeals for the Fifth Supreme Judicial District for the opinion of the Supreme Court in an action brought to try title to certain real estate, in which verdict and judgment had been rendered in favor of defendants. *Answers returned favorable to plaintiffs.*

The facts are stated in the opinion.

Messrs. R. R. Hazlewood, C. H. Smith, and Schluter & Allday, for appellants:

A deed which contains no covenants of warranty, and which contains no recital or affirmation, expressed or implied, that the grantor is seised of the entire estate in the property conveyed, will not pass an after-ac-

to an estate for years in the *feme* will bind her, and an action of covenant will lie against her after his death, the report saying the court all thought an action "well lay against the defendant on her warranty in the fine although she was a covert-baron and they did not make any scruple of it." The transfer by fine and recovery was abolished in England by Stat. 3 & 4 Wm. IV., chap. 74.

And in *Amos v. Cosby*, 74 Ga. 793, it was held that a married woman having a right to make a joint warranty deed with her husband, of a homestead set apart to him under the Act of 1868, is equally bound on her covenant of warranty against prior liens, as she was a usee, and not a surety of the husband.

This case seems to be exceptional and it neither cites any authorities nor discusses the question further than is stated.

And in *Arthur v. Caverly* (Mich.) Dec. 8, 1893, it was held that a married woman uniting with her husband in a warranty deed of his property is liable on the covenant where she obtains all the consideration, which in that case was a conveyance to her of other property. This was on the ground that she was contracting with respect to property to be held by her as separate property and which may be bound by her contract in Michigan.

And in *Hobbs v. King*, 2 Met. (Ky.) 139, while it was said that a *feme covert* cannot bind herself by warranty, yet it was held that she has power to convey and pass over her estate, and her grantor by warranty will be bound to her grantee under her warranty.

But under Iowa Rev. Stat. 1870, § 2506, providing that contracts may be made by the wife as though she was single, a married woman is liable on her covenants of warranty in a deed of her own land, *Richmond v. Tibbles*, 26 Iowa, 474.

And she is thus liable in Massachusetts since the Act of 1845. *Basford v. Pearson*, 7 Allen, 504.

quired title, nor estop the grantor nor those claiming under him from claiming the after-acquired title, although such deed assumes to convey the entire estate by metes and bounds.

Sayles, Civ. Stat. arts. 550, 557; *March v. Huyler*, 50 Tex. 243; Rawle, Covenants for Title, 411; Tiedeman, Real Prop. 729; Bigelow, Estoppel, 387-389; 2 Herman, Estoppel, p. 742, par. 607; *Jackson v. Wright*, 14 Johns. 193; *Jackson v. Hubble*, 1 Cow. 616; *Smiley v. Fries*, 104 Ill. 420; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449, and authorities cited; *Van-Rensselaer v. Kearney*, 52 U. S. 11 How. 297, 13 L. ed. 703; *French v. Spencer*, 82 U. S. 21 How. 928, 16 L. ed. 97.

If Amos Morrill knew, or under all the circumstances ought to have known, that Lillias Wadkins only owned an undivided one-half interest in the land she assumed to convey, then Lillias Wadkins and those claiming under her would not be estopped from claiming the after-acquired title.

Bigelow, Estoppel, 4th ed. 608; 2 Devlin, Deeds, 1000; *Campbell v. Roach*, 45 Ala. 667.

Where an interest passes by a deed no estoppel arises.

Tiedeman, Real Prop. 728, and authorities cited; Herman, Estoppel, 25, and authorities cited; *House v. McCormick*, 57 N. Y. 310.

A valid deed of a married woman estops her only from denying it to be a conveyance; she is not, unless she can contract independently, estopped by her covenants therein, and is not estopped from setting up an after-acquired title.

14 Am. & Eng. Encyclop. Law, pp. 639, 640,

And she is also thus liable in Illinois since the Act of 1874, and N. Y. Act 1882, Laws 62, p. 343, chap. 172, makes covenants in deeds obligatory on married women.

Indiana 1 Gavin & Hord Stat. 258, provided that a joint deed shall pass her lands but not bind her to any covenant therein.

And Ind. Rev. Stat. 1881, § 5117, provides that a married woman may be bound by an estoppel like any other person.

Estoppel by recital.

It seems that a married woman is not estopped as against a fraudulent purchaser, by recitals in her deed stating that it was made with full knowledge of her rights, and under the advice of able counsel. *Hickman v. Stewart*, 60 Tex. 255.

Or by recitals in a mortgage that advances had been made, where authority had been conferred on her to mortgage her estate for certain advances. *Patterson v. Fraser*, 5 La. Ann. 583.

And is not estopped by recitals in a deed of trust from showing that the consideration was a debt of her husband and not her own. *Bank of America v. Banks*, 101 U. S. 240, 25 L. ed. 860.

But in *Jones v. Frost*, L. R. 7 Ch. App. 773, 43 L. J. Ch. 47, 27 L. T. N. S. 485, 20 Week. Rep. 1025, it was stated that the recital in a deed by a married woman, that her father was dead and that she conveyed all interest coming through him, would bind her as if she was a *feme sole*, but this was not the question decided in that case.

Estoppel by covenant from acquiring superior title.

There is some conflict of authority as to the estoppel of a married woman in a covenant of warranty, some cases holding that a wife uniting with a husband in a warranty deed of his land is not estopped from acquiring a superior outstanding title. *O'Neil v. Vanderburg*, 25 Iowa, 104; *Childs v.*

under the head of Estoppels by deed; Preston v. Evans, 56 Md. 476; *Den v. Demarest*, 1 N. J. L. 525; *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 878; *Wight v. Shaw*, 5 Cush. 66, 67.

The deed of a married woman to her separate property will not estop her or those claiming under her from claiming an after-acquired title unless the deed contains covenants of warranty.

2 Herman, Estoppel, p. 715, par. 582.

A married woman or those claiming under her cannot be estopped from claiming her separate property which has not been conveyed in the mode pointed out by the statute except where she has been guilty of actual (intentional) fraud.

Berry v. Donley, 26 Tex. 798; *Fitzgerald v. Turner*, 48 Tex. 82; *Johnson v. Bryan*, 62 Tex. 623; *Steed v. Petty*, 65 Tex. 490; Bigelow, Estoppel, 580.

Mr. E. C. McLean, for appellee:

When a married woman joined by her husband executes and delivers a deed to her separate real estate, in which she conveys the land itself as distinguished from conveying her interest in the land for a valuable consideration, and she and her husband acknowledge the same with all the formalities of law, such a deed will convey any title afterwards acquired by inheritance to the same land, whether said deed contains a covenant of warranty or not; and she and her heirs are estopped from setting up such after-acquired title against her grantee and those claiming under such grantee.

McChesney, 20 Iowa, 481, 89 Am. Dec. 545; *Schaffner v. Grutzmacher*, 6 Iowa, 187; *Edrington v. Jefferson*, 53 Ark. 545; *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 878; *Griffin v. Sheffield*, 38 Miss. 359, 77 Am. Dec. 648; *Sanford v. Kane*, 8 L. R. A. 724, 133 Ill. 199, aff'g 24 Ill. App. 604.

In this last case she joined in the warranty solely to pass her dower.

And a covenant made in New Jersey by a married woman in a deed of her husband's property in New Jersey will not estop her from taking and assigning a prior mortgage. *Wilson v. King*, 23 N. J. Eq. 150.

Under the New Jersey Act of 1857, she may now bind herself by covenants in a deed.

And a purchase-money mortgage, made by the husband and wife of his property, will not estop her from acquiring a superior title, when the purchase-money mortgage was without consideration, the title having failed. *Gonzales v. Hukil*, 49 Ala. 261, 20 Am. Rep. 232.

And a mortgage made by the husband and wife to a third party, and afterwards assigned to her, is a prior lien over a subsequent mortgage made by the husband and wife, when such mortgagee had notice, although the first mortgagee had given an agreement to allow any subsequent mortgage priority, of which agreement the wife had no actual knowledge and believed she was only releasing her dower in the second mortgage. *Gillig v. Maass*, 23 N. Y. 191.

And is not estopped, by the covenants of a mortgage made by her husband and herself on his property to secure his separate debt, from asserting a claim of title accruing to her from a different source. So in the foreclosure of a senior mortgage on her lots including land of her husband for his debt, she is entitled to have his land sold first notwithstanding she may have executed with her hus-

Richardson v. Levi, 67 Tex. 365; *Rodgers v. Burchard*, 84 Tex. 452, 7 Am. Rep. 283; *Bigelow*, *Estoppel*, pp. 393, 351, 352; *Van Rensselaer v. Kearney*, 52 U. S. 11 How. 297, 13 L. ed. 703; *French v. Spencer*, 62 U. S. 21 How. 240, 16 L. ed. 100; *Moore v. Oratford*, 180 U. S. 122, 32 L. ed. 878; *Doe v. Oliver*, 2 Smith, Lead. Cas. *775.

A covenant of warranty is not necessary to estop the grantor and his heirs from setting up an after-acquired title against the grantee and his privies.

Doe v. Oliver, *supra*.

Under our statutes a married woman can as effectually convey her separate estate, when joined by her husband and acknowledging the instrument with all the formalities of law, as she could as a *feme sole*.

Rev. Stat. art. 559.

The fact that she was a married woman at the date of the deed does not, therefore, prevent her from being estopped.

Sayles, Civ. Stat. art. 559; *Ryan v. Maxey*, 48 Tex. 195; *Fitzgerald v. Turner*, 43 Tex. 79; *Dalton v. Rust*, 22 Tex. 155; *Klein v. Glass*, 53 Tex. 44; *Clayton v. Frazier*, 33 Tex. 99; *Equitable Mortg. Co. v. Norton*, 71 Tex. 683; *Schwartz v. Texas Nat. Bank*, 67 Tex. 217; *Nash v. Spofford*, 10 Met. 192, 43 Am. Dec. 425; *Colecord v. Swan*, 7 Mass. 291; *Russ v. Alpaugh*, 118 Mass. 369, 19 Am. Rep. 464; *Knight v. Thayer*, 125 Mass. 25.

Stayton, Ch. J., delivered the opinion of the court:

Mrs. Lillias Wadkins, joined by her hus-

band, executed, with all the formalities necessary to the conveyance of her separate estate, a deed, the material parts of which are as follows: "Know all men by these presents that we, Andrew Jackson Wadkins and Lillias Wadkins, wife of said Andrew Jackson Wadkins, and also heir at law and daughter of William Stoneham, deceased, and his wife, Eliza Stoneham, for and in consideration of two hundred and fifty dollars paid us by Amos Morrill, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release unto the said Amos Morrill a certain tract or parcel of land situated in Grayson county, Texas, patented to Robert Nall [here follows a complete and particular description of the entire tract of land, the title to one half of which is in controversy, by metes and bounds], containing eleven hundred and thirty-six and one half acres of land, to have and to hold the said land, together with all and singular the appurtenances, rights, interests, and hereditaments to the same belonging or in any wise incident or appertaining, unto said Amos Morrill, his heirs and assigns, forever." This deed was signed by Lillias and her husband, both making their marks. On this deed the court of civil appeals certifies the following questions: (1) "Where a married woman owned as her separate estate an undivided one-half interest in a tract of land (her brother owning the other half), and such married woman, joined by her husband, conveyed the whole estate by

band a junior mortgage on his land. *Trentman v. Eldridge*, 98 Ind. 525.

So a married woman not personally bound by the covenants in a mortgage made by her husband and herself is not estopped from claiming the title to a lot obtained in exchange for a part of the mortgaged premises, and put in her name before the mortgage is recorded, although the mortgage is prior in date. *Reeves v. Howes*, 104 Ind. 435.

It is not expressly stated whether she did or did not join in the covenants.

But it was held in *King v. Rea*, 56 Ind. 1, that under the statute enabling a wife to pass the lands which she holds in her own right, by joining with her husband in the conveyance which purports to convey the entire estate therein, she is estopped from afterwards setting up any title to the land whether it existed at the time of the conveyance or was subsequently acquired.

This decision is criticised in the main case and claimed to have been overruled in *Snoddy v. Leavitt*, 105 Ind. 367, which holds that a wife joining her husband in a warranty deed of his land, at a time when she was not liable on a covenant of warranty, only releases her inchoate right and is not estopped from acquiring title subsequently in her own right.

This case refers to *King v. Rea*, *supra*, and says the difference is here she only conveyed her inchoate right, but questions *Scranton v. Stewart*, 53 Ind. 68, which intimated that she might be estopped by deed.

And *Yost v. Hayes*, 90 Ind. 412, holds that where a husband and wife conveyed with covenant of warranty his land after it had been sold under execution, their vendee took her inchoate interest of one third which under Indiana statutes accrued at the expiration of the time for redemption under the sale.

And it was stated in *Mamie v. Sebastian*, 4 Bibb, 22 L. R. A.

438, that a husband and wife after their warranty deed of his land would not be permitted to claim in opposition to their deed.

And it is also held in some cases that a married woman, in the absence of statutory provisions, is not estopped by her covenants in a deed or mortgage on her property, from subsequently acquiring a superior title to the same property. *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314, 5 L. ed. 656; *Dominick v. Michael*, 4 Sandf. 374; *Teal v. Woodworth*, 8 Paire, 470, 3 L. ed. 535; *Den v. Demarest*, 21 N. J. L. 525; *Preston v. Evans*, 56 Md. 476.

There is some conflict on this question and some states have taken a different view, holding that she is estopped in such a case. *Nash v. Spofford*, 10 Met. 183, 43 Am. Dec. 425; *Hill v. West*, 8 Ohio, 222, 31 Am. Dec. 442.

And the same was held in *Nelson v. Harwood*, 3 Call (Va.) 342, but in that case the husband was seized of an estate in fee tail in right of his wife and sold the same giving bond to have an act passed dooking the entail, and then husband and wife conveyed by warranty, and an act was passed but failed to become a law, by dissolution of the assembly, and another one failed because the governor withdrew from the colony and the decision was influenced largely by this.

In *Fletcher v. Coleman*, 2 Head, 384, it was stated that a wife joining her husband in a covenant of warranty on her land is only bound by estoppel from acquiring other title, but this was not the question involved.

She is estopped by her covenants from procuring or taking a superior title in her husband's land or her own, where the statute authorizes her to contract as a *feme sole*. *Sandwich Mfg. Co. v. Zellmer*, 48 Minn. 408; *Graham v. Meek*, 1 Or. 325; *Yerkes v. Hadley*, 2 L. R. A. 363, 5 Dak. 324; *Guertin v. Mombleau*, 144 Ill. 32.

such a deed as is described above, would an after-acquired title to the other half by inheritance from her brother pass by such a deed to the grantee named therein?" (2) "Would a married woman be estopped by such a deed from asserting her after-acquired title?"

The transaction in question occurred in 1856, and, in order to determine the powers and incapacities of married women, we must look to the common law and to the statutes in force at that time. Under the common law, women under coverture had not capacity to convey their lands by deed, or to make other contracts. Since the Act of January 20, 1840, the common law, so far as not inconsistent with the several constitutions and statutes of this state, has been in force. Paschal, Dig. art. 978; Rev. Stat. art. 3128.

And under Mass. Gen. Stat., chap. 108, § 3, providing that a married woman may contract or convey if she has the assent of her husband or the approval of a judge of the court, she is estopped from acquiring a superior title, after a mortgage made by herself and husband with warranty on her property. *Knight v. Thayer*, 125 Mass. 26.

And *Sellers v. Crossan* (Kan.) Nov. 11, 1893, holds that a joint deed of the homestead estops her, even if they remain in possession, from asserting title against the mortgagee of the vendee. Although this decision is based on acts *in pais*, in assisting the vendee to procure the mortgage, yet in that state she may contract as *feme sole*.

But she is not bound, unless she complies with a statute, which provides that she shall not be bound unless the covenant expressly so states on its face. *Thompson v. Merrill*, 58 Iowa, 419.

Or where the statute says she shall not be bound. *Goodenough v. Fellows*, 53 Vt. 102.

Conveyances without covenant by wife.

A married woman joining in her husband's deed releasing her dower, and not joining in the grant, where the land is owned by husband and wife, may assert her title after his death. *Wales v. Coffin*, 13 Allen, 216.

So in a deed of the wife's land where she joined to pass her "dower right" she is not estopped from claiming the land. *Raymond v. Holden*, 2 Cush. 264; *Pierce v. Chace*, 108 Mass. 364.

So where the husband conveys her land, and she signs in token of relinquishment of all her right in the bargained premises she is not estopped from right of entry at his death. *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 380.

But signing and acknowledging a deed of itself where the husband and wife are not named in the body thereof is not an estoppel. *Hall v. Ditto*, 11 Ky. L. Rep. 667.

So signing a mortgage made by husband is no release of dower. *Lufkin v. Curtis*, 13 Mass. 223.

And it has been held that a wife joining a husband in the covenants in a deed will not release her dower. *Davis v. Bartholomew*, 3 Ind. 485.

And she is not estopped from afterwards acquiring title where she united in the deed of his land and the warranty was expressly made by the husband. *Tyler v. Moore* (Pa.) March 25, 1889; *Van-Amburgh v. Kramer*, 16 Hun, 305.

Or where he "granted" and she did not unite in that covenant, she is not liable thereon. *Dun v. Dietrich* (N. Dak.) June 18, 1892.

And a deed of husband and wife of his or her present interest in land will not estop her from asserting title to the same land acquired thereafter. *Wight v. Shaw*, 5 Cush. 56; *Nicholson v. Carress*, 45 Ind. 479; *Shumaker v. Johnson*, 35 Ind. 33.

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There are but few statutes bearing on the question of capacity or incapacity of married women to contract, and they will be briefly noticed. Under the Act of March 18, 1848, married women were empowered to contract debts for necessities furnished to themselves or children, and for the benefit of their separate property. Paschal, Dig. art. 4643. That statute, changed somewhat in phraseology, was carried into the Revised Statutes (article 2854). These statutes, however, have application only to the power of married women to contract debts, and this is carefully restricted to the purposes enumerated, and can have no bearing on the questions under consideration, further than that they show the unwillingness of the legislature since their enactment further to remove incapacities of women under coverture to con-

And the same is true under a conveyance of her "right, title, and interest in the estate of her father, deceased." *McInnis v. Pickett*, 55 Miss. 354. These cases support the doctrine in the main case.

And a mortgage made by wife and husband of land held in trust for her not containing any covenant of title or representation that she owned the fee will not estop her from showing what estate she had in the land. *Douglas v. Cruger*, 80 N. Y. 15.

Operation and effect of conveyances.

A married woman joining her husband in a conveyance of his land is estopped from afterwards claiming that the land belongs to her, and that the title did not pass by such conveyance. *Jones v. Reese*, 65 Ala. 134; *Fogg v. Yeatman*, 6 Lea, 575; *Littell v. Hoagland*, 106 Ind. 320; *Krauth v. Thiele*, 45 N. J. Eq. 407.

And is estopped from claiming dower in surplus of sale of husband's land on a prior mortgage where she had joined him in a deed before the sale. *Elmendorf v. Lookwood*, 57 N. Y. 322.

And a joint mortgage by husband and wife of husband's land operates as a release of dower, but not of her contingent dower in the equity of redemption. *Reiff v. Horst*, 55 Md. 42.

And a wife's dower is gone except in the equity of redemption where the husband and wife conveyed his land subject to a mortgage made by him and in which she had not joined, and the land was then conveyed back to the husband. *Hoogland v. Watt*, 2 Sandf. Ch. 143, 7 L. ed. 544.

And in an action for specific performance against husband and wife and their vendee with notice of plaintiff's rights under a title bond on a recovery by plaintiff the wife is estopped from claiming any interest in the land. *Farley v. Eller*, 20 Ind. 322.

But a mortgage, not for purchase money, made by husband and wife of the wife's statutory estate does not estop her, but passes his estate and his life estate by survivorship. *Chapman v. Abrahams*, 61 Ala. 115.

And in *Hodges v. Powell*, 36 N. C. 64, 60 Am. Rep. 401, it was stated that a married woman could not be estopped by contract, but that was not the question involved in the case.

In this note the estoppel of a married woman by deed has been considered only in respect to valid instruments and not with respect to the effect of deeds which are void whether by reason of defective execution or otherwise.

The subject of estoppel *in pais* as affecting married women is also omitted from this note as a subject for separate treatment.

L. T.

tract debts or incur personal obligations absolute, further than may be necessary for maintenance of themselves and children and the preservation and improvement of their separate property. Recognizing the fact that married women have no power to execute such bonds as the law requires of persons holding certain trust relations to property the legislature has enacted laws which empower them, when appointed executors, administrators, or guardians, to execute such bonds as the law requires of persons holding such positions. The statute provides that charters of private corporations, incorporated for support of any benevolent, charitable, educational, or missionary undertaking, or the support of any literary undertaking, the maintenance of a library, or the promotion of painting, music, or other fine arts, may be subscribed by married women, and that they may become stockholders, officers, and directors thereof, "and that their acts, contracts, and deeds shall be as binding and effective for all purposes of said corporation as if they were males, and the joinder and consent of their husbands, and privy examinations separate and apart from them shall not be required." Sayles' Civ. Stat. art. 568.

There is nothing in any of these statutes evidencing an intention to empower married women to make any contracts whatever except such as statutes expressly or by necessary implication give them power to make, but throughout they recognize the necessity for legislation to authorize them to contract at all. The Act of April 30, 1846, prescribes the acts necessary to be done to convey any estate or interest in lands or other property, the separate estate of married women. Paschal, Dig. art. 1008. That was an enabling act, as was the Act of February 3, 1841, and from its passage until the present time has prescribed the only mode in which married women can convey their separate property in lands. It was enacted, as shown by the language, and as well as by its title, for the purpose of enabling married women to convey their separate property, as well as for the purpose of "defining the mode of conveying property in which the wife has an interest," and not for the purpose of enabling them or of defining a mode by which they might convey, directly or by operation of covenants expressed or to be implied, something which at some future time might become the separate property of women under coverture. The statute, by compliance with its requirements, empowered married women to convey "any estate or interest in any land, slave or slaves or other effects, the separate property of the wife." The use of the words "the separate property of the wife" restricts the operation of the act, and necessarily implies that the relation of the wife to the property must be such, at the time the conveyance is made, as to render it her separate estate; for it is that alone which the statute empowers her thus to convey. The same manner of conveyance was required by the same statute when the purpose was to convey homestead or other exempt property.

If there could be any doubt as to the true
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construction of the act, so far as considered, this would be removed by that part which declares what the effect of a deed executed in accordance with its requirements shall be. After declaring the acts essential to be done by the husband and wife, and by the officer taking the married woman's acknowledgment, the statute declares that "such deed or conveyance so certified, shall pass all the right, title, and interest which the husband and wife, or either of them, may have in or to the property therein conveyed." May have in or to the property at what time? Certainly at the time the conveyance is made, and not such as they, or either of them, may subsequently acquire. The husband may doubtless be bound by warranties or covenants he may make, but those would have to be expressed when he joins *pro forma* in the conveyance of property as the separate estate of the wife. It is often not only advantageous, but necessary, for married women to convey their separate property, and for this reason the power is given under safeguards intended for their protection, but it is not necessary that they should give warranties of title or make covenants in deeds in order to sell, whereby personal obligation would be imposed in case of breach, and therefore no such power has been conferred in terms or by necessary implication. "A covenant of warranty is not an essential part of a deed conveying lands. The title will pass just as effectually without it. Therefore, though the wife execute a deed with covenants, she is not bound by them. The estate simply flows from her; no more." 1 Bishop, Married Women, § 608. Under statutes conferring upon married women, as fully as do statutes of this state, power to convey their separate estates, it had been held that such statutes do not confer power on a *feme covert* to bind herself even by express covenants in a deed, which, if given effect, would operate to prevent her successful assertion of after-acquired title, and that the sole effect of such conveyances is to pass whatever interest she has at the time the conveyance is made. *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 378; *Wadleigh v. Glines*, 6 N. H. 18, 28 Am. Dec. 705; *Den v. Demarest*, 21 N. J. L. 541; *Preston v. Evans*, 56 Md. 490; *Falmouth Bridge Co. v. Tibbatts*, 16 B. Mon. 688; *Whitbeck v. Cook*, 15 Johns. 490, 8 Am. Dec. 272; *Hobbs v. King*, 2 Met. (Ky.) 189; *Aldridge v. Burlison*, 3 Blackf. 201; *Barker v. Circle*, 60 Mo. 263; *Nicholson v. Hemaley*, 3 Harr. & McH. 409; *Chapman v. Abrahams*, 61 Ala. 115; *Porter v. Bradley*, 7 R. I. 538.

Under statutes of some of the states married women may hold, manage, and convey their separate estates as may *femes sole*; and in such cases there may be no good reason why deeds made by them should not be given the same effect in every respect as is given to the deed of one in fact *feme sole*. In Massachusetts this power and the power to make contracts generally is conferred, with perhaps but two exceptions, which withhold power from her to make contracts with her husband, or, without his written consent, to destroy or impair his tenancy by curtesy in her real

estate. In states where such laws exist the decisions must necessarily be other than can be made under the laws of this state. A usage appears to have been established in Massachusetts during its early colonial period, and before the enactment of statutes conferring the power, under which it was held to be lawful for married women, joined by their husbands, to convey their lands. This usage, it was said, "has prevailed without interruption beyond the memory of man; and it cannot now be disallowed, without shaking very many of the existing titles to real estate, and it must now be considered the law of the land. If, therefore, the wife will voluntarily join with her husband in executing a conveyance of the land, she is bound by her deed, so far as it operates to pass her estate. . . . To hold her liable on the covenants cannot be necessary to the conveyance nor beneficial to her family, but may be greatly to her prejudice. The usage, therefore, has never extended to make her liable to an action on the covenants in the deed further than they may operate by way of estoppel." *Fowler v. Shearer*, 7 Mass. 21. In *Colcord v. Swan*, which was an action for covenant broken, brought upon covenants of warranty contained in a deed made by husband and wife, purporting to convey her land, it was said: "Her executing the deed operates the conveyance of the land; but, although she is estopped by her covenants, she is not answerable in damages for any breach of them." 7 Mass. 291. These cases are frequently cited in support of the proposition that a married woman is estopped by her deed, but in the case of *Wight v. Shaw*, 5 Cush. 86, they are held in so far to be dicta. It is said in the case last cited that "the cases of *Fowler v. Shearer*, 7 Mass. 14, and of *Colcord v. Swan*, 7 Mass. 291, are leading cases upon the subject of conveying the lands of a *feme covert* and the origin of the New England practice of conveying the wife's land by a deed of husband and wife. Language is used in those cases which might seem to sanction the principle that the wife would be estopped by the covenant of warranty in such a deed from setting up an after-acquired title. Neither of those cases, however, called for any opinion upon that point, and the language is, therefore, mere dicta. The first was an action of covenant broken, and it was held that the wife was not bound by such covenant, and that an action was not maintainable against her. The other case only involved the effect of such conveyance by husband and wife of her land. The court have uniformly repudiated any liability of the wife on her covenants, and this would seem materially to affect her liability to the bar of estoppel which is supposed to result therefrom. The nature of this estoppel, and the foundation of it, were distinctly stated in the case of *Comstock v. Smith*, 18 Pick. 117, 28 Am. Dec. 670. The prior case of *Nash v. Spofford*, 10 Met. 193, 43 Am. Dec. 425, was not noticed in the opinion, but the cases are not in conflict when the fact is considered that the property involved in the case last named was held by a trustee for the sole and separate use of the wife. As to such equitable sepa-

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rate estates, a different rule prevails; the power of the wife in such cases being such as the instrument creating the estate confers upon the wife. The opinion in *Wight v. Shaw*, however, did cite with approval the case of *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 378, upon the proposition that a covenant of warranty does not estop the wife from asserting an after-acquired title. The opinion in *Comstock v. Smith* so clearly states what is believed to be the true ground on which one who has conveyed land with covenant of warranty or other like covenant cannot set up after-acquired title that an extract from it will be inserted: "Such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs and assigns. This principle is founded in equity and justice, as well as the policy of the law. It is just that a party should not be permitted to hold or recover an estate in violation of his own covenant; and it is wise policy to repress litigation, and to prevent a circuitry of actions, when better or equal justice may be administered in a single suit. By such a grant with general warranty nothing passes, nor, indeed, can possibly pass, excepting the title which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because, if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor to recover the value of the land. The principle of estoppel, therefore, not only prevents multiplicity of suits, but is sure to administer strict and exact justice; whereas, if the grantee were driven to his action to recover the value of the land, exact justice might not be obtained, because the land might possibly not be estimated at its just value. If, however, the grantee were not entitled to recover the value of the land on the grantor's covenant of warranty, then, in such a case, it is obvious that this species of estoppel would not be applicable."

The laws of the state of Ohio permitting and regulating the conveyance of lands belonging to married women being practically the same as the laws in force in this state upon that subject in the case of *Hill v. West*, 8 Ohio, 225, 31 Am. Dec. 442, it was held that a married woman making a conveyance of lands in accordance with the law could not bind herself by contract further than this was expressly authorized by the statute, and that she could not, through a covenant of warranty, render herself liable in damages for its breach; but in that case it was held that such a covenant would estop her from asserting after-acquired title, and that to this end liability to damages for breach of covenant was not necessary. The Massachusetts cases before referred to are cited as authority for these propositions.

The laws in force in Indiana empowering married women to convey lands belonging to them, and prescribing the mode in which that might be done, at the time the facts accrued on which the decision in *King v. Rea*, 56 Ind. 17, was made, are understood to have been practically the same as the laws in force in this state upon that subject. A married

woman and her two children owned as tenants in common a tract of land, and she, in the manner prescribed by the statute, made a deed, in which her husband joined, that purported to convey the entire interest in the land with warranty of title. Subsequently one of her children died, and she was one of the heirs, and the question was whether she was estopped from asserting title thus acquired, and it was held that, "where a married woman joins with her husband in a conveyance of lands held in her own right, which purports to convey the entire estate therein, she is estopped from afterwards setting up any title to the lands so conveyed, whether it existed at the time of making the conveyance or was subsequently acquired. It was conceded that she was not barred by her warranty, but it was held that she was estopped by her deed. It was said that "the statute which enables her thus to convey, during coverture, the lands held in her own right, imposes upon her as a corollary all the obligations of the conveyance, save those which the statute itself excepts; for it would be an absurdity to say that she had passed her lands if she could take them back again; and the estoppel does not depend upon the obligation of the covenant of warranty." In so far as the wife had an estate in the land, that passed by the deed executed in the manner prescribed, and no question of estoppel arose as to that; but the theory upon which it seems to have been held that the after-acquired title passed by estoppel appears unsound if the common law was in force in that state, for the wife's disabilities under such circumstances would be those prescribed by the common law, except as they may have been removed by statute. The power would not be that of a *feme sole* unless made so by statute, and her obligation would necessarily be measured by her power to bind herself, and the extent to which she had used that. If the wife has no power to convey an estate she assumes to convey, it must be true, no fraud intervening, that her act cannot be made the basis of estoppel; for otherwise she

would be able to accomplish indirectly that which the law declares she shall not do nor have power to do. The opinion in *King v. Rea*, was qualified, if not overruled, in *Snoddy v. Leavitt*, 105 Ind. 859. In the opinion in that case it was said that the estoppel referred to in the purchase was *in pais*; but there was no fact shown to make such estoppel, unless it be that the execution of a deed by a married woman, purporting to convey a tract of land, when she only owned an undivided interest in it, was of itself such fraud as would create an estoppel. Such a holding could not have been intended in the last case, for in that case it was held that a wife who joined a husband in the execution of a warranty deed conveying his land, at a time when she was not liable upon covenants of warranty, was not estopped from asserting title to the same land, subsequently acquired by her.

Under the ruling in *Lindsay v. Freeman*, 88 Tex. 259, covenants may be implied which will operate to preclude a person *sui juris*, making such a deed, and the heirs of such person, from asserting after-acquired title; but the rule announced in that case can have no application in this, and it is now unnecessary to consider whether estoppel arising in such cases is by deed or *in pais*. If a married woman is not bound by express warranty of title, she cannot be bound by any implied covenant; and it is unnecessary to inquire how far she may be bound by express covenants or recitals in deeds of a nature such, if untrue, as to mislead, and therefore fraudulent.

While there is no decision in this state bearing directly on the questions certified, the general principles which must control it have been declared. *Kavanaugh v. Brown*, 1 Tex. 483; *Trimble v. Miller*, 24 Tex. 215.

The deed in question did not pass the after-acquired title, nor did it estop Mrs. Wadkins or her heirs.

Brown, J., did not sit in this case.

TENNESSEE SUPREME COURT.

KIRKPATRICK & CO., *Appts.*,

v.

W. P. PURYEAR.

(.....Tenn.....)

1. The indorsement of the check of another to a creditor in settlement of

notes and an account, accompanied by a surrender of the notes and a receipt in full of the account, will be regarded as payment, in the absence of any agreement to the contrary.

2. The indorser of a check is released by failure, for several days, to present it at a bank in the same place during which the bank fails and the collection of the check is rendered im-

NOTE.—Release of indorser of check by delay in presenting it.

Unreasonable delay.

The indorser of a check is released if the holder does not present the same for payment in a reasonable time, even if there were no funds to meet the check.

So retaining a check seven days before mailing is unreasonable delay. *Northwestern Coal Co. v. Bowman*, 89 Iowa, 150.

And the same was held where the check was sent

by a route requiring five days, when the bank was only twenty-seven miles distant and there were two daily mails between these points. *First Nat. Bank of Wymore v. Miller* (Neb.) 48 Alb. L. J. 265, 87 Cent. L. J. 276.

So where the delay was six days, and the bank was in the same city, the indorser was released, — *Gough v. Staats*, 18 Wend. 549; or nine days, — *Carroll v. Sweet*, 13 L. R. A. 43, 128 N. Y. 19.

So where a check would have been paid if presented, and it was held from February 1, to March

possible, when there was a deposit out of which it would have been paid if promptly presented.

3. The holder of a check has the burden of proving that the indorser was not injured by delay in presenting it until after the bank had failed, where the indorser has proved that it was not duly presented for payment; and this is the rule whether the suit is brought on the check or on an indebtedness, to pay which the check was transferred and indorsed.
4. The extinguishment of the liability of an indorser of a check by failure to present it until after the bank has failed extinguishes his liability also on an indebtedness for payment of which the check was indorsed.

28, and no good reason showed for the delay. *Miller v. Moseley*, 26 La. Ann. 607.

And the same was held where a bank retained a post-dated check twenty-three days after date, before presenting the same at a bank sixteen miles distant. *Mohawk Bank v. Broderick*, 10 Wend. 304, 13 Wend. 133, 27 Am. Dec. 133.

And the indorser was released where a check was held six days, and would have been paid if promptly presented. *Merchants Nat. Bank of Poughkeepsie v. Parker*, 12 N. Y. S. R. 553.

And the failure for three days to present a check at the same place where held will release the indorser in an action for the debt, for which it was transferred, if the check would have been paid on presentment. It was also stated that he was released on his indorsement. *Betterton v. Roope*, 3 Lea, 215.

And where the delay was three days in the same city, the court held that the indorser as such was discharged, but that where the drawers had failed before the receipt of check by the indorsee, as the indorser was not prejudiced, he was still liable for the debt, which the check had been transferred to pay, as a worthless check would not pay the debt. *Fleig v. Sleet*, 43 Ohio St. 53, 54 Am. Rep. 300.

Where an indorsee held a check two days, and his indorser held it ten days, and then it took eight days more to reach New York where it was payable, when it could have reached there in five days, a prior indorser was discharged. *Parker v. Reddick*, 65 Miss. 242. As to whether it would have been paid if presented in time does not appear.

So where it does not appear whether there were funds or not, a delay of three days in presentment at the same place releases the indorser. *Westminster Bank v. Wheaton*, 4 R. L. 30; *Veazie Bank v. Winn*, 40 Me. 60.

And the same was held where a post-dated check falling due on Sunday was presented on the Saturday before but was not presented thereafter. *Salter v. Burt*, 20 Wend. 205, 32 Am. Dec. 530.

And in *Schofield v. Moon*, 9 Heak. 173, it was stated that the holder must present a check in a reasonable time, or the indorser will be released, but this was not the question involved.

These cases showing that want of diligence on the part of the holder will release the indorser support the main case.

Reasonable delay.

The indorser of a check will not be released if it is presented in a reasonable time. As to what is a reasonable time will depend on the circumstances of each case, and a presentment of a check on the day after it is drawn or received has been held to be sufficient diligence. *Shrieve v. Duckham*, 1 Litt. (Ky.) 194; *Rickford v. Ridge*, 2 Campb. 537; *Merchants Bank v. Spicer*, 6 Wend. 443.

And the same was held where an earlier presentment would have been useless. *Weddigen v. Boston Elastic Fabric Co.* 100 Mass. 423.

APPEAL by complainants from a judgment of the Chancery Court for Davidson County in favor of defendant in an action brought to recover the amount alleged to be due upon an account. *Affirmed.*

The facts are stated in the opinion.

Messrs. Smith & Dickinson, for appellants:

A check of a third person given and accepted in payment of a demand, and by both parties supposed to be good, but proving worthless, is not payment.

Briggs v. Holmes, 118 Pa. 233; *Holmes v. Briggs*, 131 Pa. 233; *Fleig v. Sleet*, 43

ment would have been useless. *Weddigen v. Boston Elastic Fabric Co.* 100 Mass. 423.

So an indorser is liable who held a check ten days and his indorsee presented it the next day, when the bank failed the day of the last indorsement. *Small v. Franklin Min. Co.* 99 Mass. 377.

And there is no release of an indorser of a post-dated check intended to be circulated, indorsed in New York city to a resident of Pennsylvania and by him taken to his place of residence and promptly transmitted from that place, reaching Middletown, New York, seventy-three miles from New York, where it was discounted, three days after due, although the drawer's funds had disappeared. *Middletown Bank v. Morris*, 28 Barb. 616.

And a payee indorsing in New York city a check dated the 17th, on Buffalo, New York, that is received by the indorsee on the 28th, and presented August 4th, when the mail required three days to transmit from New York to Buffalo, must explain the delay between the 17th and 28th. The delay thereafter is not unreasonable. *Smith v. Jones*, 3 Wend. 132, 32 Am. Dec. 537.

In *Foster v. Paulk*, 41 Me. 425, in a suit against a drawer, it was stated that an indorser would be liable if payment was refused by the drawee on proper legal demand.

And a certification of check before indorsement will not release the indorser if the holder uses diligence. *Mutual Nat. Bank v. Rotgé*, 23 La. Ann. 933, 26 Am. Rep. 123. In this case the check was presented the next day.

And an indorser who admitted the check had been dishonored and promised to take it up is liable, although the time of presentment did not appear, as this admission is presumptive evidence that a proper demand had been made. *Tebbetts v. Dowd*, 23 Wend. 379.

And an indorser is not released by delay in presentment of check if he knew that the drawer had no funds and that the check would not be paid. It would be otherwise if he believed that the check would be paid. *Humphries v. Ricknell*, 2 Litt. (Ky.) 238, 13 Am. Dec. 238.

But where a check payable to bearer and undorsed was transferred by a debtor, and there were no funds to meet the check, and it was held twenty-six days and the bank suspended, the holder may sue on the original debt, although the banker testified that the check would have been paid if it had been presented promptly. *Morris v. Kennedy*, 2 Kan. 403, 33 Am. Rep. 169.

This is similar to *Fleig v. Sleet*, 43 Ohio St. 53, 54 Am. Rep. 300, and both differ from the main case, as in the latter case there was a fund to meet the check.

And an indorser is liable on assumption on a check which had been held a year without demand and there were no funds when presented, where the indorser "waived demand and notice." *Emery v. Hobson*, 62 Me. 573, 16 Am. Rep. 513.

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Ohio St. 53, 54 Am. Rep. 800; *Koonce v. District of Columbia*, 4 Mackey, 339, 54 Am. Rep. 278.

A check is a mere request to pay the bearer or the order of the payee. Until presented and accepted, it is inchoate and vests no title or interest in the payee to the fund.

Imboden v. Perrie, 18 Lea, 504.

Taking a note for goods sold is a payment, because it is a part of the original contract; but paper is no payment when there is a precedent debt.

Andrews v. German Nat. Bank, 9 Heisk. 211, 24 Am. Rep. 800.

The presumption is that a check is not an absolute payment, but it is competent for the parties to contract that it should be an absolute payment.

Springfield v. Green, 7 Baxt. 301; *Barnet v. Smith*, 30 N. H. 256, 64 Am. Dec. 290; *Born v. First Nat. Bank of Indianapolis*, 7 L. R. A. 442, 128 Ind. 78; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 9 L. R. A. 263, 44 Minn. 224; 2 Morse, Banks & Banking, § 544; Dan. Neg. Inst. § 623; *Steinhart v. National Bank of D. O. Mills & Co.* 94 Cal. 362; *Syracuse, B. & N. Y. R. Co. v. Collins*, 3 Lans. 29.

Where a check is transferred in settlement of a debt, the implication of law is that it is not to constitute an absolute discharge of the debt, until the check is presented by the creditor and paid, or certified on such presentment.

Tiedeman, Com. Paper, § 456; *Koonce v. District of Columbia*, *supra*.

Matters in avoidance set up in an answer must be proved by the defendant, and if he fail to prove them the complainant will be entitled to a decree.

Gibson, Suits in Chancery, § 460; 3 Greenl. Ev. § 290; *Napier v. Elam*, 6 Yerg. 108; *Davis v. Clayton*, 5 Humph. 446; *Alexander v. Wallace*, 10 Yerg. 105; *Wood v. Neely*, 7 Baxt. 586; *Gass v. Arnold*, 6 Baxt. 389; *State v. McAuley*, 4 Heisk. 424.

There is no presumption that defendant was injured, but the burden of proof is on him to show that he suffered loss by the laches of complainants.

Springfield v. Green, *supra*; *Bradford v. Fox*, 38 N. Y. 289; *Syracuse, B. & N. Y. R. Co. v. Collins*, *supra*.

Messrs. Stokes & Stokes, for appellee:

As to whether a check is given and taken as payment of a debt is a question of fact to be determined by the actions, conduct, and language of the parties at the time of the transaction.

Springfield v. Green, 7 Baxt. 301.

When this new security was given and the old one surrendered under the doctrine of "novation" the original debt was extinguished and complainants must look to the check and the parties to it for payment.

Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co. 86 Va. 11; *Vancey v. Mauck*, 15 Gratt. 300; *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586; *Stimpson v. Bishop*, 82 Va. 190; *Morris v. Harveys*, 75 Va. 726.

It is the duty of the holder of a check, if he receives it after banking hours, to present

it during banking hours of the next day, if the bank is located in the same town; if not, then to forward it next day by mail. If he fails to do this and the check afterwards is not paid, his right as against the indorser is extinguished, both as to the check and the original indebtedness.

Planters Bank v. Merritt, 7 Heisk. 193; *Schoolfield v. Moon*, 9 Heisk. 173.

The question here is between the holder and the indorser of the check. In such a case it is the failure to present the check on the next day that extinguishes the indorser's liability, and not whether the indorser was damaged by the delay.

Carroll v. Sweet, 18 L. R. A. 48, 128 N. Y. 19.

If in the case of indorser the question of damages could be looked to, the law casts the burden of proving that there was no damage upon the complainants, and not upon defendant to show that he was damaged.

Even as against the makers of the check the law requires the holder to make such proof, and consequently there would be still greater reason for the enforcement of such law where the rights of an indorser are involved.

Planters Bank v. Merritt, 7 Heisk. 193; *Smith v. Miller*, 43 N. Y. 171, 3 Am. Rep. 690; 3 Am. & Eng. Encyclop. Law, p. 218; *Little v. Phenix Bank*, 2 Hill, 425; *Stevens v. Park*, 73 Ill. 887; *Ford v. McClung*, 5 W. Va. 166.

Mr. Morse says: "The burden of proof on the holder to show that the drawer was not injured by delay is shifted, if it is shown that the drawer withdrew the funds or that the drawee was insolvent at the time of presentment."

Banks & Banking, § 421, subsec. "f."

If the payee of the check receive it on Monday and deposit it in his bank, presentment must still be made, in the same place, or the check forwarded to any other place where the drawee bank is, by the payee's bank (as by himself) during banking hours Tuesday.

Id. § 421.

Snodgrass, J., delivered the opinion of the court:

This suit is brought by bill in chancery on an account for \$745, alleged to be due from defendant. The defense was by answer averring payment, and exhibiting the receipt in full of the account sued on. The defendant further set up in defense that the payment was made by a check drawn in his favor by Sulzbacher Bros., and indorsed to the complainant. It was insisted that this check, which was indorsed on the 19th of June, 1891, had been accepted in payment of the account, but that, if only taken as a means of payment, the check was not presented until the 22d of June, and until after the failure of the bank on which it was drawn,—the Nashville Savings Bank; and that the negligence of the complainant in the presentment of the check had occasioned the loss, and that defendant was thereby discharged from liability on the original account. It was shown in proof that the account, which was for a little more than \$1,100, was made up, among

other things, of two notes aggregating about \$1,000. These notes, not due, had been charged into the account by direction of defendant's agent, and for the aggregate of something over \$1,100 a receipt in full had been taken, and these notes delivered up in connection with that receipt. Other proof was taken, and the case heard by the chancellor, who dismissed the bill, and complainant appealed, and assigned errors.

The first question to be determined is whether the indorsement of the check was done in payment of the indebtedness. The settlement of that question depends upon the intent of the parties as evidenced by express agreement or the facts and circumstances of the transaction. The evidence on this subject is as follows: The member of the firm of Kirkpatrick & Co., with whom the transaction was had, was asked: "Please state whether or not you took the checks as in themselves a payment [there were other checks indorsed with this, not necessary to be noticed] for the amount of the account, or how you took them. A. I supposed that the bank drafts and the Sulzbacher check were good, and took them expecting they would be paid, and the money so realized would go in payment of Puryear's account and the cash I had advanced. I did not take them as a payment of the account, but only as a way of paying it, and for Puryear's convenience. If the checks were not paid, I, of course, did not expect the account would thereby be paid." It is observed that he does not state what was said between them, nor deny what Puryear's son and agent (to be subsequently shown) testifies as to what was said. At most it is but the expression of his present view of the condition of his mind at the time of the transaction. The son and agent of Puryear testifies, on being asked: "What did you say to him when you gave him the check, relative to its being a payment on your father's account?" "I did not say anything, except told him that I wanted to pay the account in full as to the amount of it, and gave him the Sulzbacher check in part payment of it." "Did Kirkpatrick & Co. raise any objection to taking the Sulzbacher check, or what did they say, if anything, about it?" "No, sir; they did not make any objection, but remarked that this was good for it." This, with the delivery up of the notes and the receipting of the account in full, constitute the facts of the transaction as developed in the evidence. It will be remembered that this is not the case of Puryear giving his own check for his own account, and the law relating to that condition of facts need not be discussed. It is the case of the indorsement of a check of another to a creditor in settlement of the account, whether it be payment absolute or conditional, and to be governed by the law as to such transfer. It is well settled that the taking of the creditor's check on account is not payment unless it was so intended (*Springfield v. Green*, 7 Baxt. 801), and it is true that the taking of a check of another by a creditor on account is not necessarily payment, but must have effect according to the intention of the parties. In the absence of

proof of a special agreement, the giving up or retention of the original security will, in general, be a decisive circumstance in determining that question, for if the creditor means, in any contingency, to resort to the original indebtedness, he will scarcely be willing to surrender all evidence of that indebtedness to his debtor without fortifying himself with some evidence of the real nature of the transaction. *Morris v. Harvey*, 75 Va. 726; *Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co.* 86 Va. 1.

Upon the facts of this transaction, as given by the son and not denied by the complainant, we are of the opinion that the check was accepted in payment. In this connection it is objected that the pleadings raised no question as to notes delivered up with the receipt when the account was received, but receipt for the account is exhibited with the answer, and the account itself is proven by exhibit to deposition of defendant's witness before quoted on another point, and it shows that it was largely made up of the notes charged in it, and the answer avers that the check was delivered in payment of this account, and the proof so shows. Where the creditor accepts the check of his debtor, it is his duty to make presentment and demand, and, of course, the same duty devolves upon him in the acceptance of an indorsed check, which is additional security. This check was not, in fact, presented until June 22,—after the failure of the bank. Defendant averred in answer that Sulzbacher Bros. had on deposit at the time the check was drawn, and up to the failure of the bank, an amount sufficient to have paid the check, and this amount was lost to him by the negligence of the complainant. It is not denied that if these facts be true (and the failure to make demand is proven, though no proof is offered as to the condition of Sulzbacher's account, as averred) the defendant would be discharged, and without proof of the last one he would be discharged if this was a suit upon the check; but it is insisted that, being a suit upon the original account, the burden of proof is not only on the defendant to show that presentment and demand were not made by the plaintiff, but that Sulzbacher Bros. had the amount of money on deposit to pay it, and that defendant sustained the loss of that amount by reason of such negligence in presenting the check. It is the duty of the holder of a check, if he receives it after banking hours, to present it during banking hours of the next day, if the bank is located in the same town, as was this one; if not, then to forward it next day by mail. If he fails to do this, and the check is afterwards not paid, his right, as against the indorser, is extinguished. *Morse, Banks & Banking*, § 423; *Planters Bank v. Merritt*, 7 Heisk. 193; *Schoolfield v. Moon*, 9 Heisk. 173.

It is argued, however, that though the indorser's liability as such is extinguished, yet if the indorser is the original debtor his liability on the original indebtedness is not extinguished, unless it further appears that actual loss was sustained in consequence of such delay; and that the burden of proof is on the debtor to go further, and show such loss.

This exact question in express terms has not been adjudicated in this state, and there is a great dearth of authority upon it, although it would seem to be one which must have repeatedly arisen. It is settled in this state and many others that in suits on checks, where there has not been due demand and notice, the burden of proof is upon the holder of the check to show that the drawer has sustained no injury. 3 Am. & Eng. Encyclop. Law, and cases cited under the note as to burden of proof. See *Planters Bank v. Merritt*, 7 Heisk. 177. The same doctrine has been applied in this state to the case of suit on the original indebtedness. *Betterton v. Roope*, 3 Lea, 215. It is true that in that case it appeared in fact that the drawer had funds to his credit, but this was not the controlling point in the case, and, besides, this was the case of a drawer's check, and not an indorsed one. We think the sound rule is, whether the suit be on the check indorsed or on the original indebtedness, and it appears in the proof that such check was not duly presented and payment demanded, where the check has been received as absolute or conditional payment, then the burden of proof shifts to the holder to show that, notwithstanding such delay, the debtor was not injured. In the *Merritt Case*, already cited, it is said if the presentment and demand be not properly made the presumption of injury from the negligence of the holder arises, and the *onus* of showing that no injury has resulted from delay to the drawer rests on the holder. The presumption is that the check is drawn on actual funds.

It is insisted in the argument of complainant that a different rule is settled in the cases of *Bradford v. Fox*, 38 N. Y. 289, and *Syracuse, B. & N. Y. R. Co. v. Collins*, 3 Lans. 29; but this is an erroneous application of these cases. The first was the case of the debtor giving his own check in payment, which the bank refused to certify without explanation, thus creating the inference that the check was worthless. It is true that the court in that case said "that cases regarding the laches of the holder in demanding payment or in giving notice of dishonor, in which the *onus* of proving that no damages accrued was upon the holder, had no application, because this action was for the collection of the pre-existing debt, and the *onus* of proving payment was upon the defendant; and that it was not sufficient for him to show laches of the plaintiff, but he must go further, and show that loss had occurred." But that was simply applying the rule, which, as we understand it, is applied by courts holding that the burden of proof, in cases where the creditor has given his own check in payment of his indebtedness, is upon the holder to show both delay and loss. Such holding puts the burden upon him, not only to show delay in presentment of the check, but loss to himself in consequence. If, however, payment absolute or conditional has been made by the check of another, indorsed by the debtor, the failure to present such check and demand payment properly, will release the debtor as to his liability upon the check and original

indebtedness. *Smith v. Miller*, 43 N. Y. 171, 8 Am. Rep. 690; Dan. Neg. Inst. § 828, cited and approved; *Betterton v. Roope*, 3 Lea, 220.

The second case in 8 Lansing's Reports, cited, was also a case where the debtor had given his own check, and in which the rule stated in the *Bradford Case* was applied; put, too, upon the ground that the action was upon the pre-existing debt, and was not, therefore, concluded by proof of delay in presentment of the check, independent of any proof of loss. They sustain the theory that such delay alone does not discharge the original debt of the drawer. But in the case of *Carroll v. Sweet*, 128 N. Y. 19, 13 L. R. A. 43, a later case from the same state, and from the court of appeals, where provisional payment of a debt had been made by indorsed check, it was said: "The debt remained until discharged by payment of the check, or by such dealing with the check by the plaintiff as would in judgment of law convert what was originally a provisional payment into an absolute one. The check was dated August 22, 1887, and was drawn on the Asbury Park National Bank, and was on the same day indorsed and delivered by the defendant to the plaintiff at the place where the bank was located. The plaintiff, on accepting the check, assumed, as between himself and the defendant, an obligation to present the same to the bank for payment within the time prescribed by the law-merchant,—that is to say, not later than the next day after its date,—and, if refused, to protest the same, and give notice of nonpayment. *Smith v. Jones*, 20 Wend. 192, 33 Am. Dec. 527. It was not presented until the 31st of August, nine days after it was received by plaintiff. The defendant was, by such delay, discharged from liability as indorser of the check, irrespective of any question of loss or injury. Presentment in due time, as fixed by the law merchant, was a condition, upon the performance of which the liability of the defendant as indorser depended, and this delay was not excused although the drawer of the check had no funds, or was insolvent, or because presentment would have been unavailing as a means of procuring payment. *Mohawk Bank v. Broderick*, 10 Wend. 304; *Gough v. Staats*, 18 Wend. 549. A different rule obtains as between the holder and drawer of a check. As between them, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer, unless loss to him has resulted. *Little v. Phenix Bank*, 2 Hill, 425. The action here is not upon the indorsement of the defendant, but upon the original indebtedness. If the discharge of the defendant's liability as indorser discharges also his liability as debtor for the original debt, the judgment must, on that ground, be reversed. In *Hamilton v. Cunningham*, 2 Brock. 850, Chief Justice Marshall considered the effect of the neglect of the holder of a bill to give due notice of dishonor, whereby prior parties thereto were discharged upon the liability of the debtor for a debt for which the bill was drawn. After showing that the author-

itles in which the debtor had been discharged proceeded upon the theory that he has sustained an actual loss, he reached the conclusion that the true principle is 'that, if a bill be received as provisional payment, the omission to give defendant notice of its dishonor deprives the creditor of his action on that bill, but does not compel him to take it in absolute payment, or deprive him of his action on the original debt, further than damage has been sustained actually or in legal supposition by the debtor.' See also, *Gallagher v. Roberts*, 2 Wash. C. C. 191; *Fleig v. Sleet*, 48 Ohio St. 58, 54 Am. Rep. 800." Andrews, J., who delivered the opinion in that case, adds: "I am not sure that this doctrine is reconcilable with expressions in the opinion of this court in *Smith v. Miller*, 48 N. Y. 171, 3 Am. Rep. 690, 52 N. Y. 545." He then quotes from that case, and shows that judgment was therein rendered for the defendant on two grounds: "First, in the absence of proof of demand and refusal and notice to the drawer according to the usual course, there could be no recovery upon the draft, or upon the indebtedness upon which it was given; and, second, on the ground of

negligence in failing to present the check on the day on which it was given. The last ground stated was, upon the facts, a satisfactory basis for the judgment, and the same principle was applied upon similar facts in *First Nat. Bank of Meadville, Pa. v. Fourth Nat. Bank of New York City*, 77 N. Y. 330, 33 Am. Rep. 618." The court then declines to determine whether the cases cited were in conflict or not, or which class of cases stood upon the better reason, but gave the defendant a new trial upon the facts. We think, as therein indicated, that the extinguishment of liability as indorser on the check was an extinguishment of liability for the original indebtedness; that when defendant had shown such delay in the presentment and demand as discharged the indorser, it made out a case in which he was discharged from the original indebtedness, and, if any facts existed which would rebut the case thus made out, the *onus* shifted to the plaintiff to show them. See, as to shifting of burden of proof on analogous question, *Morse, Banks & Banking*, § 421, subsec. f.

The judgment is therefore affirmed, with costs.

CALIFORNIA SUPREME COURT (In Banc).

Clara H. SCHMIDT *et al.*, *Respts.*,
v.

BRIEG *et al.*, *Appts*

(.....Cal.....)

1. The words "Sarsaparilla and Iron" cannot be claimed as a trademark for a medicinal compound or beverage including sarsaparilla and iron as ingredients as against an alleged infringing compound of which the words are equally descriptive, even if the ingredients named are only a small part of the compound.

2. The use of labels, marks, and devices so closely resembling those used by one claiming a trademark as to deceive purchasers exercising ordinary care constitutes an infringement of his rights independently of the validity of the trademarks in question.

3. A palpable imitation of a label for a medicinal compound called "Sarsaparilla and Iron" both having the word "sarsaparilla" at the top in large letters and the word "iron" in the border of the lower half of the label, and both having parallel lines across the middle with the names of the manufacturers between and their monogram in the same position, and both having the words "a great blood purifier" and "cures all skin diseases" printed in the lower half of the label while the only material difference in the design and appearance of the labels is in their color, is sufficient to constitute an infringement, even if there is no valid trademark in any of the words copied.

(December 30, 1893.)

A PPEAL by defendants from a judgment of the Superior Court for the City and

County of San Francisco in favor of plaintiffs and from an order denying a motion for a new trial in an action brought to recover damages for the alleged infringement of a trademark and to enjoin further infringement. *Modified and affirmed.*

The facts sufficiently appear in the opinion. *Messrs. James G. Maguire, E. S. Salmon, and Henry Eickhoff*, for appellants:

The words comprising the name alleged to have been adopted were and are words in common use, which were and are the common property of the whole people.

No one can acquire an exclusive right to any of those words by adopting it as a trademark unless it be used arbitrarily as a fancy name, neither intended to designate qualities or ingredients of the commodity to which it is attached, nor to mislead the public as to the true qualities or ingredients of the commodity.

Browne, Trademarks, § 161; *Cal. Civil Code*, § 991; *Corbin v. Gould*, 183 U. S. 308, 33 L. ed. 611; *Amoskeag Mfg. Co. v. Trainor*, 101 U. S. 51, 25 L. ed. 993; *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 311, 20 L. ed. 581; *Eggers v. Hink*, 63 Cal. 445, 49 Am. Rep. 96; *Burke v. Cassin*, 45 Cal. 467, 18 Am. Rep. 204; *Wolfe v. Goulard*, 18 How. Pr. 64; *Burnett v. Phalon*, 9 Bosw. 192; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Colonial Life Assur. Co. v. Home & Colonial Assur. Co.* 33 Beav. 548; *Corwin v. Daly*, 7 Bosw. 233.

Words which are merely descriptive of an article, constituting its ordinary and known name, or indicating its ingredients, mode of composition, characteristic properties, quality,

NOTE.—For other specific instances of words which are held to be common property not subject to trademark, see *Rumford Chemical Works v. Muth* (C. C. D. Md.) 1 L. R. A. 44, and note; *Alt v. 23 L. R. A.*

Radam (Tex.) 9 L. R. A. 145, and note; *Bolander v. Peterson* (Ill.) 11 L. R. A. 350; *Munro v. Tousey* (N. Y.) 14 L. R. A. 245.

nature, size, or the like, cannot be appropriated as a trademark.

Sebastian, Trademarks, 31-36; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. ed. 247; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598, 32 L. ed. 535; *Amoskeag Mfg. Co. v. Trainer*, *supra*; *Falkinburg v. Lucy*, 85 Cal. 53, 95 Am. Dec. 76; *Stokes v. Landgraff*, 17 Barb. 608; *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. 599; *Fetridge v. Wells*, 4 Abb. Pr. 144; *Phalon v. Wright*, 5 Phila. 484; *Marshall v. Pinkham*, 53 Wis. 572, 38 Am. Rep. 756; *Larrabee v. Lewis*, 67 Ga. 561, 44 Am. Rep. 735; *Ginter v. Kinney Tobacco Co.* 12 Fed. Rep. 782; *Avery v. Meikle*, 81 Ky. 73; *Cheavin v. Walker*, L. R. 5 Ch. Div. 850; *Humphrey's Specific Homeopathic Medicine Co. v. Wens*, 14 Fed. Rep. 250; *Cannell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Van Beil v. Prescott*, 14 Jones & S. 542; *Hosletter v. Adams*, 10 Fed. Rep. 838; *Bullock v. Gray*, 19 Jour. Jurisp. 218; *Taylor v. Gillies*, 59 N. Y. 381, 17 Am. Rep. 838; *Batty v. Hill*, 1 Hem. & M. 264.

The rule excluding descriptive terms applies to tradenames as well as trademarks.

Delaware & H. Canal Co. v. Clark, 80 U. S. 18 Wall. 311, 20 L. ed. 581; *Chojnaki v. Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Cohn v. Kahn*, 8 Cin. L. Bull. 154, 26 Alb. L. J. 342; *Gray v. Koch*, 2 Mich. N. P. 119.

To entitle to relief the resemblance must be such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives and to cause him to purchase the one supposing it to be the other.

Gorham Mfg. Co. v. White, 81 U. S. 14 Wall. 511, 20 L. ed. 781; *Walton v. Crowley*, 8 Blatchf. 440.

That question is one of fact to be determined upon evidence.

Ibid.

The unreasonable delay on the part of respondents in asserting any claim of exclusive right in or to the trademark or label, whatever effect it may have under our law upon the right to an injunction, certainly takes away all equitable right to any accounting for damages, or to any awarding of damages beyond that which is merely nominal.

Amoskeag Mfg. Co. v. Garner, 4 Am. L. T. N. S. 176; *Sawyer v. Kellogg*, 9 Fed. Rep. 601; *Isaacson v. Thompson*, 41 L. J. Ch. 101; *Rogers v. Rogers*, 81 L. T. N. S. 285; *Estcourt v. Hop Essences Co.* Id. 567; *Harrison v. Taylor*, 11 Jur. N. S. 408; *Beard v. Turner*, 13 L. T. N. S. 746.

Messrs. John L. Boone and Langhorne & Miller, for respondents:

Respondents do not claim the right to the exclusive use of the word "Sarsaparilla." Neither do they claim the exclusive right to the use of the word "Iron."

What they do claim is that they adopted the words "Sarsaparilla and Iron" as a compound name or phrase, to indicate or designate a new product, and that the use of this name or phrase is foreign to any use to which it had ever before been applied.

Cannell v. Davis, 35 How. Pr. 75.

The natural association of these words with the article they represent would be in connection with a medicine in the minds of most, if
22 L. R. A.

not all, persons. When, however, they are used to indicate a beverage, there is no association whatever that will indicate the true nature of the article.

There may be an exclusive right in names expressing qualities or attributes where forming part of a device peculiar to the manufacturer or vender of the article.

Corwin v. Daly, 7 Bosw. 222; *Burton v. Stratton*, 12 Fed. Rep. 696; *Browne, Trademarks*, § 185.

Tradename has been adopted to indicate a mark or name which has become known and established, as the name of a new product, so as to become identified with the product, or article that it indicates, whether the name constitutes a true legal trademark or not, and it receives its support from the rule of law that one man shall not be permitted to pass off his goods as and for the goods of another.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; *Browne, Trademarks*, chap. 12, p. 524; § 521 *et seq.*, also § 48; *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1; 4 Harvard L. Rev. 321; *Burton v. Stratton*, 12 Fed. Rep. 696; *McCann v. Anthony*, Price & S. 1054; *Levy v. Walker*, L. R. 10 Ch. Div. 447; *William Rogers Mfg. Co. v. Rogers & S. Mfg. Co.* 11 Fed. Rep. 495; *Celuloid Mfg. Co. v. Cellonite Mfg. Co.* 32 Fed. Rep. 94; *Morie Nerve Food Co. v. Baumbach*, 32 Fed. Rep. 205; *Société Anonyme de la Distillerie de la L. B. de l'A. de F. v. Western Distilling Co.* 43 Fed. Rep. 416.

The very fact, therefore, that the appellants are selling, under the name "Sarsaparilla and Iron," a beverage that is not respondents' patented beverage, is evidence of fraud on their part. Their beverage is not "Sarsaparilla and Iron," but an imitation of respondents' beverage, and in order to deceive the public and keep up the imitation and fraud they call it "Sarsaparilla and Iron," thus uniting every element that constitutes a fraud, both upon the respondents and upon the public, and carrying on an unfair competition in business.

Congress & E. Spring Co. v. High Rock Congress Spring Co. 57 Barb. 526.

A mere change of color of a label where the design is retained does not relieve the party from infringing.

Browne, Trademarks, § 263; *Sebastian, Trademarks*, pp. 79, 307; *McLean v. Fleming*, 96 U. S. 245, 24 L. ed. 828; *Guinness v. Ulmer*, 10 L. T. 127.

Paterson, J., delivered the opinion of the court:

This is an action for an injunction, and to recover damages for an infringement of plaintiffs' trademark and labels. The facts found by the court below are substantially as follows: In the year 1887 plaintiffs commenced to manufacture and sell a new and valuable medicinal compound or beverage, and adopted and used in connection with the sale thereof the name "Sarsaparilla and Iron." By reason of the superior character of the medicinal constituents employed in the manufacture of the beverage or compound it became widely known and highly esteemed by the trade, and identified and distinguished by dealers and consumers under the designation of "Sarsaparilla and Iron." This name

was not at that time in use or known as a designation of any similar article of manufacture on sale. For the purpose of identifying the beverage as being of their manufacture, and to distinguish it from other articles of a similar nature, plaintiffs have affixed to the bottles containing the same their own labels, devices, and trademark, specimens of which are attached to the complaint herein. The article has become widely known to the public and to buyers and consumers thereof as the beverage manufactured and sold by the plaintiffs, not only through the name "Sarsaparilla and Iron," but through said labels; and up to the time of the infringement, hereinafter referred to, large sales and great profits had been made by the plaintiffs. The defendants, since the month of December, 1888, willfully disregarding the rights of the plaintiffs, and with the intention to divert to themselves the business of the plaintiffs, and the profits and gains thereof, have fraudulently prepared, sold, and now continue to manufacture and sell, throughout the state of California, an article or beverage in imitation of the plaintiffs' beverage, having the same taste, flavor, and appearance as plaintiffs' article, with the intent to deceive and defraud the public and to injure and defraud the plaintiffs. They have put their beverage in bottles and packages similar to those used by the plaintiffs, and have labeled their bottles with labels, names, marks, and devices similar to those used by the plaintiffs. Copies of these labels are attached to the complaint. These marks and devices so closely resembled those used by the plaintiffs as to be calculated and liable to deceive purchasers and consumers of plaintiffs' article, and to lead them, although exercising ordinary care and prudence, to believe that the article contained therein is the plaintiffs' article, greatly to the diminution and damage of the business and profits of plaintiffs derived therefrom. The defendants' beverage in imitation of the plaintiffs' compound or beverage is inferior to that put up by the plaintiffs, and by reason thereof the reputation of plaintiffs' article has been greatly injured, but there is no deleterious or poisonous substance in the defendants' beverage. By reason of the wrongful acts of the defendants the plaintiffs have sustained damage in the amount of \$3,539.25. Upon these findings the court concluded that the plaintiffs were entitled to an injunction perpetually restraining the defendants from "preparing, putting up, selling, or offering for sale said or any imitation of plaintiffs' article, or any article under or bearing the name of 'Sarsaparilla and Iron,' or any article under or bearing a colorable or other imitation of said name, or any article bearing said false labels (Exhibit B), or any imitation of the said labels of plaintiffs, or any article bearing upon or connecting therewith any of the said names, devices, or trademarks of the plaintiffs which are shown upon said labels or exhibits. Also that plaintiffs were entitled to recover said sum of \$3,539.25 and costs." A decree was entered accordingly.

1. Words which are merely descriptive of the character, quality, or composition of an article cannot be monopolized as a trademark.

Thus it has been held that the words "Iron Bitters" are so far indicative of the qualities of an article as to fall within the scope of the rule (*Brown Chemical Co. v. Meyer*, 139 U. S. 542, 35 L. ed. 248), and that name is no more generic than the name "Sarsaparilla and Iron." Our Code provides that a trademark shall not include any designation "which relates only to the name, quality, or description of the thing." Civil Code, § 991. Words in common use are the common property of the people, and no one can acquire an exclusive right to such words by adopting them as his trademark, unless they be used out of their ordinary acceptation, and as a fancy name. The general rule is opposed to the use of mere words as a trademark; but if all of the words be used under a new combination in the way of a fancy name or designation, they may constitute a valid trademark, if they do in fact indicate origin or ownership. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.* 138 U. S. 546, 34 L. ed. 1008. We think the words "Sarsaparilla and Iron" are generic terms, and were used for the purpose of indicating, not so much the origin, manufacture, or ownership of the beverage, as the quality of the article itself. In *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 327, 20 L. ed. 584, the court said: "True, it may be that the use by a second producer, in describing truthfully his product by a name or combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the property; but if it is just as true in its application to his goods as it is to those of another, who first applied it, and who, therefore, claims an exclusive right to use it, there is no legal or moral wrong done." We held here that a person is not entitled to the exclusive use of the words "Antiquarian Book Store" as a trademark. *Choyne v. Cohen*, 89 Cal. 501, 2 Am. Rep. 476. See also *Browne, Trademarks*, § 164; *Raggett v. Findlater*, L. R. 17 Eq. 29. The words "Sarsaparilla and Iron" describe ingredients well known to the public. The word "sarsaparilla" means a root, or its extract, and iron, as used in connection with the word "sarsaparilla," must mean a solution of the metal iron. But it is claimed by respondents that the words "Sarsaparilla and Iron" do not, in fact, indicate the character, kind, or quality of their beverage; that it is not a composition of sarsaparilla and iron, but a solution of various substances; that it contains only a small quantity of sarsaparilla and a small quantity of iron and the name was given to the beverage only as a name by which it might be known, without in any way being descriptive. But it is sufficient to say in answer to this claim that the name given to the article is either generic, or it is of such a character that it can as well be applied to defendants' beverage as to the plaintiffs'; and, this being so, as was said in *Delaware & H. Canal Co. v. Clark*, *supra*, although the use of the name may have the effect of causing the public to mistake as to the origin or ownership of the product, "if it is just as true in its application to his

goods as it is to those of another, who first applied to it, . . . there is no legal or moral wrong done," the words or combination being of such a character as to designate respectively well-known articles of commerce.

2. It will be observed from our statement of the facts that the court found the defendants willfully, with intention to divert to themselves the business of the plaintiffs, and secure the profits and gains thereof, prepared and sold large quantities of an inferior imitation of the defendants' beverage, and in doing so had used labels, marks, and devices so closely resembling those used by the plaintiffs as to deceive the purchasers, and lead them, although exercising ordinary care, to believe that they were purchasing plaintiffs' beverage. Upon this finding the plaintiffs were entitled to judgment, independently of the validity of the trademarks in question. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *supra*, Mr. Chief Justice Fuller said: "Undoubtedly an inferior and fraudulent competition against the business of the plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief;" and in the course of his opinion referred to an English case, in which Lord Justice Lindley remarked that, "although the plaintiffs had no exclusive right to the use of the words 'Stone Ale' alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, yet, as against a particular defendant, who is fraudulently using or going to fraudulently use the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders." A competing business firm is bound to deal fairly in placing its rival article upon the market; and, if it clearly appears that the defendants have closely imitated the plaintiffs' labels and style, and have done obvious damage to the latter's business through the unlawful business methods employed, the plaintiffs are entitled to relief upon the ground of fraud. *Sperry v. Percival Milling Co.* 81 Cal. 258; *Pierce v. Guittard*, 68 Cal. 68, 58 Am. Rep. 1. Cases are not wanting of injunctions issued to restrain the use even of one's own name, where such use is made with such additions as to intentionally deceive the public, and make them believe he is selling the goods of another. *McLean v. Fleming*, 96 U. S. 251, 24 L. ed. 830; *Brown Chemical Co. v. Meyer*, *supra*. See also *Mozie Nerve Food Co. v. Baumbach*, 82 Fed. Rep. 212; *California Fig Syrup Co. v. Improved Fig Syrup Co.* 51 Fed. Rep. 297; *Improved Fig Syrup Co. v. California Fig Syrup Co.* 54 Fed. Rep. 178, 7 U. S. App.—; *Cleveland Stone Co. v. Wallace*, 52 Fed. Rep. 438.

There is abundant evidence in the record to support the finding of the court. The defendant's label is a palpable imitation in form and design of the plaintiffs' label. Both have the same general appearance, except in color—one being blue, the other red.

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Both have crescent-shaped neck labels for the bottle, lined and lettered in similar form. Both have the word "Sarsaparilla" at the top of the label in large letters, and the word "Iron" printed in the border of the lower half of the label. Both have parallel lines running across the middle of the label with the name of the manufacturers between the same. The monogram of the defendants occupies the same position upon their label as the trademark of the plaintiffs upon the label of the latter. Both labels have the words, "A great blood purifier," and "Cures all skin diseases," printed in the lower half of the label. In fact the only material difference between the two labels in design and appearance exists in the colors, but this is no defense. *Browne, Trademarks*, § 286. The difference in color is a mere probative fact,—a circumstance to be considered by the court in determining the ultimate question as to whether the defendants' devices so closely resembled the plaintiffs' labels as to deceive the public. The court below has found the fact that the purchasers have been deceived by the acts of the defendants, and we cannot say that this finding is not supported by the evidence. As was said in *McLean v. Fleming*, *supra*: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trademark so resembling that of another trader as that ordinary purchasers buying with ordinary caution are likely to be misled." See also *Improved Fig Syrup Co. v. California Fig Syrup Co.* 54 Fed. Rep. 178, 7 U. S. App.—. The testimony shows clearly that the size, form, design, ornamentation, and phraseology of plaintiffs' label were studiously followed by the defendants in the preparation of their own, and that the latter was used and intended to be used as a close imitation of the plaintiffs' label, and for the purpose of leading the public to believe that the beverage contained in the bottles upon which the defendants' labels were placed was the identical article manufactured by the plaintiffs.

3. The appellants insist that the plaintiffs should not be allowed to recover any damages, because of the delay in commencing this action. This claim is set up for the first time in this court, and appears to be an afterthought. There is nothing in the answer, or in the report of the proceedings at the trial below, indicating an intention to set up such a defense. The point ought to have been raised at least at the time the motion for a nonsuit was made, the facts having come out in the evidence of the plaintiffs; but conceding for the purposes of the discussion that, notwithstanding the failure of the defendants to set up the plea of laches until this time, it should still be considered, we think the contention is not supported by the admitted facts. The action was commenced about two years after the plaintiffs discovered the infringements, and the record shows that plaintiffs had, prior to the bringing of this action, brought suit against other infringers, and that the defendants not only had notice of this prior litigation, but had changed the

color of their label on account of a decision in the court below. The doctrine of laches, as applied to stale claims in matters of trust, does not apply with full force to cases of infringement. *Browne, Trademarks*, § 685.

It follows from the views we have expressed that the judgment of the court is erroneous in two particulars. The plaintiffs were not entitled to a decree restraining the defendants from preparing, putting up, offering for sale, or selling the beverage in question. There is nothing in the complaint upon which a judgment awarding to plaintiffs the exclusive right to manufacture the beverage as against the defendants can be predicated. The decree is also erroneous in so far as it enjoins the defendants from making, offering for sale, or selling any beverage or article under the name of "Sarsaparilla and Iron." As we have seen, the plaintiffs have not the exclusive right to the use of those words. In other respects the decree is correct. The restraining portion of the decree should simply

have enjoined the defendants from selling or offering for sale any beverage or article bearing the labels shown by Exhibit B, attached to the complaint, and from selling or offering to sell any article or beverage under any marks, signs, devices, or labels calculated or liable to deceive purchasers and consumers of plaintiffs' article, or the public generally, or to lead them, while exercising ordinary care and prudence in purchasing, to believe that the article contained in the defendants' bottles and packages is the plaintiffs' article.

The order denying the defendants' motion for a new trial is affirmed. The cause is remanded, with directions to the court below to modify the decree in accordance with the views herein expressed. As so modified the judgment will stand affirmed.

We concur: *McFarland, J.; Garoutte, J.; Harrison, J.; Fitzgerald, J.*

Rehearing denied.

WASHINGTON SUPREME COURT.

F. M. MULDOON, *Respt.*,

v.

SEATTLE CITY R. CO., *Appt.*

(.....Wash.....)

1. One who accepts a free pass on a street railway with a printed condition that

NOTE.—Rights of person riding on pass or contract for free passage.

Stock drover.

A carrier is liable for negligence of its employees causing personal injuries to a stock drover, who is with his stock, or riding on a stock contract, or stock pass, where no question is made as to the assumption of risk by the drover, or contract limiting liability. *Union R. & Transit Co. v. Shacklet*, 119 Ill. 222; *Florida R. & Nav. Co. v. Webster*, 25 Fla. 394.

And in such a case he is entitled to all the rights of a passenger for hire. *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 43 Am. Rep. 10; *Waterbury v. New York Cent. & H. R. R. Co.* 17 Fed. Rep. 872; *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 261, 28 L. ed. 898; *Missouri Pac. R. Co. v. Aiken*, 71 Tex. 373.

And in such a case the company is liable for not honoring the pass and expelling the holder who refused to pay fare. *Graham v. Pacific R. Co.* 66 Mo. 536.

And a company is bound to exercise reasonable care and safety towards a drover who was directed to ride to the stock yards with his car, and was required to ride on an engine. *Lake Shore & M. S. R. Co. v. Brown*, 128 Ill. 102.

And a minor allowed to ride on a stock pass is entitled to the same care as an adult, although the rules of the company forbid minors from riding on such passes. *Texas & P. R. Co. v. Garcia*, 62 Tex. 285.

But a party obtaining a pass through fraudulent misrepresentations that she is the owner and shipper of a carload of stock when it belongs to her 23 L. R. A.

the company shall not be liable under any circumstances, whether by negligence of agents or otherwise, for injuries, is bound by that condition.

2. A passenger's standing on the platform of the trail car in a moving cable train in accordance with custom is not negligence as matter of law, in the absence of any rule of the company against it.

husband, who is in charge, is not entitled to ride on that pass. *Brown v. Missouri, K. & T. R. Co.* 64 Mo. 536.

And a stock drover guilty of contributory negligence cannot recover for injuries caused by negligence of the company. *McCorkle v. Chicago, R. I. & P. R. Co.* 61 Iowa, 555; *Richmond & D. R. Co. v. Picklesimer*, 85 Va. 798, 89 Va. 399; *Tuley v. Chicago, B. & Q. R. Co.* 41 Mo. App. 432. See also *Chicago, B. & N. R. Co. v. Hawk* and *Atchison, T. & S. F. R. Co. v. Lindley*, *infra*.

Drover's pass; assuming risk.

It seems that the weight of authorities in this country hold that the carrier is liable for injuries caused to the drover or attendant on stock, by negligence of its employees, notwithstanding that under the contract of carriage or the pass, such person assumed all risk of personal injury. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Flinn v. Philadelphia, W. & B. R. Co.* 1 Houst. (Del.) 499; *Indiana Cent. R. Co. v. Mundy*, 21 Ind. 48, 38 Am. Dec. 339; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126; *Carroll v. Missouri Pac. R. Co.* 88 Mo. 239, 57 Am. Rep. 332; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1, 3 Am. Rep. 332; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 315; *Missouri Pac. R. Co. v. Ivey*, 1 L. R. A. 500, 71 Tex. 409.

So where the contract released the company from liability for personal injury, it was still liable for gross negligence. *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526.

And where the contract of carriage with the stock was by parol, it was held that if it had been adopted and signed, assuming all risk by the party, the

(December 30, 1893.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. Andrew F. Burleigh, for appellant: In accepting a free pass over the appellant's road the respondent expressly agreed to assume the risks of injury resulting from the negligent acts of appellant's employes, and has thereby precluded himself from now seeking to invoke the doctrine of *respondent superior* against this appellant.

Griswold v. New York & N. E. R. Co. 58 Conn. 371, 55 Am. Rep. 115; *Quinby v. Boston & M. R. Co.* 5 L. R. A. 846, 150 Mass. 365; *Kinney v. Central R. Co. of N. J.* 34 N. J. L. 513, 8 Am. Rep. 265; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556. See also *Seybold v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Bissel v. New York Cent. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369; *Magnin v. Dinmore*, 56 N. Y. 168.

same rule of liability would apply, and the company could not limit its liability for gross negligence. *Lawson v. Chicago, St. P. M. & O. R. Co.* 64 Wis. 447, 54 Am. Rep. 684.

And a shipper in charge of a market car, assuming all risk provided the carrier would take it with a passenger train, did not release the carrier for negligence. *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. 382, 31 Am. Dec. 168.

In *International & G. N. R. Co. v. Armstrong*, 4 Tex. Civ. App. 146, it is stated that the carrier cannot relieve itself of liability to the drover by his assuming all risk, but this was not the question involved.

So where the contract stipulated to "assume all risk" but the attendant did not sign it, the railroad company was liable for injury to him caused by negligence of its employes. *Pitchev v. Lake Shore & M. S. R. Co.* 40 N. Y. S. R. 296, 23 N. Y. S. R. 647.

So where the contract released the railroad company from all damages attending the transportation of stock, but did not contain any release from personal injuries, the carrier was liable for injuries to the attendant, and it was said that the shipper could not have assumed risk for the attendant unless he was so authorized. *Porter v. New York, L. E. & W. R. Co.* 59 Hun. 177.

And a stock attendant in charge of stock is entitled to all the rights of a passenger. *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind. 496.

And a plea that the drover traveled on a "free pass" and "assumed all risk" does not meet the allegation of the declaration that the pass was included in the cost of freight transportation. *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.

Where horses were injured, it was said that 31 Vict., chap. 43, and 42 Vict., chap. 9, prohibit railway companies from protecting themselves against liability for negligence by notice, condition, or declaration. *Grand Trunk R. Co. v. Vogel*, 11 Can. Sup. Ct. Rep. 612.

And where a shipper with his horse, who had contracted to "load and unload" at his own risk, was hurt by a concussion of the cars after the end of the journey was reached, and he had left the car and came back to look after his horse and laid down in the car, the carrier was held bound to exercise care. *Orcutt v. Northern Pac. R. Co.* 45 Minn. 368.

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Another class of cases holds that in the case of a passenger who is carried gratuitously by a common carrier the carrier may, by express contract, relieve himself for the mere neglect or want of ordinary care on the part of the carrier or of his servants and employes, but that he cannot relieve himself from liability for gross negligence on his part or on the part of his servants or employes.

Illinois Cent. R. Co. v. Read, 37 Ill. 484, 87 Am. Dec. 260; *Annas v. Milwaukee & N. W. R. Co.* 67 Wis. 46, 57 Am. Rep. 888, 58 Am. Rep. 848.

Gross neglect is defined as "the want of slight diligence, or it is the want of that care which every man of common sense, however inattentive, takes of his own property."

Lawson, Carr. § 123; *Story, Bailm.* § 17.

A passenger who voluntarily and unnecessarily rides upon the platform of a railway car assumes the risk which that position imposes and cannot recover if he is thereby injured.

Pennsylvania R. Co. v. Langdon, 92 Pa. 21, 37 Am. Rep. 651; *Hickey v. Boston & L. R. Co.* 14 Allen, 439; *Quinn v. Illinois Cent. R. Co.* 51 Ill. 495; *Buel v. New York Cent. R. Co.* 31 N. Y. 814, 88 Am. Dec. 371; *Camden*

Under a contract requiring the shipper to "load . . . at his own risk, and the person riding free to assume all risk," the company was liable for causing the death of the shipper while loading, as the pass for the person had not yet been issued, and might have been intended for another party to be in charge and not the shipper, who had not started on the trip, and the stipulation as to shipper's risk referred to stock. *Stinson v. New York Cent. R. Co.* 32 N. Y. 333, 88 Am. Dec. 382.

A shipper of stock riding free under a contract to take charge of the same at his own risk of personal injury, is not a gratuitous passenger, and the company is liable for injuries caused by gross negligence. *Smith v. New York Cent. R. Co.* 24 N. Y. 222.

But this was substantially overruled in *Bissell v. New York Cent. R. Co.*, 26 N. Y. 442, 82 Am. Dec. 369, 29 Barb. 602, holding that where the cattle are carried at a reduced rate and the shipper is carried free, the company may relieve itself of liability by stipulation in contract for shipper to assume all risk of personal injury. The New York authorities, with the exception above (*Smith v. New York Cent. R. Co. supra*), follow the English rule noted *infra* and are recognized as in conflict with the rest of the American cases.

And other New York cases hold that the railroad company may limit its liability by proviso in the pass, "assuming all risks." *Boswell v. Hudson River R. Co.* 5 Bosw. 699.

So where one was riding on a stock pass and was injured by a stick of wood carelessly thrown by the engineer, the company was not liable. Distinction is made in this case between *Smith v. New York Cent. R. Co., supra*, in that here a pass had issued. *Poucher v. New York Cent. R. Co.* 49 N. Y. 233, 10 Am. Rep. 364.

And the English and Irish cases hold that the carrier may secure exemption from liability by a stipulation in the drover's pass, "Assuming all risk." *McCawley v. Furness R. Co.* L. R. 8 Q. B. 57, 4 Moak, Eng. Rep. 218, 42 L. J. Q. B. 4, 27 L. T. N. S. 485, 21 Week. Rep. 140; *Hall v. North Eastern R. Co.* L. R. 10 Q. B. 487, 14 Moak, Eng. Rep. 261, 44 L. J. Q. B. 164, 38 L. T. N. S. 303, 23 Week. Rep. 860; *Gallin v. London & N. W. R. Co.* L. R. 10 Q. B. 212, 12 Moak, Eng. Rep. 268, 44 L. J. Q. B. 92, 32 L. T. N. S. 550, 23 Week. Rep. 308; *Duff v. Great Northern*

& *A. R. Co. v. Hoovey*, 99 Pa. 492, 44 Am. Rep. 123.

To ride on the platform of a street-car unnecessarily, there being seats, is negligence.

Ashbrook v. Frederick Avenue R. Co. 18 Mo. App. 290; *Andrews v. Capitol, N. O. S. & S. W. R. Co.* 2 Mackey, 137, 47 Am. Rep. 266; *Downey v. Hendrie*, 46 Mich. 498, 41 Am. Rep. 177; *Hutchinson*, Carr. 2d ed. § 653a; *Clark v. Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104; *Ward v. Central Park, N. E. River R. Co.* 42 How. Pr. 289; *Rochat v. North Hudson County R. Co.* 49 N. J. L. 445.

Messrs. Will H. Thompson, Eduard P. Edsen, and John E. Humphries, for respondent:

The authorities applicable to the case are collected under the text in *Negligence of Imposed Duties of Passenger Carriers* by Chas. A. Ray, §§ 80-83.

The doctrine is thoroughly discussed in the

cases of *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643, and *Ohio & M. R. Co. v. Shelby*, 47 Ind. 461, 17 Am. Rep. 719.

In the last-named case the court holds that the weight of authority is against the position that the company can exempt itself from negligence by a contract made with the person using a free pass.

See Cooley, *Torts*, 2d ed. pp. 825-827; *Bishop*, *Non-Cont. L.* §§ 1074, 1160, 1191; 3 *Sutherland*, *Damages*, 1st ed. pp. 214, 249; 2 *Parsons*, *Cont. p.* 249; *Beach*, *Contrib. Neg.* 2d ed. § 165; *Greenhood*, *Pub. Pol.* pp. 518-515; *Christenson v. American Exp. Co.* 15 Minn. 280, 2 Am. Rep. 122; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 249; *Shearm. & Redf. Neg.* 3d ed. § 274; *Patterson*, *Railway Accident Law*, p. 419; *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126.

It is not negligence *per se* for a person to ride upon the platform of a street-car.

Sutherland v. Standard Life & Acc. Ins. Co.

R. Co. L. R. 4 Ir. 173, 41 L. T. N. S. 197; *Neville v. Cork*, etc. *R. Co.* 9 Ir. L. J. Rep. 69, 2 Cent. L. J. 366.

And a railroad company is not liable on the contract or on the evidence, where the stock drover on a free pass assumes all risk, except from gross carelessness of the railroad company, and his contributory negligence is the cause of the injury. *Chicago, B. & N. R. Co. v. Hawk*, 36 Ill. App. 337.

See also *McCorkle v. Chicago, R. I. & P. R. Co.* 61 Iowa, 555.

So where a stock drover riding on a pass "assuming all risk" who was injured while on top of the car assisting in making up the train, cannot recover on account of contributory negligence. The question of risk assumed is not discussed. *Atchison, T. & S. F. R. Co. v. Lindley*, 6 L. R. A. 646, 43 Kan. 714.

Express agents, newboys, and the like.

An express agent or a newboy permitted to ride under a contract without paying fare is regarded according to the weight of authority as an ordinary passenger, and the carrier is liable for an injury caused to such person by the negligence of the employes of such carrier. *Yeomans v. Contra Costa Steam Nav. Co.* 44 Cal. 71.

And the same was held where the express company released the carrier and guaranteed against any liability for damage to its agents. *Kenney v. New York Cent. & H. R. R. Co.* 125 N. Y. 422; *Brewer v. New York, L. E. & W. R. Co.* 11 L. R. A. 483, 124 N. Y. 59.

So where the contract was that the carrier assumed no liability. *Blair v. Erie R. Co.* 65 N. Y. 313, 23 Am. Rep. 55.

And the same was held where a party having the right to sell pop-oorn under a contract for pay was killed while riding on a pass which stipulated that he assumed all risk. *Mass. Gen. Stat.* chap. 63, § 97, rendering corporations liable for causing death of passenger by gross negligence. *Com. v. Vermont & M. R. Co.* 108 Mass. 7.

So where the contract with a telegraph company provided that the railroad company would pass, free, employes if they have passes, the evidence that a foreman had a pass for himself and twelve men was properly excluded in an action for injury to one of the men where there was no proof that the pass had any stipulations exempting the carrier from liability. *Elliott v. New York Cent. & H. R. Co.* 33 N. Y. S. 861.

The court held also that a stipulation releasing the carrier in general terms from responsibility would not extend to acts of negligence. 22 L. R. A.

And it is no defense that the plaintiff who was injured was an express messenger carried under a contract with the company, which contract required him to take a hazardous place. *Pennsylvania Co. v. Woodworth*, 36 Ohio St. 585.

But a party who is not in the employ of the express company riding in the express car attempting to learn the route and assisting the messenger, is not entitled to the rights of a passenger. *Union Pac. R. Co. v. Nichols*, 8 Kan. 506, 12 Am. Rep. 473.

In Canada where the manager of the new route released the railroad company from all risk, the carrier is released from liability for injuring a newsboy by a projecting timber, while the boy was on the depot platform. *Alexander v. Toronto & N. R. Co.* 33 U. C. Q. B. 474, 35 U. C. Q. B. 453.

But where such assistant signed a contract assuming all risks, and the injury was not caused by fraudulent, willful, or reckless misconduct, such stipulation relieves the carrier. *Higgins v. New Orleans, M. & C. R. Co.* 23 La. Ann. 133. See also *Woodruff v. Great Western R. Co.* *infra*, and cases next following, as to contracts for pass.

Complimentary or gratuitous pass.

The authorities are not agreed as to the liability of a carrier where the passenger is injured while riding on a free pass, with a proviso that the holder assumes all risk, some authorities holding that the company is not exempted from gross negligence. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 37 Am. Dec. 260.

And a special plea that plaintiff rode on a free pass limiting the liability of the carrier, was bad as it did not contain any direct denial. *Kimball v. Rutland & B. R. Co.* 23 Vt. 247, 63 Am. Dec. 567.

And Ohio Code, § 1307, provides that every railroad company shall be liable for damages caused by mismanagement of employes, all contracts to the contrary notwithstanding. *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246.

And in Massachusetts a carrier is bound to exercise the same degree of care to one riding on a free pass as though he had paid his fare if there is no express stipulation to the contrary. *Todd v. Old Colony & F. River R. Co.* 3 Allen, 13, 30 Am. Dec. 49, 7 Allen, 207, 53 Am. Dec. 679.

And the same rule is applied by some courts where he "assumed all risk." *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 685; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360; *Gulf, C. & S. F. R. Co. v. McGown*, 65 Tex. 643; *Pennsylvania R. Co. v. Butler*, 57 Pa. 335; *Buffalo, P. & W. R. Co. v. O'Hara (Pa.)* 12 W. N. C. 473.

(Iowa) 22 Ins. L. J. 85; *Metz v. St. Paul City R. Co.* (Minn.) Jan. 10, 1893; *Cogswell v. West Street & N. E. Electric R. Co.* 5 Wash. 46; *Real v. Lowell & D. Street R. Co.* 157 Mass. 444; *Willmott v. Corrigan Consol. Street R. Co.* 106 Mo. 585; *Ohio & M. R. Co. v. Stansberry*, 182 Ind. 583; *Beach, Contrib. Neg.* 2d ed. p. 881, § 298; *Fleck v. Union R. Co.* 184 Mass. 481; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 845; *Thirteenth & Fifteenth Street Pass. R. Co. v. Boudrou*, 92 Pa. 475, 37 Am. Rep. 797; *Geitz v. Milwaukee City R. Co.* 73 Wis. 807; *City Railway Co. v. Lee*, 50 N. J. L. 435; *Meesel v. Lynn & B. R. Co.* 8 Allen, 284, 20 Cent. L. J. pp. 104-106.

Stiles, J., delivered the opinion of the court:

In this case the bare legal question is up for determination whether a person riding upon a public street-car, upon a free pass, can recover for personal injuries suffered by

him through the negligence of the street-railroad company's servants, when the pass had printed upon the back of it such a condition as the following: "The person accepting this pass assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether by negligence of their agents or otherwise, for injury to the person, or for loss or injury to the property of the person, using this pass." It is a general rule that carriers of passengers for hire cannot contract against their liability for damages for injuries to their passengers, and this rule has been frequently held to be none the less operative when the evidence of the passenger's right to travel was put in the form of a free pass, if in fact there was a consideration for the issuance of it. *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Grand Trunk R. Co. of Canada v. Stevens*, 95 U. S. 655, 24 L. ed. 585. The cases

But other cases hold that the carrier is not liable to a passenger using a free pass with a stipulation "assuming all risk." *Griswold v. New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115; *Quimby v. Boston & M. R. Co.* 5 L. R. A. 346, 150 Mass. 365; *Kinney v. Central R. Co. of N. J.* 32 N. J. L. 407, 90 Am. Dec. 675, 84 N. J. L. 513, 3 Am. Rep. 283; *Perkins v. New York Cent. R. Co.* 24 N. Y. 193, 32 Am. Dec. 282; *Wells v. New York Cent. R. Co.* 24 N. Y. 181, aff'd 26 Barb. 641; *Sutherland v. Great Western R. Co.* 7 U. C. C. P. 400.

These cases sustain the position of the main case that such a contract absolves the company from liability.

And in such a case the purchase by the traveler of a ticket entitling him to a seat in the drawing-room car will not change the exemption of the railroad company. *Ulrich v. New York Cent. & H. R. Co.* 108 N. Y. 80, reversing 18 Daly, 129.

In Wisconsin a railroad company is not liable for the death of a party holding a free pass, containing a proviso "assuming all risk" when the injury was caused by want of ordinary care, unless the same was made a crime or was caused by wilful neglect. Under Wis. Rev. Stat., §§ 4257-4293, a carrier cannot stipulate against negligence which is a crime. *Annas v. Milwaukee & N. W. R. Co.* 67 Wis. 46, 57 Am. Rep. 383, 53 Am. Rep. 842.

And while a carrier cannot limit his liability in Ohio yet he can in New York, and such a contract made in New York will be upheld in Ohio. *Knowlton v. Erie R. Co.* 19 Ohio St. 220, 3 Am. Rep. 395.

A party riding in New Jersey on a pass assuming all risk, which pass was issued on the consideration of a lease of a pleasure resort by his employer from the carrier, has all the rights of a passenger. *Camden & A. R. Co. v. Bausch* (Pa.) Jan. 24, 1897.

But injury caused by the slamming of a door is not sufficient proof of negligence to render a railroad company liable. *Hospes v. Chicago, M. & St. P. R. Co.* 29 Fed. Rep. 763.

Right of a party to the use of a pass.

The carrier is only liable for gross negligence where a party is injured while using a free pass that was issued to another person and was not transferable. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 23 Am. Rep. 613.

And the same rule of law was applied where the pass was written for "E. Price" instead of "E. Rice," and it was a question for the jury whether the holder was the proper party. *Rice v. Illinois Cent. R. Co.* 22 Ill. App. 643, 22 L. R. A.

And where a pass was used by a reporter on "Bell's Life" which was issued to another and non-transferable, it was properly submitted to the jury whether or not the railroad which issued the pass, and caused him injury, was not accustomed to carry other reporters of the same paper on similar passes. *Great Northern R. Co. v. Harrison*, 10 Exch. 376, 12 C. B. 576, 26 Eng. L. & Eq. 448.

And the setting aside a verdict for \$5,000 for ejecting a holder of a free pass, who refused to sign the condition on the back of the ticket assuming all liability is not an abuse of discretion. *Elliott v. Western & A. R. Co.* 53 Ga. 454.

But where a party was killed riding on a train, and he had a pass on his person issued to another and had a check, and was recognized as a passenger, the presumption is that he was lawfully on the train and that the falling of the bridge causing the accident occurred through the negligence of the company. *Louisville, N. A. & O. R. Co. v. Thompson*, 107 Ind. 442.

A woman tendering a slip of paper claiming it to be a pass, but which is not, may be ejected for not paying fare. *Chicago, R. I. & P. R. Co. v. Herring*, 57 Ill. 59.

Where the defense is that the party killed on a train was using a free pass which "assumed all risk" a replication is good which states that such pass was issued to the holder under a contract for right of way over a bridge of which he was a director. *Woodruff v. Great Western R. Co.* 18 U. C. Q. B. 480.

And it was a question for the jury whether a railroad company should have issued without application a ticket, under a contract in consideration of land entitling one of the firm to a ticket and transportation. *Knopf v. Richmond, F. & P. R. Co.* 85 Va. 799.

But in a similar case it was held that it was the company's business to see that a ticket was issued, if any was necessary. *Grimes v. Minneapolis, L. & M. R. Co.* 37 Minn. 66.

A receiver of a railroad is not authorized to bind the subsequent owners of the road, by a parol agreement to give a pass for life as part consideration for land conveyed. *Martin v. New York, S. & W. R. Co.* 36 N. J. Eq. 109.

Cases as to liability for injuries to employes of the carrier carried on contracts or passes are not included herein.

As to liability for injuries to postal clerks, see note to *Cleveland, C. C. & St. L. R. Co. v. Ketcham* (Ind.) 19 L. R. A. 339.

above cited expressly refrain from any expression of opinion as to what the law would be were the pass purely a gratuity, with a condition against liability. There are dozens of such cases as *New York Cent. R. Co. v. Lockwood*, in the reports, and the language of many of them is fully strong enough to justify counsel in claiming that they would cover the case of a gratuitous pass with conditions. However, nearly all of them are cases where drovers or other shippers, being under the necessity of accompanying their shipments of stock or other merchandise to properly care for it while in transit, were granted transportation without payment of fare *eo nomine*, but where the Federal Supreme Court found that there was a valuable consideration, and therefore a contract of carriage for hire. But of all the cases called to our attention, or discovered by us in a somewhat extended examination of the subject, there are but eight where the naked question of liability under a free pass with conditions was presented. There may be some others, but they are most likely to be found in New York and Illinois, where the right of a carrier to contract against liability has long been recognized in some form or other. *Illinois Cent. R. Co. v. Read* (1865), 37 Ill. 484, 87 Am. Dec. 260, held that a passenger traveling on such a pass could not recover; also, *Kinney v. Central R. Co. of N. J.* (1869), 34 N. J. L. 518, 5 Am. Rep. 265. *Jacobus v. St. Paul & C. R. Co.* (1873), 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360, held the opposite, as did *Ross v. Des Moines Valley R. Co.* (1874), 39 Iowa, 246. *Griswold v. New York & N. E. R. Co.* (1885), 58 Conn. 871, 55 Am. Rep. 115; and *Annas v. Milwaukee & N. W. R. Co.* (1886), 67 Wis. 46, 57 Am. Rep. 388, 58 Am. Rep. 848, held there could be no recovery. *Gulf, C. & S. F. R. Co. v. McGown*, (1886), 65 Tex. 648, followed Minnesota and Iowa; but *Quimby v. Boston & M. R. Co.* (1890), 150 Mass. 365, 5 L. R. A. 846, decided against recovery.

The Iowa case was largely based upon a statute of that state, which was construed to prohibit any attempt at limitation by the carrier. We have given these cases in their order of time, so that it may be seen that there is no absolute weight of authority on this subject. The language of the most of the text-books, of which a dozen or more have been cited, is, so far as any opinion is expressed, for the most part favorable to a right of recovery in such cases; but Beach on Contributory Negligence (sec. 172) and Patterson's Railway Accident Law (page 505) are the only books of this class which give any consideration to the cases above cited.

There can be no question as to the propriety of that rule of law which prohibits a common carrier from forcing upon any person who deals with it in its public capacity a condition against liability arising from its own negligence. The very idea of a public or common carrier, with its features of monopoly and right of eminent domain, bears with it, to the modern mind, the duty of conveying passengers with safety, so far as its own acts are concerned, upon the pay-

ment of reasonable compensation. The duty which the carrier owes to the public and to the individual is to perform the service safely, without any limiting conditions; and therefore such conditions, when the imposition of them is attempted, violate an implied duty, and are justly held void. But when the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz. to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in, and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon conditions like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and of all the passengers carried but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers and employes of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be while the doctrine of *respondent superior* has its present healthy existence. Considerations of business success, of competition, of the preservation of expensive machinery, of continuance in employment, of the safety of their own lives and limbs, and, to some extent at least, of humanity, have incalculably more influence upon the servants of these carriers in making them careful than any thought of damage suits in favor of free passengers. It is only in the rarest instances that disasters of this kind occur through recklessness, or through any other cause than the innate weakness of human nature, which cannot forever maintain a perfect guard. The cases from Massachusetts, New Jersey, and Wisconsin, above cited, seem to us to present, by conclusive argument, the better reason on this subject, and we adopt the views therein expressed, and hold that the person who accepts a pass with such conditions indorsed on it as those alleged in this case is bound by their terms. It follows that the demurrer to the first defense should have been overruled.

The nonsuit asked by appellant was properly refused. We do not think it can be said that it is negligence *per se* for a passenger to stand upon the front platform of the trail car in a moving cable train, in the absence of any rule of the company against it, and where it has been the custom for passengers to occupy that position. Doubtless there is more liability that accidents will occur where a car is propelled by cable than where horses are used, but common experience has not discriminated between the two to the extent of changing the rule of law. In most

cases of this class the question of contribution is one for the jury. *Wills v. Lynn & B. R. Co.* 129 Mass. 351; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 845.

If the question of the conditional pass be not in the case, and the jury find that the appellant was negligent in causing the sudden stoppage of the car, and that no failure of respondent to use ordinary care to preserve himself from the danger of such accidents

contributed proximately to produce his injury, then, upon a new trial, respondent will be entitled to recover; otherwise he will not.

Judgment reversed, and cause remanded, with directions to overrule the demurrer to the first defense, and proceed with a new trial.

Dunbar, Ch. J., and Hoyt, Scott, and Anders, JJ., concur.

MISSOURI SUPREME COURT.

STATE of Missouri, *ex rel.* Adam FLICKINGER,

v.
Daniel D. FISHER.

(.....Mo.....)

A dentist, though having a diploma from a reputable dental college and on the roll of dental surgeons and registered according to law, is not exempt from jury duty, under Rev. Stat. 1889, § 6062, as a "practitioner of medicine."

(December 5, 1893.)

APPPLICATION for a writ of mandamus to compel defendant to recognize relator's exemption from jury duty on the ground that he was a doctor of dental surgery. *Denied.* The facts are stated in the opinion.

Mr. Selden P. Spencer for relator.
Messrs. W. C. Marshall and W. L. Bruce for respondent.

Sherwood, J., delivered the opinion of the court:

In this original proceeding for a mandamus, the single question presented is whether the relator, a dentist, and who appends to his name "D. D. S.," is liable to do jury duty under the laws of this state. Among those exempt under the general laws of this state is "a person exercising the functions of a . . . practitioner of medicine." Rev. Stat. 1889, § 6062. Under the provisions of section 8, article 21, of the Scheme and Charter (Rev. Stat. 1889, p. 2162), "every male citizen of this state, resident in such city, sober and intelligent, of good reputation, over twenty-one years of age, and not exempt from jury duty by the general laws of this state, or otherwise disqualified or excused as provided in this act, shall be deemed to be qualified for and subject to the performance of jury duty under the provisions hereof." Section 9 of the same article then proceeds to define who are exempt from jury duty, and among them specifies a person who is actually exercising the functions of "a practitioner of medicine." Of laws *in pari materia* with those mentioned is chapter

110, Rev. Stat. 1889, p. 1612. This chapter is entitled, "Medicine, Surgery, and Dentistry," and consists of three articles,—the first "Medicine and Surgery;" the second, "Disposition of Human Bodies;" and the third, "Dentistry." These articles were originally separate acts, approved at different times. Laws 1883, p. 114, approved February 20; Id. p. 115, approved April 2; and Laws 1887, p. 215, approved March 31, relating to dead bodies. Those acts, however, like the diversified contents of the great sheet, knit at the four corners, that Peter saw in his vision, have been gathered together in all their incongruity in the present revision, and now form chapter 110. Section 6871, article 1, of that chapter provides that "every person practicing medicine and surgery, in any of their departments, shall possess the qualifications required by this article," to wit: If the applicant is a graduate of medicine, he must present his diploma to the state board of health, etc.; and thereupon that board issues its certificate to the applicant, and such diploma and certificate are made conclusive of the right of the holder of the same to practice medicine in this state. Other provisions are inserted in the section with respect to the steps necessary to be taken by those who are not graduates of medicine, but who also desire to practice it, etc. To this end two kinds of certificates are provided to be issued by the board,—one for graduates who possess diplomas, and the other for those not graduates who have stood a successful examination before the board as to their qualifications. Without such certificate of one sort or the other, no one can lawfully practice medicine and surgery in any of their departments in this state. *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565. Section 6881 of the same chapter and article denounces certain penalties against those who shall practice medicine or surgery in this state without complying with the provisions of this article, to wit, a fine of not less than \$50, nor more than \$500, or by imprisonment in the county jail not less than thirty, nor more than three hundred and sixty-five days, or by both such fine and imprisonment. Sec-

NOTE.—The above case presents a question that is somewhat difficult as well as new, but which is liable to arise in almost any jurisdiction. The status of dentists as members of the medical profession under recent statutes regulating their business and requiring a license for its exercise is subject to some 23 L. R. A.

doubt as the disagreeing opinions in the above case indicate.

For judicial review of action of boards in respect to such licenses, see *note* to *Iowa Eclectic Medical College Assn. v. Schrader* (Iowa) 20 L. R. A. 355.

tion 6869 of article 3, entitled "Dentistry," makes it unlawful for any person to practice dentistry or dental surgery in this state without being the possessor of a diploma, etc. No provision, however, is made for the presentation of such diploma to the board of health, nor for any examination by that board of the applicant touching his qualifications. The applicant simply presents his diploma to the county clerk or city register, as the case may be, and receives a certificate, which is made "prima facie evidence of the right of the holder to practice under this article." Section 6893 of that article prescribes a penalty for violating the provisions of such article, to wit, by a fine not less than \$25, nor more than \$200. These different penalties under articles 1 and 3 evidently go to show that the legislature regarded the violation of article 1 by a physician as a more serious offense, and therefore to be punished more severely, than a violation of article 3 by a dentist. In a word, by those very penalties they drew a distinction between a doctor and a dentist. Relator relies on a certificate obtained under the provisions of article 8 aforesaid, from the city register, on presentation to the latter by relator of his diploma, which certificate, among other things, states that relator's name had been entered on the "roll of dental surgeons" in the city register's office. Looking at all these statutory provisions bearing on the point in hand, the question mentioned at the outset recurs to the mind: Do those provisions, or any of them, exempt relator from the performance of jury duty? The general laws of this state, as already seen, as well as the provisions of sections 8 and 9 of the Scheme and Charter, exempt only certain persons from the performance of that duty. Has relator brought himself within any exemption therein contained? The prevalent rule in construing statutes is that the expression of one thing is the exclusion of another. Anderson, Law Dict. "*Espresso*," etc. An express exception, exemption, or saying excludes all others (*Brocket v. Ohio & P. R. Co.* 14 Pa. 241, 53 Am. Dec. 534), and, when a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication (Sutherland, Stat. Constr. § 338; *Tyson v. Britton*, 6 Tex. 224; *Roberts v. Yarboro*, 41 Tex. 450; *United States v. Dickson*, 40 U. S. 15 Pet. 165, 10 L. ed. 698). Here relator claims the force and benefit of a certain exception which he asserts takes his case out of the operation of the general statute which compels the performance of jury duty by all male citizens, resident, etc. In order to avail himself of such exception he must show that his case falls strictly within it, since exceptions, privileges, and exemptions are not favored in the law. And in this investigation the familiar rule laid down by Lord Bacon is peculiarly apposite, "that, as exceptions strengthen the force of a general law, so enumeration weakens, as to things enumerated." *Page v. Allen*, 58 Pa. 388, 98 Am. Dec. 272. Service on juries is one of the general burdens imposed upon the male citizens of a state, and all men who receive the advantages of government are bound to

contribute to its support, and "none can claim exemption unless the exemption be so clearly expressed in the statute as to admit of no other construction." *Miller v. Kirkpatrick*, 29 Pa. 226. The state has an inherent and indisputable right to the service of all her male citizens as jurors, and therefore any statute which strips the government of any portion of its prerogative in this regard, by giving exemption from this general burden should receive a strict construction. *Academy of Fine Arts v. Philadelphia County*, 23 Pa. 496. Here it cannot be successfully claimed that relator finds any exemption in the terms of the statute, for certainly he is not a "practitioner of medicine and surgery in any of their departments," as defined in section 6871, nor does he exhibit the qualifications required by that section, to wit, a diploma from a legally chartered medical institution in good standing and a certificate from the board of health. His contention, stripped of all verbiage and disguises, and stated baldly and boldly, simply is that, inasmuch as he possesses a diploma granted him by a reputable dental college, and a certificate of the city register showing the filing of that diploma, and the enrollment of his name on the "roll of dental surgeons," that therefore he is entitled to the same exemptions from jury service as if, instead of qualifying under the provisions of section 6869, he had actually qualified under those of section 6871. This contention, for reasons already given, cannot prevail; it will not bear a moment's scrutiny. Either relator is a practitioner of medicine and surgery, or he is not. If not, that determines this litigation against him. If he is such practitioner, then this fact avails him nothing until he complies with the terms and conditions of section 6871 and its associate sections. The law, by the terms it employs, means a lawful "practitioner of medicine," not one who fails to comply with its requirements. Relator makes no pretense of such compliance. The statute in question being couched in unambiguous terms, its words are to be taken "in their plain or ordinary and usual sense." Rev. Stat. 1889, § 6570.

Relator evidently feels unsteady on his logical legs if his sole reliance is to be on the statutory exemptions heretofore noted, and so he resorts to the lexicographers, and quotes from the Century Dictionary, where "dentist" is thus defined: "One whose profession it is to clean and extract teeth, repair them when diseased, and replace them, when necessary, by artificial ones; one who practices dental surgery and mechanical dentistry; a dental surgeon." If relator had delved more deeply into the science of definitions, and had turned another page of the same work, he would have found: "Chiropodist. One who treats diseases or malformations of the hands or feet; especially a surgeon for the feet, hands and nails; a cutter or extractor of corns and callosities; a corn doctor." So that if relator is exempt from jury duty because, as he says, he "treats, professionally, diseases of the oral cavity," so also is his less pretentious professional brother, who with equal scientific skill treats

diseases or malformations of the hands or feet, and who is content to be dubbed "corn doctor." Certainly, the argument and the definition which would support the exemption of the dentist as a "practitioner of medicine and surgery" would also equally support that of his cognate scientist, albeit of humbler professional pretensions. The disposition of persons to magnify and exalt their callings or occupations has become wonderfully prevalent in these latter days. He who shoves a jack plane and wields a saw is no longer a "carpenter" but an "architect and builder;" the solicitor of orders from our retail merchants is no longer a "drummer," but a "commercial traveler;" and the loquacious individual who scrapes your chin is no longer a "barber," but a "tonsorial artist." But this euphemistic style of dressing things in different and more high-sounding verbiage does not alter their essential nature, nor have the least tendency to evade the force and effect of the statutes pointing out those who are subject to jury duty, and those exempt therefrom.

The premises considered, *we hold that, on the facts presented in this record, relator is not exempt from jury duty, and hence deny the peremptory writ.*

Barclay, Gantt, and Burgess, JJ., concur.

Brace, J., dissenting:

The question for our consideration upon the return in this case is whether the relator, who is a graduate of a reputable college of dental surgery, duly registered, and engaged in the practice of dentistry and dental surgery in the city of St. Louis, is exempt from jury service under the provisions of section 9, article 21, of the law governing courts in the city of St. Louis, and section 6062, Rev. Stat. 1899, which, upon this subject, are the same in substance. The question turns upon the meaning of the provision that "no person exercising the function of practitioner of medicine shall be compelled to serve on any jury." The subject of the qualification of jurors, and the exemption of certain citizens from jury service, has always, in this state, been purely a subject of statutory regulation; the first act having been passed by the territorial legislature in 1808, before the common law of England was introduced into the territory (1 Terr. Laws, p. 198, § 2), in which "practitioners of physic" were exempted from service on juries. This law was repealed in 1810, and a new one passed, by which "all persons exercising the function of practitioner of physic" were exempted. This continued to be the law until after the admission of the territory into the Union as a state, when in 1825 a new act was passed, providing that "no person exercising the functions of a practitioner of physic shall be compelled to serve on any grand or petit jury." This act was revised in 1835, in which revision the provision reads: "No person exercising the functions of a practitioner of physic shall be compelled to serve on a jury." Rev. Stat. 1835, p. 843, § 9. In the revision of 1845 it ap-

pears in precisely the same language as in the revision of 1835 (Rev. Stat. 1845, p. 627, § 9), and also in the revision of 1855; except the word "physic" was changed to "medicine;" and, as thus changed, the provision has been carried into every revision since. So that the law on this subject is not only exclusively statutory, but is the same as it has always been since the sovereignty of the state began. Service upon a jury of the country is a privilege as well as a duty, and, however regarded by the individual in any particular case, is, in fact and in law, a position of honor and trust, charged with the gravest responsibility, from the discharge of the duties of which no citizen ought to be exempted who is personally fit for the position, except for the general welfare. Exemption from jury service is not granted as a personal favor, but for the public comfort and convenience, and in the light of this reason for its existence should the law governing such service be interpreted and administered. While the law on this subject, and the reason for its existence, remains the same to-day as on the day of its first enactment, its application now is not so simple as it was in the beginning, and for many years thereafter. While the early practitioners of medicine in the state were not necessarily M. D.'s or doctors of medicine in the technical sense of the schools, they were all called "doctors," and as such exercised the functions of doctors of medicine, surgeons, and dentists, and generally treated indiscriminately all the ailments that human flesh and bone is heir to, whether external or internal, according to the light they possessed; and such continued to be the case down to the memory of the present generation, and doubtless still remains so in many of the rural districts of the state. But in the cities and more populous districts we find now the functions formerly exercised by the doctor or practitioner of medicine of the olden time divided up and exercised by specialists, each confining himself generally to the practice of a particular branch or department of the science, such as surgeons, dentists, oculists, aurists, etc. While dentistry, as an independent calling, may have had an humble and comparatively recent origin, it has now become a very important branch of medical science (Address N. S. Davis, M. D., Pres. Am. Med. Asso.), and there are but few who have arrived at the age of those who are usually called to serve as jurors who would not testify that, when the exercise of its functions become necessary, it is as exigent as the exercise of most of the other functions of the general practitioner. The fact that this branch of the medical profession has grown to such proportions as to have its own independent colleges, and to confer its own degrees, and that it has become necessary that its practice should be regulated by statute (2 Rev. Stat. 1899, chap. 110, art. 3), indicates the importance of the exercise of its functions to the public welfare. The fact that it is regulated in a separate article and as an independent calling from that of an M. D. does not in any manner affect the character of those functions. When in 1874

the legislature first began the regulation of the practice of medicine by general law, they were careful to preserve the exercise of the functions of the old practitioner of medicine to him, by exempting him from the operation of its provisions (Laws 1874, p. 111, § 8; Laws 1877, p. 343, § 1); and, whatever changes may have been made in the law since on this subject, the question of jury service or exemption therefrom is not treated therein, and they have nothing to do with the question in hand. The relator,

under the present law, is authorized to exercise all the functions thus recognized that belong to his department of medicine. They are now more extensive, more important, and more exigent to the public welfare than they ever were before. He is within the purview of both the letter and reason of the law that exempts; "a practitioner of medicine" from jury duty, and should have a peremptory writ commanding his discharge. In these views, **Black, Ch. J.**, and **Macfarlane, J.**, concur.

TEXAS SUPREME COURT.

LYONS-THOMAS HARDWARE CO. *et al.*, *Appts.*;

PERRY STOVE MANUFACTURING CO. *et al.*

(.....Tex.....)

1. A preferential deed of trust executed by a private trading corporation

after its insolvency and ceasing to carry on business without any intention of resuming is void as against unsecured creditors of the corporation.

2. Statutory authority of a corporation to hold, purchase, and sell property as the "purposes" of the corporation shall require applies only to powers to be used while the corporation is carrying on business, and does not give power to execute a preferen-

NOTE.—Preferences among creditors given by insolvent corporations.

It is generally held that a corporation may make an assignment of all its property for the payment of creditors, in the absence of any statutory restriction. *Pope v. Brandon*, 2 Stew. (Ala.) 401, 20 Am. Dec. 49; *Thorington v. Gould*, 59 Ala. 461; *DeCamp v. Alward*, 52 Ind. 468; *Merrick v. Bank of the Metropolis*, 8 Gill, 59; *Sargent v. Webster*, 13 Met. 497, 46 Am. Dec. 743; *Shockley v. Fisher*, 75 Mo. 498; *Chew v. Ellingwood*, 86 Mo. 380, 56 Am. Rep. 429; *Arthur v. Commercial & R. Bank*, 9 Smedes & M. Ch. 304, 48 Am. Dec. 719, reversing *Smedes & M. Ch.* 307; *Smith v. Clinton Co.* 12 N. H. 431; *Lamb v. Cecil*, 25 W. Va. 288, and in nearly all other cases in which the question is involved and which are cited to other propositions in this note.

In some states, as in New York, the statutes have prohibited any transfer of property after or in contemplation of insolvency.

Under a statute authorizing "any person" to make an assignment for creditors, it is held that the word "person" applies to a corporation. *Shockley v. Fisher*, 75 Mo. 498.

The power of a board of directors without authorization of the stockholders to make such an assignment is somewhat in dispute, but that question will not be entered upon here as the subject of preferences only is here considered.

When the assignment of a corporation for creditors involves any preference between the creditors, the question becomes a somewhat disputed one, although the early cases seemed generally to regard the right to make preference as inhering in the right to make an assignment. The earlier cases therefore uphold preferences in such cases with but very little discussion of the question.

Among these early cases were *Dana v. Bank of United States*, 5 Watts & S. 223; *Warner v. Mower*, 11 Vt. 390; *Burr v. McDonald*, 3 Gratt. 215; *Ex parte Conway*, 4 Ark. 348; *Ringo v. Biscoe*, 13 Ark. 563; *Catlin v. Eagle Bank*, 6 Conn. 238; *New Haven Sav. Bank v. Bates*, 8 Conn. 505; *Bank of United States v. Huth*, 4 B. Mon. 423; *Lexington L. & M. F. Ins. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 166; *State v. Bank of Maryland*, 6 Gill & J. 206, 28 Am. Dec. 561.

In *United States v. Bank of United States*, 8 Rob. (La.) 282, in which Pennsylvania law governed, it 22 L. R. A.

was held that such preferences were valid in Pennsylvania.

In *Town v. Bank of River Raisin*, 3 Dougl. (Mich.) 530, such preferences by insolvent corporations are disapproved by the court, but held lawful in the absence of legislative prohibition.

And this decision is followed in *Covert v. Rogers*, 38 Mich. 383, 31 Am. Rep. 319.

In *Hopkins v. Gallatin Turnp. Co.*, 4 Humph. 403, an assignment of all the property of a corporation by way of mortgage was upheld, although it was to secure only part of the debts.

In *Schroeder v. Mason*, 25 Mo. App. 190, a transfer of property in payment of a valid debt, although creating in effect a preference of that creditor is held valid.

So in the case of a transfer of securities creating a preference, it is held that such preferences are not unlawful. *Ahl v. Rhoads*, 84 Pa. 819.

In *Commercial Nat. Bank v. Burch*, 40 Ill. App. 506, it is said to be by no means settled that an insolvent corporation may not prefer particular creditors.

And in *Reichwald v. Commercial Hotel Co.*, 106 Ill. 489, it is held that an insolvent corporation may make such preferences in the absence of statutory restrictions,—especially where the law under which the corporation was created confers the right to acquire and transfer property with the same rights as an individual.

Again in *Ragland v. McFall*, 137 Ill. 81, it is held that a corporation may prefer a creditor and turn over property in payment of his debt, if done in good faith without any fraudulent purpose.

In Arkansas it is established that an insolvent corporation may make preferences among its creditors, and this doctrine is followed by a federal court in that state. *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680.

The court in that case says: "The established rule in that state is in harmony with the general though not quite uniform current of authorities in this country on the question."

In Iowa it is well settled that an insolvent corporation may lawfully mortgage all its property for the security of a portion of its debts, even though nothing is left for the payment of those unsecured. *Rollins v. Shaver Wagon & C. Co.* 80 Iowa, 869.

tial deed of assignment after insolvency and permanent cessation of business.

3. The "business" of a corporation, within a statutory authority to contract in "its authorized business" cannot be construed to include the making of a preferential deed of trust after the corporation has become insolvent and ceased to carry on its operations, without any intention of resuming.

(November 16, 1898.)

QUESTIONS CERTIFIED by the Court of Civil Appeals for the Second Supreme Judicial District for the opinion of the Supreme Court in an action brought to set aside certain chattel mortgages given by the Lyons-Thomas Hardware Company as a fraud upon their creditors, in which a judgment had been rendered in favor of plaintiffs and defendant had appealed to the Court of Civil Appeals. *Answers favorable to plaintiffs given.*

On November 9, 1889, the Lyons-Thomas Hardware Co., a private trading corporation, being insolvent, made certain chattel mortgages in which they preferred the claims of certain other creditors, and the assets of the corporation were transferred to L. P. Harrison as trustee. Plaintiffs filed a creditors' bill

asking the appointment of a receiver, and that the assets be paid to all the creditors ratably, attacked the mortgages as void for want of power to make them, because the corporation, being a private trading corporation and insolvent, having ceased to be a "going concern," could not prefer its creditors or pledge its property to part of them only, its assets being a trust fund for the payment of all creditors ratably. The mortgages were declared void, and the mortgagees appealed. The case was transferred from the supreme court to the court of civil appeals and that court certified the questions indicated in the opinion of the supreme court to the supreme court for answer.

Further facts appear in the opinion.

Messrs. Maxey, Lightfoot & Denton and Dudley & Moore for appellants.

Messrs. Hale & Hale and T. S. Hill, with Messrs. Ross & Scott, H. D. McDonald, and Park, Ownby & Dailey, for appellees:

An insolvent private corporation, when it ceases to carry on its business, with no intention to continue its legitimate business, and not having the ability to do so, cannot pledge its assets or make a valid mortgage, preferring

In Maryland it is held that a corporation in failing circumstances may, like any other debtor, unless restrained by some express provision in its charter, make a preference among creditors on an assignment of its property to trustees. *State v. Bank of Maryland*, 6 Gill & J. 205, 38 Am. Dec. 561.

In Mississippi it is held that an insolvent corporation may make a preferential assignment for creditors. *Palmer v. George W. Hutchison Grocery Co.* (Miss.) Oct. 17, 1893.

In Michigan it is not unlawful for an insolvent corporation to give preferences to creditors by way of mortgage. *Bank of Montreal v. Potts Salt & Lumber Co.* 90 Mich. 345.

In *Warner v. Littlefield*, 89 Mich. 329, a chattel mortgage made to one who was not himself a creditor, giving a preference to creditors of an insolvent corporation, was attacked on the ground that it constituted a general assignment for creditors, but was upheld.

Sheldon v. Mann, 85 Mich. 385, made substantially the same decision in respect to several chattel mortgages.

A chattel mortgage creating a preference is upheld in Michigan, although made at substantially the same time as a general assignment, if the mortgagee does not know of the contemplated assignment. *Whipple v. Stebbins*, 67 Mich. 507.

The case of *Kendall v. Bishop*, 70 Mich. 684, held that an instrument called a chattel mortgage constituted in effect a transfer of all the property of the insolvent corporation, and was a general assignment in fact. But this case is distinguished in *Sheldon v. Mann*, 85 Mich. 385, and later cases holding that a chattel mortgage is not necessarily an assignment for creditors within the prohibition of the statute, because it is made in trust.

But a chattel mortgage made as part of the same transaction, in which an assignment for creditors is made by an insolvent corporation, must be regarded as part of such assignment, and cannot be allowed to create a preference which the assignment cannot give directly. *Burnham v. Haskins*, 79 Mich. 35.

A chattel mortgage by an insolvent corporation cannot be upheld when it was given under an arrangement for the immediate filing of a bill in equity and the appointment of a receiver and the 23 L. R. A.

transfer of the business of the corporation, which could not be done by an assignment for creditors. *Merchants & M. Nat. Bank v. Kent*, 43 Mich. 238.

In the circuit court of the United States sitting in Nebraska it is held that a private corporation in a failing condition has the same common-law right that a natural person has to prefer creditors by way of payment or security. *Allis v. Jones*, 45 Fed. Rep. 143.

The doctrine that a corporation, in the absence of statutory restriction, has authority to prefer creditors is approved in *Coats v. Donnell*, 94 N. Y. 168, which upholds a preference made by an insolvent foreign corporation on the ground that the statutory restrictions upon preferences by insolvent corporations do not apply to foreign corporations.

Forster v. Mullanphy Planing Mill Co., 16 Mo. App. 150, although holding merely that a preference was not a fraud which would sustain an attachment, is quoted in *Schroeder v. Mason*, 26 Mo. App. 190, as authority for the doctrine that an insolvent corporation may make a preference among creditors; and it is said the corporation and its creditor may by united voluntary action do what the creditor alone could do by virtue of the law relating to attachment, and therefore a transfer of property by an insolvent corporation in payment of a bona fide debt is upheld, although creating a preference.

In New Jersey it is held that under the law as it has stood since the revision, corporations like individuals can prefer creditors, although insolvent. *Bergen v. Porpoise Fishing Co.* 41 N. J. Eq. 238; *Wilkinson v. Bauerle*, Id. 636; *Vail v. Jameson*, Id. 648.

The New Jersey decisions are probably influenced to some extent by the fact that preferences, and indeed any sale or transfer of the property of a corporation after, or in contemplation of insolvency, had been expressly prohibited by statutory provisions, which had been omitted from the revision of the statutes.

Under this statute while it existed, which originally became law February 16, 1829, various decisions were made denying the validity of such preferences. *Coryell v. New Hope Delaware Bridge Co.* 9 N. J. Eq. 457; *Van Wageningen v. Paterson Sav.*

a portion of its creditors to the exclusion of the other creditors, but in such case its assets are a trust fund held by it for the payment of its creditors, ratably, and such creditors have an equitable lien on the assets to secure such ratable payment, and its directors are then trustees for the creditors.

Rev. Stat. art. 606; *Jefferson Nat. Bank v. Texas Invest. Co.* 74 Tex. 486; *Panhandle Nat. Bank v. Emery*, 78 Tex. 505; *Lang v. Dougherty*, 74 Tex. 231; *Seale v. Baker*, 70 Tex. 291; *Tobin Canning Co. v. Fraser*, 81 Tex. 407; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 620, 21 L. ed. 781, 735; *Sanger v. Upton*, 91 U. S. 56, 64, 23 L. ed. 220, 228; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. ed. 208; *Morgan County v. Allen*, 103 U. S. 508, 509, 26 L. ed. 501, 502; *Baring v. Dabney*, 86 U. S. 19 Wall. 10, 22 L. ed. 95; *Richardson v. Green*, 133 U. S. 44, 83 L. ed. 522; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 594, 29 L. ed. 235, 238; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 161, 26 L. ed. 106, 111; 2 Morawetz, Priv. Corp. §§ 787, 803, 861-863; Wait, Insolvent Corp. §§ 142, 144, 146; Cook, Stock & Stockholders, § 661; Angell & A. Priv. Corp. § 600; 1 Pom. Eq. Jur. § 410; Taylor, Priv. Corp. §§ 668, 669; 1 Jones, Liens, §§ 84-

86; Thompson, Liability of Stockholders, § 267; *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229; *State v. Brockman*, 39 Mo. App. 181; *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 378, 46 Ohio St. 498; *Olney v. Conantcut Land Co.* 5 L. R. A. 381, 16 R. I. 597; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Roan v. Winn*, 93 Mo. 503, 19 Am. & Eng. Corp. Cas. 102; *Williams v. Jackson County Patrons of Husbandry*, 28 Mo. App. 132; *Marr v. Bank of West Tennessee*, 4 Coldw. 471; *Eppright v. Nickerson*, 78 Mo. 490; *Chew v. Edlingwood*, 86 Mo. 260, 56 Am. Rep. 429; *Hightower v. Mustain*, 8 Ga. 506; *Foster v. Mullanphy Planning Mill Co.* 92 Mo. 79; *Beach v. Miller*, 19 Am. & Eng. Corp. Cas. 93; *Bouton v. Dement*, 123 Ill. 142, 19 Am. & Eng. Corp. Cas. 811; *Powers v. Hamilton Paper Co.* 60 Wis. 28, 8 Am. & Eng. Corp. Cas. 269; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387, 8 Am. & Eng. Corp. Cas. 257; *Hopkins v. Johnson*, 90 Pa. 69; *McDonnell v. Alabama Gold L. Ins. Co.* 35 Ala. 401, 26 Am. & Eng. Corp. Cas. 261; *Hove v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7.

Insolvent corporations which have ceased to do business in this state, or anywhere else,

Bank, 10 N. J. Eq. 13; *Wells v. Rahway White Rubber Co.* 19 N. J. Eq. 402.

In West Virginia the court, while holding that an insolvent corporation having ceased to do business has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of debts, declared that it would hold the contrary doctrine if it was free to do so. *Pyles v. Riverside Furniture Co.* 30 W. Va. 123.

The court based this decision on the fact that by an early Virginia decision (*Burr v. McDonald*, 3 Gratt. 286) it was established as the law in that jurisdiction that a corporation could make such preferences, except when restrained by statute; and that the only statute restricting such preferences applied to mining and manufacturing companies merely, and that this statute had not been in force for many years.

Preferences prohibited.

Preferences are in fact allowed to creditors who are not members of the corporation by nearly all the cases in which the question has been decided. The actual conflict on this point is very slight and the main case, *LYONS-THOMAS HARDWARE CO. v. PERRY STOVE MFG. CO.* is, although not alone in denying such preference, supported by very few cases.

The leading prior case on this point was *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 373, 46 Ohio St. 498, which did decide broadly that insolvent corporations cannot give preferences by mortgage, and did not limit the decision to any class of creditors. But from the report of the case it appears that the mortgage was authorized by the same resolution that ordered a general assignment for creditors, and that one defense set up in the answer was that the mortgage secured an individual debt of the president of the corporation. Still these elements do not seem to have been regarded and the decision is fairly made on the doctrine that any preferences by an insolvent corporation which has ceased business are unlawful.

Following the doctrine of *Rouse v. Merchants Nat. Bank*, *supra*, the Supreme Court of the United States held that in a case arising in the circuit court of the United States in Ohio mortgages made 22 L. R. A.

by an insolvent trading corporation to prefer some of its creditors were invalid. *George F. Smith Middlings Purifier Co. v. McGroarty*, 134 U. S. 237, 34 L. ed. 348.

But in this case the president of the corporation was in fact one of the preferred creditors. In addition to this the court expressly declared that the Ohio law must govern.

Again in *Kankakee Woolen Mill Co. v. Kampe*, 38 Mo. App. 229, it was said that a corporation hopelessly insolvent cannot make a preference among its creditors, whether they are directors or strangers. But here also the case involved a preference to a director.

In *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639, the mortgage to secure directors was authorized by a vote when a majority of the quorum vote were interested as creditors. But it is said in the case that an insolvent corporation can make "no preferences to any one of the creditors, much less to the directors or trustees, as such." The court says that it has found this principle recognized in every case, but, as will be seen, there are numerous cases in which the principle is fully denied.

Other cases denying preferences have been those in which the attempted preferences were to officers or members of the corporation or else those in which the statutes prohibited preferences.

In Wisconsin the statute makes every assignment void, if it gives any preference to one creditor over another, except for wages. *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.* 66 Wis. 481.

Under the Georgia statute transfers to create preferences by a corporation, which is insolvent, or in contemplation of insolvency, are prohibited. *Hightower v. Mustain*, 8 Ga. 506.

And under a similar statute mortgages creating preferences are invalid. *Central R. & Bkg. Co. v. Claghorn*, 1 Speers, Eq. 545.

The reinsurance by a New York insurance company of all policies issued from its home office when it was involved in consequence of heavy losses sustained in the Chicago fire, and when the company was in fact insolvent, although this was not known to the officers, made as a temporary expedient, with the expectation of resuming the reinsurance policies when the Chicago losses were adjusted, was held to constitute a preference in favor of

except where allowed to do so by statute, and which have no intention nor the ability to go on and carry out the objects of their creation, have no right to execute mortgages preferring their creditors, having no lien on their assets, but in such case the creditors have a lien in equity and the assets are in such case a trust fund for the payment of the debts ratably, and its directors or managers are trustees for the creditors, and hold the assets for that purpose.

Tobin Canning Co. v. Fraser, 81 Tex. 407; *Morgan County v. Allen*, 108 U. S. 508, 509, 26 L. ed. 502; 1 Jones, Liens, §§ 84-86.

Creditors of an insolvent corporation which has ceased to carry on the business for which it was created, have a right in equity to file a creditor's bill to arrest an illegal or fraudulent transfer of its assets, and to recover them from whomsoever they may be found in possession of, without first having reduced their claims to judgment, and in such case they have a lien in equity on the assets and can follow them and take them, unless they have passed into the hands of an innocent purchaser, for a valuable consideration without notice.

Kankakee Woolen Mill Co. v. Kampe, 88 Mo. App. 229; Story, Eq. §§ 827, 835, 851; *Innes v. Lansing*, 7 Paige, 588, 4 L. ed. 288.

those insured by the home policies to the extent that the premiums paid for reinsurance diminished the fund applicable to the payment of all losses; and such insurance was a violation of 2 N. Y. Rev. Stat. 5th ed. 519, §§ 9, 10, prohibiting the transfer of the effects of a corporation in contemplation of insolvency with intent to give a preference. *Cassery v. Mannera*, 9 Hun, 695.

The invalidity of a transfer of a mortgage as security by an insolvent corporation will not defeat the mortgage in the hands of a bona fide purchaser. *Hoyt v. Sheldon*, 3 Boew. 267.

The knowledge as to insolvency of a creditor receiving a transfer or payment made by an insolvent corporation, or in contemplation of insolvency, with intent to give a preference will not prevent such preference from being invalid. *Brouner v. Harbeck*, 9 N. Y. 594.

A pledge of securities to secure the payment of bonds issued by an insolvent corporation to obtain funds for use in its business will not constitute an unlawful transfer or assignment under the New York statute, if not made with intent to prefer one creditor over another, but with an honest expectation to continue business and pay all debts. *Curtis v. Leavitt*, 15 N. Y. 110.

So one who takes a chattel mortgage in good faith from a corporation which is insolvent, but alive and active, is as fully protected as if dealing with an individual. *Manhattan Brass Co. v. Webster Glass & Q. Co.* 37 Mo. App. 145.

And a mortgage by a corporation which is in fact insolvent will not be regarded as an invalid preference if that is not its intent; but if it was given merely to obtain an extension of credit and the company was then endeavoring to carry on its business. *Damarin v. Huron Iron Co.* 47 Ohio St. 581.

But the question what transfers must be regarded as made in contemplation of insolvency, or when a corporation is to be deemed insolvent is not entered upon in this note.

Although an insolvent corporation in New Jersey may prefer creditors, a mortgage creating such a preference pending a suit to wind up the affairs of the corporation, in which an injunction against mortgage or other disposal of its property had been issued, is invalid. *Bissell v. Beason*, 47 N. J. Eq. 580.

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An insolvent corporation, when it intends to immediately cease to do business, or further carry out the objects of its creation, has no right to convey all its assets to a trustee, giving preference to a portion of its creditors, nor can it thus prefer its members and stockholders.

See 2 Morawetz, Priv. Corp. §§ 861-868; *Panhandle Nat. Bank v. Emery*, 78 Tex. 498; *Thompson, Liability of Stockholders*, § 267; *McDonnell v. Alabama Gold L. Ins. Co.* 85 Ala. 401, 26 Am. & Eng. Corp. Cas. 261; *Central Agr. & M. Assn. v. Alabama Gold L. Ins. Co.* 70 Ala. 120, 8 Am. & Eng. Corp. Cas. 78; *Stee v. Bloom*, 19 Johns. 456; *Briggs v. Penniman*, 8 Cow. 887.

Stayton, Oh. J., delivered the opinion of the court:

The questions submitted by the court of civil appeals for decision are: "(1) Whether or not a preferential deed of trust executed by a private trading corporation (chartered in July, 1884, under general law) after it has become insolvent, and consequently ceased to carry on its business, without any intention of resuming the enterprise, is void as against the unsecured creditors of

Preferences by a bank which is insolvent, or made in contemplation of insolvency, are prohibited by special act in Georgia, Code, § 4429. *Hill v. Western & A. R. Co.* 86 Ga. 284.

An insolvent bank which transfers securities in payment of drafts on which a loan had been obtained makes an assignment which is prohibited by 1 N. Y. Rev. Stat. 608, § 4 (pt. 1, chap. 18, title 4). *Robinson v. Bank of Attica*, 21 N. Y. 406.

A transfer of bills of exchange by an insolvent bank to a depositor, with intent to give him a preference, cannot be upheld on the ground that his deposits had been received after the bank officers knew of its insolvency, where the bills of exchange were not a part of the deposits made by him. *Atkinson v. Rochester Printing Co.* 114 N. Y. 168.

Payment of a check by a bank while it continues in business, to a depositor ignorant of its insolvency, is not within the prohibition of the New York statute against a transfer or assignment in contemplation of insolvency. *Dutcher v. Importers & T. Nat. Bank*, 59 N. Y. 5.

By U. S. Rev. Stat., 5242, assignments or transfers by an insolvent national bank and to prefer creditors and attachments against such banks from state courts are made unlawful, but the interpretation and application of that section constitutes a distinct subject, which is not here entered upon.

Stockholders as preferred creditors.

Where insolvent corporations are allowed to make preferences among creditors, a stockholder may be a preferred creditor. *Burr v. McDonald*, 3 Gratt. 215; *Lexington L. & M. F. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 165; *Reichwald v. Commercial Hotel Co.* 106 Ill. 489.

And a stockholder may obtain such preference by transfer of property. *Reichwald v. Commercial Hotel Co.* *supra*.

But in *Swepeon v. Exchange & D. Bank*, 9 Lea, 713, it was held that the sole stockholder of an insolvent bank could not take a conveyance of its property in payment for his debt to the exclusion of other creditors.

Insolvency of a corporation will not prevent a creditor from getting security if he can while the corporation is a going concern and the directors intend to continue business, even if he might push

such corporation. (3) If a private corporation, under such circumstances, has the same power to prefer its creditors as an individual, whether such preferential deed is void in law because of the fact that the stockholders, directors, and other officers of the corporation, who executed in the name of the corporation, are liable as sureties and indorsers on the preferred claims." Both questions present a case in which, on account of insolvency, the corporation had ceased to carry on business, and had no intention at any time to resume, when the instrument was executed through which preference was intended to be given. The corporation was one having no powers other than such as are given by the laws of this state regulating incorporation under the general law, which of course will embrace powers, although not expressly given, that are necessary to the exercise of those which are. It is contended, however, that such corporations have all the powers to give preferences which a person has, so long as the corporate existence continues, unless such power is denied by the common law or by the statutes of this state; and, in support of this proposition, reference is made to the opinion in case of *Riche v. Asbury Railway Car-*

riage Iron Co., L. R. 9 Exch. 263, in which the court was considering the powers conferred on corporations created under general acts of parliament. In the course of the opinion, referring to the case of *Sutton Hospital*, 10 Coke, 30, it was said that was "an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own; and, further, that an attempt to forbid this, on the part of the king, even by express negative words, does not bind the law. . . . I take it that the true rule of law is . . . a corporation, at common law, has, as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has." The question involved in that case was whether a certain transaction was *ultra vires*, and its solution depended on the question whether corporations incorporated under the general law had the same powers as what may be termed "common-law corporations." On appeal to the house of lords, it was held that a company created a corporation under the general

his claim to judgment and force the corporation into liquidation. *Commercial Nat. Bank v. Bureh*, 40 Ill. App. 505.

Directors and officers as preferred creditors.

The most serious conflict between the courts on the question of preferences by insolvent corporations is in reference to the preference of debts of directors. In a few states the doctrine that corporations may prefer creditors is followed to its full extent, and preferences to the directors themselves, although obtained by virtue of their superior knowledge of the condition of the corporation, are upheld. Such is the law in Michigan.

A mortgage by an insolvent corporation in trust to secure debts on which the directors are liable as indorsers is held by the circuit court of the United States in Michigan to be valid. *Hills v. Stockwell & D. Furniture Co.* 23 Fed. Rep. 432.

See also *BROWN v. GRAND RAPIDS PARLOR FURNITURE CO.* post, —

In *Buell v. Buckingham*, 16 Iowa, 234, 85 Am. Dec. 514, which is one of the leading cases cited in support of the allowance of preferences to directors, the director obtained his preference by a purchase of property of the corporation for more than its real value, and in addition to the discharge of his own debt assumed, as part of the consideration for the property, the payment of other debts. But it is said in that case: "Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of diligence with them, availing himself in the contest of his superior knowledge and of the advantages of his position to obtain security for the payment of his debt."

This is established law in Iowa and the fact that a preference by an insolvent corporation is exercised in favor of directors or shareholders is immaterial, although they may have voted for the proposition to secure their own debts. *Warfield v. Marshall County Canning Co.* 72 Iowa, 667; *Garratt v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461.

In Virginia also preferences to directors are upheld. *Planters Bank v. Whittle*, 78 Va. 737.

In *Lamb v. Cecil*, 25 W. Va. 288, a preference to directors of an insolvent bank was held invalid, 22 L. R. A.

where it was obtained by a transfer of discounted bills of the bank in excess of the cashier's authority.

This case was followed by *Lamb v. Pannell*, 28 W. Va. 663.

In *Lamb v. Laughlin*, 25 W. Va. 300, directors of a bank were held guilty for a breach of trust and also fraud, where they kept the bank open after it was insolvent to receive deposits, which they took in payment of their own deposits.

So a deed of trust to secure directors was held in *Hope v. Valley City Salt Co.*, 25 W. Va. 799, to be fraudulent both in law and fact.

But the validity of preferences as such in West Virginia is settled in favor of the preferences, though with much reluctance without making or discussing any exception in respect to directors in the case of *Pyles v. Riverside Furniture Co.*, 30 W. Va. 123.

In Missouri it was said in the case of *Forster v. Mullanphy Planing Mill Co.*, 32 Mo. 79, that a deed of trust preferring creditors of an insolvent corporation is valid even though such creditors are directors of the corporation.

But the question actually decided was that an unlawful preference by an insolvent corporation for the benefit of directors is not a fraudulent conveyance which will constitute the basis of an attachment under the Missouri statute as a fraud on creditors. This was also the decision of the court of appeals. *Forster v. Mullanphy Planing Mill Co.* 18 Mo. App. 150.

The court holds that a fraudulent conveyance which will justify an attachment must be utterly void as to creditors and not merely voidable, so that it will create a resulting trust in favor of the creditors.

Other Missouri cases do not agree with the broad doctrine stated in the above case (32 Mo. 79). It was held in *Williams v. Jackson County Patrons of Husbandry*, 23 Mo. App. 132, by the court of appeals a little before the decision in 32 Mo. 79, that after a corporation is recognized to be insolvent and has ceased business directors cannot make preference of their own claims against it to the exclusion of other creditors.

And in *Roan v. Winn*, 93 Mo. 508, it was held that deeds by an insolvent bank to a stockholder and

law providing for voluntary incorporation was not a corporation possessed of inherent common-law rights, but was limited to the powers properly embraced under the law in the memorandum of association. *Asbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653. The English acts regulating incorporation, as do the acts in force in this state on that subject, prescribe the powers corporations organized under them may exercise, and it ought to be deemed settled law that they have only such powers as the acts under which they are created confer upon them. *Atty-Gen. v. Great Northern R. Co.* 1 Drew. & S. 154; *Eversfield v. Mid-Sussex R. Co.* 3 DeG. & J. 286; *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 100, 27 L. ed. 413; *Thomas v. West Jersey R. Co.* 101 U. S. 81, 25 L. ed. 951.

In the case last cited it was contended, as in this, that a corporation created as suggested in the questions submitted may do any act not expressly or impliedly prohibited by its charter, as might corporations at common law, but in reply to this it was said: "We do not concur in this proposition. We take the general doctrine to be, in this country, though there may be exceptional cases

and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." In *Head v. Providence Ins. Co.*, 6 U. S. 2 Cranch, 127, 2 L. ed. 229, it was said: "An individual has an original capacity to contract and bind himself in such manner as he pleases. . . . But, with those bodies which have only a legal existence, it is otherwise. The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract." In *Davis v. Old Colony R. Co.*, 131 Mass. 259, 41 Am. Rep. 221, it was said that a corporation "is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such, only, as its charter confers;" and it may be doubted if the English decisions assert any other rule, except as to corporations existing by prescription, whose existence, as well as powers, must be determined

director in consideration of a surrender of paid-up stock are fraudulent preferences, when the insolvency of the bank was known to him at the time.

The mere fact of a stockholder's availing himself of his superior advantages to obtain security of debts due to himself to the exclusion of other creditors is held in *Whitwell v. Warner*, 20 Vt. 423, not to constitute a constructive fraud, which will make the stockholders individually liable for other debts of the corporation. In this case the validity of the preference itself is not directly questioned, but the question involved was the individual liability of stockholders.

In *Smith v. Skeary*, 47 Conn. 47, it was held that directors had a perfect right to receive payment of their debts, although the corporation was insolvent, but in that case it seems to have been supposed at the time that the corporation was able to pay all its debts.

But the great weight of authority denies the right of directors of a corporation to take advantage of their position to obtain preferences for themselves or unsecured debts. *Olney v. Conant-out Land Co.* 5 L. R. A. 361, 16 R. I. 597; *Corey v. Wadsworth* (Ala.) June 14, 1892; *Gibson v. Trowbridge Furniture Co.* (Ala.) June 15, 1892; *Clay v. Towle*, 78 Me. 36; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 373; *Hays v. Citizens Bank*, 51 Kan. 535; *Smith v. Putman*, 61 N. H. 632; *Richards v. New Hampshire Ins. Co.* 43 N. H. 203; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Howe v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Thompson v. Huron Lumber Co.* 4 Wash. 600; *Coons v. Tome*, 9 Fed. Rep. 532; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 339; *Gillet v. Moody*, 3 N. Y. 479.

The fact that stockholders authorized a mortgage giving a preference to directors of an insolvent corporation is immaterial. *Howe v. Sanford Fork & Tool Co.* *supra*.

Thus, the president of an insolvent corporation cannot acquire a preference over other unsecured creditors by accepting on his claim bonds secured by mortgage. *Sicardi v. Keystone Oil Co.* 149 Pa. 145.

So acts of the directors of an insolvent corporation creating a preference in favor of a certain

firm of which one of the directors was a member and was present co-operating, or consenting, or acquiescing in the transaction, cannot be upheld. *Bradley v. Farwell*, Holmes, 433.

Trustees of an insolvent corporation cannot sell its property to themselves, or any one of their number, nor pay off their own claims against the company in preference to those of other creditors. *Third Nat. Bank of Buffalo v. Elliott*, 42 Hun. 121.

A mortgage by an insolvent corporation to obtain a loan for the payment of debts may be upheld so far as the proceeds of the loan were legitimately used by the corporation, although it is invalid as to that part the proceeds which were used to pay debts on which directors were liable, thus constituting preferences to them. *Corbett v. Woodward*, 5 Sawy. 403.

Directors who, by executing a mortgage, secure to themselves advantages not common to all the stockholders, are held, in *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 339, to be guilty of an unauthorized act violating their trust; but in this case the invalidity of the mortgage was asserted by the corporation itself, as being in effect a fraud by the directors on other stockholders.

A preference given to the estate of a deceased director and president of an insolvent corporation by a board consisting of three directors, two of whom were brothers of the decedent and the other the agent of his estate, was held unlawful in *Adams v. Kehlor Mill Co.* 35 Fed. Rep. 433.

A transfer of the property of a corporation to a creditor by an officer and manager of the corporation, who is personally liable for the debt as a guarantor, indorser, or joint maker of notes, made without authority or sanction of the board of directors, is in effect a preference to him and is invalid. *Goodyear Rubber Co. v. Geo. D. Scott Co.* (Ala.) June 21, 1892.

Security given by an insolvent corporation for debts upon which directors are themselves liable as indorsers, being in fact a preference to them, is invalid. *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 43 Fed. Rep. 204.

Securities given by an insolvent corporation to a

by long and uninterrupted exercise of corporate franchise. If the power thus used be for sufficient length of time as unrestricted in business as is that of a natural person, the same reason exists for presuming that a grant of such power was at some remote period made as for presuming the existence of a grant of corporate franchise from its exercise for a great number of years. It is probably true that English courts, in speaking of "corporations by the common law," refer only to those that have exercised corporate powers from time immemorial, and it may be safely assumed that no mere trading corporation was ever thus classified. Although requested to do so, if possible, counsel have been unable to furnish any decision by an English court, except the one before referred to,—which, as we have seen, was expressly overruled,—in which it was held that a corporation created under the acts of parliament regulating the formation and business of companies with corporate powers had any such powers as are here claimed for trading corporations created under the general laws of this state; and, in view of the learning and industry of counsel, we feel authorized to conclude that no such decision exists.

Whether such transactions as are set out in the questions propounded are consistent with rules recognized by courts of law as well as by courts of equity, and by them enforced for the preservation of rights and redress of wrongs, will be considered hereafter.

The broad proposition that a corporation created under the general laws of this state may do any act in reference to its property which a natural person may do with his is expressly negatived by the statute. The memorandum of association termed by the statute the "charter" is required to state "the purpose for which it is formed." Rev. Stat. art. 567. This requirement is not solely that evidence may be thus furnished that the company is one intending to pursue a business for which the statute permits incorporation, but is also intended for the protection of those who may become stockholders or creditors, who are entitled to know in what business the corporation may engage, for without this they cannot know the extent of its powers, nor the hazards to which they may be legally exposed. The statute further provides that "no corporation created under the provisions of this title shall employ its stock, means, assets or other property, directly or indi-

firm of which the vice-president of the corporation, who was a member of the board of directors, was a member, constitute an unlawful preference as to other creditors not provided for. *Bradley v. Converse*, 4 Cliff. 375.

A deed of trust constituting an invalid preference of debts on which directors are liable is also invalid as to another debt secured thereby, where the attorney who drew the deed and advised concerning it was prosecuting the latter claim against the insolvent corporation and declined to act unless his claim was included in the deed. *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7.

The directors of an insolvent corporation cannot, to the prejudice of any of its creditors, by mortgage upon its assets, indemnify one or more of their own body against loss as surety for the corporation upon liabilities already incurred, where such indemnity had not been agreed upon as an inducement to the incurring of such liabilities. The inability to indemnify a director in such case extends to the co-surety of a director, inasmuch as the indemnity of one would operate to the benefit of both. *Lowry Bkg. Co. v. Empire Lumber Co. (Ga.)* May 2, 1893.

A mortgage to indemnify a director as surety of the corporation, which constitutes as to him an invalid preference, cannot be held valid as to the creditor for whose debt the director is a surety. Being void as to both maker and mortgagee, it cannot be valid by way of subrogation in favor of the creditor. *Ibid.*

But security given to directors of a corporation after it became insolvent may be upheld, if given for advances by the directors made under an agreement for such securities. *Stout v. Yaeger Mill Co.* 18 Fed. Rep. 302.

The denial of the right of directors to obtain a preference, after knowledge of the insolvency of the corporation, is generally based on the doctrine that the assets of the corporation as soon as it becomes insolvent, constitute a trust fund, and that the directors are trustees of such fund. *Roseboom v. Whittaker*, 122 Ill. 81; *Beach v. Miller*, 130 Ill. 162; *Corey v. Wadsworth (Ala.)* June 14, 1892; *West v. West Bradley & C. Mfg. Co.* 9 N. Y. S. R. 255, and other cases above cited.

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Preferences by legal proceedings.

A creditor is not precluded from obtaining an attachment against a corporation which is still doing business by the fact that he knows it to be insolvent. *White P. & P. Mfg. Co. v. Pettes Importing Co.* 30 Fed. Rep. 864; *Breene v. Merchants & M. Bank*, 11 Colo. 97.

Judgments in attachment suits do not constitute an unlawful preference against an insolvent corporation, although it was insolvent when the attachment was levied. *Roseboom v. Whittaker*, 122 Ill. 81.

An attachment on the property of an insolvent corporation is not invalid because of its insolvency, and the void appointment of a receiver. *Jones v. Bank of Leadville*, 10 Colo. 464. But see, as to directors, *infra*.

Merely suffering a default in an action to which there is no valid defense does not constitute an unlawful preference by an insolvent corporation. *Varnum v. Hart*, 119 N. Y. 101; *Kingsley v. First Nat. Bank of Bath*, 81 Hun. 329.

It is said in *Stratton v. Allen*, 16 N. J. Eq. 233, that it cannot be denied that a corporation, as well as an individual, may, independently of the statute, confess judgment in order to prefer creditors; but it was held in that case that such a preference could not be supported under the New Jersey statute. But see *infra*, as to judgments confessed to directors.

Judgments entered in accordance with offers of judgment by the defendant, although in actions regularly commenced by process, constitute unlawful preferences, if the defendant is a corporation known to be insolvent at the time of the offer, under the New York statute, which declares an assignment or transfer by a corporation in contemplation of insolvency void. *Kingsley v. First National Bank of Bath*, *supra*.

A judgment against an insolvent corporation obtained by its secretary on an offer of judgment in an action begun by him is held to constitute an unlawful preference, under N. Y. Rev. Stat., pt. 1, chap. 18, title 4, § 4. *National Broadway Bank v. Wessell Metal Co.* 59 Hun. 470.

A judgment obtained against a corporation in favor of the wife of the president of the company, who enabled her to obtain it by having a summons

rectly, for any other purpose whatever, than to accomplish the objects of its creation." Rev. Stat. art. 589. The objects of its creation are none other than such as are named in the charter. A natural person may make any disposition of his property not forbidden by law, and may make any contract lawful within itself; but, under the plain terms of the statute referred to, a private corporation has no such power. The statute enumerates the powers of private corporations existing under it, and they will be here noticed. It declares that they shall have power "to hold, purchase, sell, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation shall require, and also to take, hold, and convey such other property real, personal, or mixed as shall be requisite for such corporation to acquire in order to obtain or secure the payment of any indebtedness or liability due or belonging to the corporation." Rev. Stat. art. 575.

No such restrictions upon the power of natural persons to acquire, hold, or dispose of property exist; and the manifest purpose of this statute was not so much to confer power on such corporations to hold, purchase, sell, or mortgage property necessary for the

proper transaction of the business named in the charter as to restrict the power of corporations to hold, buy, sell, or mortgage, subject to one exception,—to such property as may be reasonably necessary to the legitimate business of the particular corporation; for without such an express grant of power the incorporation of a company, with authority to carry on a specified business, would carry with it power to hold, purchase, sell, mortgage, or otherwise convey property necessary to that business. Power to hold, purchase, and sell property would be absolutely necessary to the business of any trading corporation, and power, through mortgage or like conveyance, to acquire means with which to purchase property necessary to carry on the business, would also exist. It will be observed that the powers mentioned in the statute are authorized to be exercised in relation to such property "as the purposes of the corporation shall require," and they are all powers ordinarily necessary to be exercised while a business is in active operation, with a view to obtain the results contemplated when a corporation is created; and the exercise of some of them, as the powers to hold and to purchase such property as the

served upon himself, in order to obtain a preference over other claims while the corporation was insolvent, is invalid, if he knew of its insolvent condition. *West v. West Bradley & C. Mfg. Co.* 9 N. Y. S. R. 265.

A judgment obtained against an insolvent corporation by a stockholder and director, who has been made a trustee for the collection of debts owing by the corporation, which is in effect a preference for indebtedness to one who is the president and trustee of the company, amounts to an unlawful preference, under the New York statute prohibiting an assignment or transfer in contemplation of insolvency, or while insolvent. *King v. Union Iron Co.* 83 N. Y. S. R. 545.

A director cannot take advantage of his superior means of information to secure his debt against the corporation, either by confession of judgment or otherwise. *Hill v. Pioneer Lumber Co.* 31 L. R. A. 580, 113 N. C. 173.

A judgment confessed by a corporation when its insolvency was known by a judgment note in favor of a majority of its board of directors who had paid indebtedness of the corporation as guarantors, constitutes an unlawful preference as to other creditors. *Roseboom v. Whittaker*, 132 Ill. 81.

And directors are denied the right to get a preference by a judgment note for themselves, or as agents for others, in *Atwater v. American Exch. Nat. Bank*, 40 Ill. App. 501.

A judgment confessed to a director on the eve of the insolvency of a corporation was denied a preference in *Stratton v. Allen*, 16 N. J. Eq. 229.

So judgments taken by directors on obligations given to themselves when the corporation was insolvent, with a view to a preference, were held to be not entitled to any preference, in *Hopkins* App. 90 Pa. 66.

Although an officer of an insolvent corporation may bring an action against it as creditor, a levy on his judgment with a view to selling property of the corporation to pay his debt is indirectly a transfer of the property of the company for his benefit and is illegal under the New York statute, which prohibits the transfer of any of the property of an insolvent corporation to any officer, or stockholder, directly or indirectly. *Kingsley v. First Nat. Bank of Bath*, 31 Hun, 329.

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Under N. Y. Rev. Stat., pt. 1, chap. 18, title 4, § 4, prohibiting any transfer of its property or choses in action to any officer or stockholder directly or indirectly, a director of an insolvent corporation cannot, by attachment even, although acting in distinct hostility to the other directors and officers of the company, acquire a preferential lien. *Throop v. Hatch Lithographic Co.* 125 N. Y. 530.

But in Iowa, following the general doctrine allowing any preference, a director may pursue his remedy against the corporation by attachment, although he knows the company is insolvent, especially where he has recently become a member of the corporation and is not responsible for its condition. *Rollins v. Shaver Wagon & C. Co.* 30 Iowa, 380.

This doctrine is also recognized in New York except as affected by statute. Thus the director of a foreign corporation is allowed the remedy of attachment against the corporation when insolvent on the ground that the provisions of the New York statutes as to insolvent corporations do not apply to foreign corporations. *Hill v. Knickerbocker Electric Light & P. Co.* 45 N. Y. S. R. 761.

On examination of the decisions it is clear that the weight of authority is overwhelmingly in favor of the legality of preferences to ordinary creditors except as restricted by statute, and overwhelmingly against the validity of such preferences when made in favor of directors. Therefore the two cases reported here with which this note is connected represent the two extremes of the doctrine and are both in conflict with the weight of authority. The Texas case, *LYONS-THOMAS HARDWARE CO. v. PERRY STOVE MFG. CO.*, denies the validity of any preference, while the federal case, *BROWN v. GRAND RAPIDS FURNITURE CO.*, holds (and correctly so far as the law of Michigan is concerned) that preferences even to directors are valid.

Remedies.

The assignee of an insolvent corporation cannot have relief in equity to set aside a payment by the corporation to its treasurer on the ground of trust, but may have equitable relief on the ground of his fraud. *Taylor v. Taylor*, 74 Me. 582.

In *State v. Brockman*, 39 Mo. App. 131, it is held that the payment by an insolvent corporation of a

business of the corporation may require, would be necessary or permissible, looking to the rights of stockholders and creditors, only when the business was being carried on. If a corporation be created with power to manufacture cotton or woolen goods, its power to buy and hold raw material while the business was carried on would be clear. But suppose such a corporation to become insolvent, and on that account to cease business, with intent never to resume it. Would it be contended that it had power to buy and hold wool or cotton for purposes of speculation? The statute answers the question. Some of the powers mentioned, however, may be as advantageously used in winding up the affairs of a corporation as in carrying it on,

and these are the powers to sell, mortgage, and otherwise convey; but it must be kept in mind that the exercise of these powers, if we look alone to the statute under consideration as their source, is authorized only in reference to such property "as the purposes of the corporation require" to be sold, mortgaged, or otherwise conveyed. If these powers stood alone, it ought to be held that they might be exercised whenever necessary or advantageous to sell, mortgage, or otherwise convey, as in winding up the affairs of a private corporation; but standing in connection, as they do, with powers relating to the same property, which can be exercised upon such property only when it is necessary to carry on the corporate business then con-

debt by a transfer of property constituting a preference, although constituting a breach of trust, could not be assailed by another creditor in defense of an action brought by the purchaser based on a levy by the defendant. See also *Foster v. Mullanphy Planing Mill Co.*, 22 Mo. 79.

Although equity may interfere to prevent unjust preferences by an insolvent corporation, an execution creditor attempting to enforce his claim to the disadvantage and exclusion of other creditors is not entitled to enforce his execution against personal property sold to another creditor in payment of a just debt of the corporation, on the ground that such sale constituted a preference, unless he can show that more property was transferred than was necessary to pay the debt at a fair valuation. *Lang v. Dougherty*, 74 Tex. 226.

So property purchased by a director to obtain a preference over other creditors, although subject to a trust in equity, cannot be reached by such creditors by execution. *Beach v. Miller*, 180 Ill. 162.

The illegality of a preference obtained against an insolvent corporation upon an offer of judgment will not render the plaintiff in that action, who enforced his execution against the property of the corporation, liable in an action at law to another creditor who is thereby prevented from obtaining satisfaction of his judgment. *Braem v. Merchants Nat. Bank*, 127 N. Y. 508.

The court says the proceeds of the sale on execution may properly have been made the subject of contest, and also suggests, but does not decide the question, whether an action for money had and received would lie against the creditor who had obtained the unlawful preference in favor of the creditor who had been thereby prevented from obtaining satisfaction of his judgment.

The case of *Marr v. Bank of West Tennessee*, 4 Coldw. 473, which is cited in numerous instances among others in the main case, as an authority on this subject, related merely to the right of judgments against an insolvent bank to priority in distribution of the assets of the bank.

That class of cases is not considered in this note. The question here considered is that of the power of a corporation to create preferences among its creditors as distinguished from any question of priorities created by law, without any intent on the part of the corporation, after it had become insolvent, to prefer one creditor over another.

English decisions.

In England the right of a corporation to prefer creditors is fully established except as restricted by statute.

In *Re Wincham Ship Building, B. & S. Co.*, L. R. 9 Ch. Div. 322, it is declared that directors are not trustees for creditors, and that there is therefore nothing to prevent them from paying a debt of the 29 L. R. A.

company on which they are individually liable in preference to other debts, even where a judgment had already been obtained against them for the debt. In this case directors passed a resolution recommending the payment of amounts due on the shares, and in accordance therewith themselves paid the sums due on their shares to a person acting without authority for the secretary, who gave them a receipt for the money and applied it in payment of the debt of the company on which they were liable. It was held that this payment was good and relieved the directors from further liability on their shares; and that it did not constitute a fraudulent preference within the meaning of section 164 of the Company's Act of 1862, but that it was made in the ordinary course of business.

This section 164 provided in substance that any conveyance, mortgage, payment, or other act relating to property, which in the case of an individual trader would be deemed a fraudulent preference in the event of his bankruptcy, would be so regarded in the case of a corporation in the event of its being wound up.

But in *Gaslight Improvement Co. v. Terrell*, L. R. 10 Eq. 168, it is held that directors of an insolvent company cannot obtain a preference by an assignment of all its property in their favor, although they are pressing the company on their claims, but that such an assignment is an unlawful preference within section 164 of the Company's Act. It is said in that case that they are "trustees for creditors to this extent, that they are bound to apply all the assets for the benefit of the creditors as far as they will extend."

That section 164 applies only in case of a winding up is decided in *Wilmott v. London Celluloid Co.*, L. R. 34 Ch. Div. 147, 56 L. J. Ch. 98, 55 L. T. N. S. 696, 35 Week. Rep. 145, holding that until a winding up petition, while the business is going on, it has no application. Therefore the application by directors of insurance money received for the destruction of property of the company to the directors' own debts was not a fraudulent preference within that section.

But the application, after a petition for winding up, of a debt due by the corporation in payment for shares held by one who had purchased the debt constitutes a fraudulent preference. *Re Land Development Assn.*, L. R. 39 Ch. Div. 259, 57 L. J. Ch. 977, 59 L. T. N. S. 449, 35 Week. Rep. 818, 1 Meg. 69.

So in England a corporation may give security on its entire property to quiet a creditor's demands where no winding up of the company is contemplated. *Re Patent File Co.*, L. R. 6 Ch. App. 63.

Although a preference is involved in the application to a stockholder's liability of a claim against the corporation, such set-off is a question which is not here considered.

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tinuing, it may be doubted if the statute under consideration has any application to the winding up of the affairs of an insolvent corporation that has ceased to do business. If by the word "purposes" be meant the business or occupation, in all its phases, which the corporation, by its charter, is empowered to pursue, as is meant by the word "purpose" in that part of the statute requiring "the purpose for which it is formed" to be stated in the charter, then it is evident that the statute has application only to powers to be used while the business for which the corporation was given existence is carried on. The power of a trading corporation to sell or to mortgage property to raise means to pay its debts during its active life, or after it has become insolvent and ceased business, is not controverted, but that is not the immediate question under consideration; for the present inquiry is, Does the statute now under consideration, as claimed, expressly or by necessary implication, confer on a corporation circumstanced as was the hardware company power to make the conveyance in question? If such a power existed, we are of opinion that it must be found elsewhere.

The statute further provides that private corporations have power "to enter into any obligation or contract essential to the transaction of its authorized business." Rev. Stat. art. 575. This statute must be considered in connection with the one just passed from, and with any other relating to the powers of private corporations, in order to understand and arrive at the legislative intent. It will be observed that this statute empowers such corporations to enter into any contract or obligation whatever, with only one restriction, which is that the contract or obligation must be essential to the transaction of the corporation's authorized business. What was the authorized business of the private corporation making the conveyance in question? That business was authorized which its charter stated it was formed to pursue. What was that business? "Business" is defined to be "that which busies, or that which occupies the time, attention, or labor of one, as his principal concern, whether for a longer or shorter time; employment; occupation." Webster. "'Business' is a word of large signification, and denotes the employment or occupation in which a person is engaged to procure a living." *Goddard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 796. "It is the synonym of 'employment,' signifying that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." *Martin v. State*, 59 Ala. 36.

The corporation making the conveyance in question was a private trading corporation, the business of which consisted in buying and selling for profit in the ordinary course of mercantile business. That was its business, within the meaning of the statute; and when that ceased, without intent to resume, the business no longer existed, and no contract thereafter made could be essential to the transaction of—the doing of—that business. The mere act of paying or securing an indebtedness can never become a business. This statute is broader than that before no-

ticed, and evidently was intended to apply only to such contracts and obligations as it might become necessary to assume or make in carrying on the business for which incorporation was given. One applies, in terms, to power over property necessary to be held or purchased to carry on the corporate business, and to property necessary to sell, mortgage, or otherwise convey for a like purpose, while the other applies to every kind of obligation or contract necessary to be made or assumed because essential to the transaction of its authorized business.

The statute further provides that "corporations shall have power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor, and may pledge the property and income of the corporation." Rev. Stat. art. 577. Was it, by this statute, intended to confer power on a corporation to borrow money, and incur its property to secure its payment, when the corporation, because of insolvency, had ceased to do business, with intent not to resume? The limitation on the sum to be borrowed, evidently based upon the presumed ability to pay to that extent, and the fact that the pledging of the income is authorized, would seem to forbid the belief that a corporation so circumstanced was contemplated by the act, for such a corporation would have no income to pledge.

These are all the provisions of the statute affecting the powers of private corporations, and it certainly is true that they do not confer upon them, in reference to corporate property, that unrestricted power a natural person has over his own. No parts of the acts of the legislature affecting private corporations, carried into the Revised Statutes or subsequently enacted, except chapter 5, title 20, Rev. Stat., seem to have application to the winding up of the business of an insolvent corporation after it has ceased to do business, with intent not to resume, nor do they undertake to declare the rights of creditors under such circumstances, but do seem to apply only to the creation, organization, powers, general management, and like matters looking to the right to carry on, and the active transaction of, the business for which incorporation is given in the particular instance; and for this reason such parts of the statute cannot be looked to in order to determine the rights of creditors, or the powers that may be exercised by the corporation under such circumstances. Such rights and powers must be determined by the general principles of law applicable to the conditions, if they be not controlled by statute.

Among other things, chapter 5, title 20, Rev. Stat., provides that "upon the dissolution of any corporation already created by or under the laws of this state, unless a receiver is appointed by some court of competent authority, the president and directors, or managers of the affairs of the corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of such corporation, with full power to settle the affairs, collect the outstanding debts and divide the

money and other property among the stockholders after paying the debts due and owing by such corporation at the time of its dissolution as far as such money and property will enable them; and for this purpose they may maintain or defend any judicial proceeding." Rev. Stat. art. 606. These trustees are made responsible to creditors and stockholders to the extent of property and effects that shall have come into their hands. Rev. Stat. art. 607. By "dissolution," as here used, is meant that result which follows the expiration of time limited by its charter, or the result of a judgment of a court of competent jurisdiction declaring the dissolution. Rev. Stat. art. 604: The mere insolvency of a corporation, followed by cessation of business, with no intent to resume, will not operate what is technically known as "dissolution;" but it has been held in many cases, with much reason, that such condition of affairs will confer on creditors practically the same rights as they would have under technical dissolution. *Slac v. Bloom*, 19 Johns. 456, 10 Am. Dec. 273; *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 478; *Carey v. Cincinnati & C. R. Co.* 5 Iowa, 357; *Moore v. Whitcomb*, 48 Mo. 543; *State Sav. Asso. v. Kellogg*, 52 Mo. 588.

Article 606, Rev. Stat., establishes the proposition that a trusteeship exists in every case of dissolution to which it is applicable, and this necessarily fixes upon the property a trust primarily for the payment of debts; and we see no good reason, so far as creditors are concerned, why the facts shown to exist by the certificate before us should not be given the full effect technical dissolution would have. If, however, that article is to be limited in its operation, it indicates the legislative policy in such cases. This is illustrated by other legislation. Whenever a sale is made of the roadbed, track, franchise, and chartered powers and privileges of a railroad corporation, unless a receiver be appointed, the directors or managers are made trustees for the creditors and stockholders of the sold-out company, with full power to administer the unsold estate first for the benefit of creditors, and to them are responsible to the extent of property received. Rev. Stat. art. 4264. When there is a trustee clothed with such power over property, a trust, strictly, exists, which the *cestui que trust* may enforce. This is an instance of a trust on corporate property in behalf of creditors, where there has been no dissolution of the corporation; and this is simply because the property is no longer used, or intended to be used, for the corporate purpose for which it was originally acquired.

While the general rule is that the insolvency of a corporation will not authorize the appointment of a receiver at the suit of a creditor, so long as it is honestly carrying out the business for which it was incorporated, still such appointment may be made if the creditor's right is imperiled by a threatened misappropriation of assets; and this is upon the ground that the corporate property is a trust fund to which the creditor has the right to look for payment of the

debt due him. By a recent statute the appointment of a receiver is authorized when a corporation is insolvent, or in imminent danger of insolvency, as when it has been dissolved. Sayles' Civ. Stat. art. 1461. Without considering whether there may be implied limitations to this statutory rule, it illustrates the fact that in this state mere insolvency of a corporation has been made a ground for the appointment of a receiver, doubtless for the purpose of enforcing claims against the corporate property in behalf of creditors which could not be thus enforced without recognition of the fact that the property is, at least in a limited sense, a trust fund to which creditors have the right to resort. A limited partnership, under the statutes of this state, in a respect material to the questions before us in this case, is very similar to a corporation. The special partner is liable for debts of the partnership only to the extent of the fund contributed by him to the partnership, as is the stockholder in a corporation liable only to the extent of his stock subscription; but the legislature of this state, recognizing that all creditors of such a partnership have equal claim upon the assets of such a firm when insolvent or in contemplation of insolvency, has declared that "every sale, assignment, or transfer of any property or effects of the partnership when insolvent or in contemplation of insolvency, or after or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership; and every judgment conferred, lien created or securely given by any such partnership under the like circumstances and with like intent,—shall be void as against the creditors of such partnership." Sayles' Civ. Stat. art. 8460. This statute simply gives legislative sanction to the proposition often asserted and sometimes denied, in cases of insolvent corporations, that when there is no personal liability for a debt, and the creditor must look to a fund such as the capital of a corporation, that such fund is a trust fund, if the corporation is insolvent and has ceased business, to which the creditor may resort on terms of equality with other creditors who acquired no lien prior to the time the trust character attached. This statute makes a broad application of that rule, even when there is a personal liability on the part of the general partners, on the ground that as to the special partner there is no personal liability. The succeeding article denies the right even of the general or special partner, under such circumstances, to make any sale, assignment, or other transfer of, or to create any lien on, property of the general or special partner, with intent to give a creditor of himself or of the partnership a preference over the other partnership creditors. Sayles' Civ. Stat. art. 8461.

Under the statutes in force in this state, if an insolvent corporation, in contemplation of an assignment under the statute, with intent to give preference to one creditor, should convey to him property of the corporation, this would be invalid as to other creditors, and the property would pass to the assignee

under a subsequent assignment for the benefit of all creditors, unless the person so taking took under circumstances that would constitute him a bona fide purchaser, which could not well be if the corporation was insolvent, and was known to have ceased business on that account; for such knowledge, of itself, would seem sufficient to put the purchaser on inquiry. *Sayles' Civ. Stat.* art. 651. This statute further illustrates the fact that the property of an insolvent corporation is deemed in this state a trust fund, and emphasizes the right of all of its creditors to equality in distribution of its assets, as against all other creditors who had not acquired superior right prior to known insolvency.

In the application of principles illustrated by this statute, ought the fact that the insolvent corporation subsequently made no general assignment, and made, in effect, only mortgages conveying all of its property, as, from the papers certified by the court of civil appeals, appears to have been the case, to affect the rights of the parties? The mortgages, if sustained, would give preferences as fully as would absolute conveyances, and all of the corporate property, if not more than sufficient to pay the preferred claims, would pass from the corporation as fully as would it by subsequent assignment. These statutes have been referred to, not because any of them, in terms, declare the law applicable to the questions propounded, but because they indicate the trend of legislation on some essential matters involved in the questions, and tend to support the proposition, through analogies, that the assets of an insolvent corporation, which has ceased to carry on business, and does not intend to resume, is a fund from which all creditors not secured by valid liens existing before the condition was fixed have the right to be paid on terms of perfect equality. If such a fund be a trust fund, then the assets of a corporation so circumstanced are trust funds, and those whose right and duty it is to administer such a fund are trustees.

We have seen that such corporations as the hardware company, in England and in this state, have not the same powers in reference to property owned by them for corporate purposes as have natural persons, and that in this state there is no statute, expressly or by necessary implication, conferring on such corporations power to make preferential mortgages or like conveyances, when in the condition assumed in the questions propounded; and the question arises whether, under the general principles of law or equity applicable to such a condition, such a power exists. No English decision has been furnished in which the questions involved arose or were discussed; and it is probably true that the laws of that country in regard to insolvent corporations and persons have been such, for three centuries past, that no claim would be made in the courts of that country that such conveyances as the questions submitted refer to were valid against other creditors. We take it for granted that all English courts, under the laws of that country, would hold all such attempted preferences unauthorized and illegal, when made by an insolvent cor-

poration circumstanced as was the hardware company, and therefore seek no further for authority from that source. It would be a useless consumption of time to review the many American decisions bearing on the questions submitted, for it must be conceded that they are clearly in conflict, and that on each side of the question may be found many decisions made by courts eminent for learning and conservatism; but reference will be made to a sufficient number on each side of the question to show the grounds on which these conflicting decisions rest.

Catlin v. Eagle Bank, 6 Conn. 283, is a leading case, and is understood to rest on substantially the same facts presented in the first question certified, except that it does not appear that there was no intention to resume the corporate business. While conceding that such corporations derive their powers solely from their charters, it was assumed that an insolvent corporation which had ceased to do business had the same power in the management and disposition of its property as had natural persons, and that for this reason the officers of such corporation might prefer creditors. It was further held that under such circumstances no trust relation existed between the managing officers of the corporation and creditors, and that no trust attached to the property of the insolvent corporation in behalf of creditors. In *Dana v. Bank of United States*, 5 Watts & S. 223, preference was given to named creditors through conveyance of property in trust to be sold for their benefit, when the corporation was insolvent; but it does not appear that this was done after the corporation had ceased to do business, or that this made cessation of business necessary, nor that this was contemplated. The court held that, under the principles of the common law, such corporations had certain powers enumerated, and power to do all other acts that a natural person had, unless restrained by its charter or some other act. In the course of the opinion it was said: "Although there are some restrictions placed on the bank by the act establishing it, yet it cannot be pretended, or at most cannot be shown, that the bank, or its president and directors, are either expressly or impliedly restrained from giving, directly or indirectly, preference to some of its creditors over others; and, not being restrained in this respect by this or any other act, it must be deemed to have the same power to make a distinction between its creditors, and to give preferences to some of them over others, that any natural person has." In *Wilkinson v. Buuorle*, 41 N. J. Eq. 696, it appeared that the directors of a corporation transferred all of its assets to one of its directors after it became insolvent. The sale was made to give preference, and this, by other creditors, was claimed to be illegal as to them, but the court said: "The correctness of this view, and the success of the contention now made, depend upon the legislation now in force respecting this subject; for if there be no legislative prohibition against the transfer of corporate property, or its use in preferring creditors after insolvency, no reason can be given why such transactions should be in-

validated which would not also invalidate the like transactions of individuals." It was held in that case, however, as the purchaser was a director who took part in the transaction, that it was incumbent on him to show that he paid fair value for the property, or otherwise he should be held responsible for the difference between that and the price paid. In *Pyles v. Riverside Furniture Co.*, 80 W. Va. 123, it was held that an insolvent corporation, having ceased to do business, has the same power as an insolvent individual to prefer a creditor in a general assignment of all its property for the payment of its debts; but it seems this decision was controlled by a statute, but for which the court would have held otherwise, as is shown in the opinion, as well as by the cases of *Lamb v. Laughlin*, 25 W. Va. 300, and *Lamb v. Cecil*, 28 W. Va. 653. In *Warfield v. Marshall County Canning Co.*, 72 Iowa, 670, it is said, speaking in a case in which the effect of a mortgage to directors was to defeat the claims of other creditors: "The mortgagees, it is true, were officers and stockholders of the corporation; but, notwithstanding that fact, they had the right to procure the corporation to execute the mortgage, although other creditors of the corporation are unable to obtain the payment of their indebtedness. Corporations can make contracts and transfer property, possessing the same powers in such respects as private individuals. Code, § 1059. Such is the rule in the absence of a statute, and therefore it has the right to prefer one creditor to another. 2 Morawetz, Priv. Corp. § 802. The fact that the preference is exercised in favor of directors or shareholders of the corporation is immaterial, although the director or shareholder may have voted for the proposition, and the security given was to secure an indebtedness to himself." The facts of that case, it is proper to say, may not have been practically the same as those made the basis of the questions propounded, but it tends to show the grounds of decision, holding that, at all times prior to technical dissolution, corporations have power, when insolvent, to give preferences even to directors. Many other cases might be referred to, bearing on both states of fact presented in the questions propounded, but those already noticed give substantially the grounds on which rest all the opinions holding such transaction legal.

Rouse v. Merchants Nat. Bank, 46 Ohio St. 493, 5 L. R. A. 378, involved the facts presented in the first question propounded, and in that case the doctrine that corporations have the same power over corporate property as have natural persons was denied. Approving the principles announced in *Wood v. Dummer*, 3 Mason, 811; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220, and *Curran v. Arkansas*, 56 U. S. 15 How. 312, 14 L. ed. 709,—and quoting with approval from the opinion, it was held "that where a corporation for profit . . . becomes insolvent, and ceases to carry on its business, or further pursue the purposes of its creation, the corporate property constitutes a trust fund for the equal benefit of the corporate creditors, in proportion to the amounts of their respective

claims, and that it cannot then, by pledge or mortgage of the property to some of its creditors as security for antecedent debts, without other consideration, create valid preferences in their behalf over the other creditors, or over an assignment thereafter made for the benefit of creditors." The case of *Marr v. Bank of West Tennessee*, 4 Coldw. 471, involved substantially the same facts, and therein the same rules were announced, with citation of many cases. The case of *Appleton v. Turnbull*, 84 Me. 72, rested on facts which made it necessary to determine the character of the assets of an insolvent corporation, and the rights of its creditors, and in the opinion it was said: "It is too firmly established at the present day to be questioned that the capital stock of a corporation is a trust fund for the payment of its debts. It is a substitute for the personal liability of the individual members of private partnerships, and those who deal with the corporation have a right to rely upon its capital stock for their security. Unpaid stock is as much a part of the assets of the corporation as the money that has been paid in upon it. . . . During the existence of the life of the corporation, it is a trust to be managed for the benefit of the stockholders; but, in the event of its dissolution or insolvency, it becomes a trust fund for the benefit of its creditors. If in such case the assets are not sufficient to pay all its debts in full, each creditor is equitably entitled to receive a ratable share of the assets which remain.

. . . In such cases the doctrine laid down by the courts for thirty years is that they must pay up their shares in full, and are entitled only to a ratable distribution of all the company's assets, and are to receive dividends upon their claims against the corporation in common with other creditors. Morawetz, Priv. Corp. § 861; Cook, Stock & Stockholders, § 198. The rule was settled by the Supreme Court of the United States in *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 731; where the court says: "The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt, to its full amount, ceased. It became a fund belonging equally, in equity, to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." *Scott v. Thayer*, 105 U. S. 143, 152, 26 L. ed. 968, 972; *Sanger v. Upton*, 91 U. S. 56, 23 L. ed. 220; *Stockton v. Mechanics & L. Sav. Bank*, 32 N. J. Eq. 163, 167; *Williams v. Traphagen*, 38 N. J. Eq. 57; *Wheeler v. Millar*, 90 N. Y. 353. The same rule prevails in England, as may be seen in the leading decision of *Grisell's Case*, L. R. 1 Ch. App. 528. If the defendant's rights, as well as his duties, were to be determined by the common law alone, it is evident that the defense interposed in this case could not prevail." In *Kankakee Woolen Mill Co. v. Kamps*, 38 Mo. App. 229, the general questions involved in this case were considered, and after stating the general powers of a cor-

poration while carrying on its business, and the right to protection persons obtaining preferences in good faith would be entitled to, the court said: "But these principles are only applicable to what may be termed or designated as 'going concerns.' They cannot be applied to insolvent corporations. By this we do not wish to be understood as deciding that a corporation that is financially embarrassed will be deprived of the right to deal with its corporate property in a legitimate and proper way; but we do say that when the corporation is hopelessly insolvent, and there is no reasonable or well-founded hope for a continuation of its business and these facts are known to its officers and directors, then all of the assets of the corporation become a trust fund in the hands of the directors, to be administered by them as trustees or agents for the equal benefit of all the creditors of the concern, and any attempted preference in favor of the directors themselves, or of a stranger, will not be upheld. *Williams v. Jackson County Patrons of Husbandry*, 28 Mo. App. 182; *Roan v. Wirtz*, 98 Mo. 508; *Foster v. Mullanphy Planing Mill Co.* 92 Mo. 79." The same reasons for denying an insolvent corporation, so circumstanced, power to give preferences, are announced with much clearness and force in the following cases: *Olney v. Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Beach v. Miller*, 130 Ill. 162; *Corey v. Wadsworth* (Ala.) 11 So. Rep. 350; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387; *Adams v. Kehlor Milling Co.* 35 Fed. Rep. 483; *Howe v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7.

The line of decisions first referred to, in substance, holds that insolvent corporations, even though they have ceased to do business, have the same power to give preferences as have natural persons, on the theory that, unless their charters forbid this, it is an implied power; but this seems indefensible under the rules applicable to the construction of charters such as may be granted to private corporations under the general laws in force in this state. The power is not expressly given, and it cannot be implied, for it is not necessary to the accomplishment of any purpose for which such corporations may be created. While such a corporation is carrying on its business, it has power to buy on credit such property as to secure such services or funds as may be reasonably necessary for the transaction of its legitimate business, and, to secure indebtedness thus incurred, may give mortgages or other security, and thus give preferences, although in fact insolvent. The exercise of such a power may often be, not only beneficial, but necessary for the continuance or prosperity of the business; but no such necessity can exist where the business has been abandoned. Self-interest, while the business is honestly carried on, will ordinarily be sufficient to prevent abuse of what is then a right; but where the business has ceased, on account of insolvency, stockholders have no further beneficial interest in the corporate assets, and 22 L. R. A.

they have no right or power, directly or through the managing officers, through preferences, in effect, to pay or secure some of the creditors at the expense of others, if the law be that the assets of an insolvent corporation, that has ceased business, with no intent ever to resume, are a fund held in trust for creditors, for in such a fund all creditors have equality of right, unless, prior to the condition which gives that, one or more have acquired right to priority.

The second class of cases to which reference has been made seems conclusively to establish the proposition that the assets of a private corporation circumstanced as was the hardware company at the time its directors attempted to give preferences are a trust fund held for the benefit of creditors,—a fund which they have the right to have converted into money, and that distributed among them ratably. The reasons for holding the assets of such an insolvent corporation to be a trust fund for the payment of its debts are set forth so clearly and fully that we will not undertake to restate them, or to give additional reasons, but will simply refer to some of the opinions giving the grounds, among which are the following: *Wood v. Dummer*, 3 Mason, 308; *Curran v. Arkansas*, 56 U. S. 15 How. 315, 14 L. ed. 710; *Sanger v. Upton*, 91 U. S. 60, 23 L. ed. 222; *Marr v. Bank of West Tennessee*, 4 Coldw. 476; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 781; *Morgan County v. Allen*, 103 U. S. 508, 26 L. ed. 501. The subject is elaborated by elementary writers. Taylor, *Priv. Corp.* 654-659; Morawetz, *Priv. Corp.* 780-803; Wait, *Insolvent Corp.* 142-157; Waterman, *Corp.* 120-140; Cook, *Stock & Stockholders*, 199; Angell & A. *Priv. Corp.* 600-604.

Whatever technical objections may be urged in the use of the words "trust" and "trustee" in such a connection is a matter of no importance, for the substance of the matter is that the word "trust" is used to express the fact that creditors of an insolvent corporation have the right to have the specific property owned by the corporation subjected to the payment of the sums due them; and the word "trustees" is used to give expression to the fact that the directors and other managing officers of such a corporation, lawfully having possession and control of such assets, are under obligation so to apply them. If more appropriate terms be suggested, courts, no doubt, will be willing to adopt them. All of the decisions of the Supreme Court of the United States are understood to hold that those terms properly describe the relation between creditors of an insolvent corporation and its assets, and officers lawfully controlling them, and to give the usual effect to such relations; but it is suggested that the opinion in *George F. Smith Middlings Purifier Co. v. McGrouther*, 186 U. S. 241, 84 L. ed. 348, casts a doubt upon this subject, or suggests limitations that would affect the questions involved in this case. The opinion is not so understood, and it may be true that the real difficulty some courts may have had was not so much any doubt upon the question whether the assets of an insolvent corporation were a trust fund which credit.

ors had a right to have subjected to payment of sums due them, as was it on account of a doubt as to the time when, and circumstances under which, such right so attached as to cut off all power of directors, or even of stockholders, to confer upon any person, as a creditor, by way of preference, a right inconsistent with the right of all creditors to a ratable distribution of the proceeds of such assets, as against all other creditors not holding legal priorities. The cases cited in the opinion referred to will be noticed, with a view to illustrate the fact that no limitation of the general rule was intended, as well as to show when that court has understood the rule to become operative as to creditors. In case of *Graham v. La Crosse & M. R. Co.*, 103 U. S. 148, 26 L. ed. 106, it appeared that a solvent corporation, with no fraudulent intent, disposed of lands for an inadequate consideration, and a subsequent creditor sought to apply the rule in his favor, but the court held that he could not question the transaction. The court, however, said: "When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." In *Richardson v. Green*, 133 U. S. 80, 33 L. ed. 516, it appeared that Richardson loaned a sum of money to a railroad company, and as a bonus therefor received shares of paid-up stock and bonds, and was given practical control of the board of directors; and he afterwards received other bonds as further collateral, when he proposed to make further advances, if 300 other bonds were put in his hands as collaterals. This was done, but he advanced no more money, and after the insolvency of the company he claimed to hold the bonds last mentioned and those given as further collaterals to secure the sum lent. When these things occurred, he was acting as treasurer of the company. It was held that, as between him and other creditors of the company, he could not, under the circumstances, hold them as collateral for his debt. The bonus was also held to be illegal. The court quoted with approval so much of the opinion in *Graham v. La Crosse & M. R. Co.* as has been inserted, and from the opinion in the case of *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235, as follows: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among its stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of property of the debtor without authority of law, and in fraud of existing creditors, is void as against them." And the court then said that "the principle underlying all of the decisions which we have cited

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upon this point is that the capital stock of a corporation, when it becomes insolvent, is, in law, assets of the corporation, to be appropriated to the payment of its debts, and that creditors have the right to assume that the stock issued by a corporation and held by its stockholders as paid-up stock had been paid up, or, if unpaid, that a court of equity, at the instance of the proper parties, could require it to be paid up."

In *Fogg v. Blair*, 133 U. S. 534, 33 L. ed. 721, also cited, it appeared that a railroad company, in purchasing the road and property of another company, agreed to pay a claim held by a person against the latter company, but in no way secured by lien on its property, and after the sale the holder of that claim sought to give it priority over a mortgage made by the purchasing company to secure an issue of bonds; but the court held that this could not be done, and in the course of the opinion said: "We do not question the general doctrine invoked by the appellant, that the property of a railroad is a trust fund, for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company, before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers except subject to the liability of being appropriated to pay that indebtedness." The case of *Peters v. Bain*, 133 U. S. 670, 33 L. ed. 696, while it asserts the general rule as to the trust character of the assets of a corporation, and the relation of directors to that and to creditors, seems to have no application to any question involved in questions submitted.

In so far as the rights of creditors of an insolvent corporation are concerned, there exists no good reason for making any distinction between unpaid subscriptions for stock and other corporate assets: for each belong to the fund from which creditors are entitled to be paid. As we have before seen, in so far as the rights of creditors are concerned, the consequences of technical dissolution occur when the corporation is in the condition set forth in the questions propounded, and in addition to the authorities cited on that point the following are now added: *Graham v. La Crosse & M. R. Co.* 103 U. S. 161, 26 L. ed. 111; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235; *Corey v. Wade-worth* (Ala.) 11 So. Rep. 353. In the case last cited, after announcing the general principles governing the assets of an insolvent corporation, the court answered a question involved in cases of that character as follows: "At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principles we have declared? It is not enough that its assets are insufficient to meet all its liabilities, if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so,—in other words, if it be, in good faith, what is sometimes called a 'going'

business or establishment. Many successful corporate enterprises, it is believed, have passed through crises where their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent." The case made by the questions propounded bring it clearly within so much of the rule thus stated as may be safely adopted, and it

is not now necessary to inquire whether other parts should be qualified. The condition of the corporation, set forth in the questions propounded, under the long-recognized rules of equity, conferred upon every unsecured creditor of the corporation the right to a ratable share of the proceeds of all the assets of the corporation, not subject to priorities lawfully existing when this condition arose; and we therefore answer that neither the stockholders nor directors of the insolvent corporation had lawful power, under the facts stated, to make a preferential deed of trust, whereby any creditor, whether a stockholder, director, or other officer of the corporation, or not, could acquire a preference, and that the attempted preference would be invalid as to other creditors of the corporation.

UNITED STATES CIRCUIT COURT OF APPEALS.

Willard S. BROWN *et al.*, *Appts.*,
v.

GRAND RAPIDS PARLOR FURNITURE
CO. *et al.*

(58 Fed. Rep. 286.)

1. **Whether chattel mortgages are void as common-law assignments giving preferences to creditors is a question of local law, upon which a federal court will follow the state decisions.**
2. **A federal court will follow the latest decisions of the supreme court of the state as to the validity of mortgages, although a different decision by that court was regarded as the law when the mortgages were made.**
3. **A change of decision as to the validity of a certain kind of mortgages made after some instruments of the kind were made whereby they are upheld does not impair the obligation of a contract between the mortgagor and a creditor who gave him credit when under the existing decisions such mortgages would be held void.**
4. **The fact that one of the debts secured by chattel mortgage was due at the time the mortgage was given does not nullify the defeasance clause so as to make the instrument absolute before demand and refusal to pay.**
5. **A resolution authorizing officers of a corporation "to secure any and all other creditors" after a person named does not require that a mortgage executed in pursuance thereof should secure all other creditors, but the word "and" has the meaning of "or."**
6. **A director who is a bona fide creditor of a corporation may be made a preferred creditor, where preferences to any creditors are lawful.**
7. **The fact that directors and stock-**

holders of a corporation vote to give a mortgage preferring themselves as creditors does not render it invalid.

(October 2, 1898.)

A PPEAL by complainants from a decree of the Circuit Court of the United States for the Southern Division of the Western District of Michigan in favor of defendant in a suit brought to set aside certain chattel mortgages given by the defendant corporations as being in fraud of other creditors. *Affirmed.*

Before Jackson and Taft, *Circuit Judges*,
and Barr, *District Judge*.

Statement by Taft, *Circuit Judge*:

This was an appeal from a decree of the circuit court for the western district of Michigan, southern division. The bill was filed by Willard S. Brown, Jacob G. De Turk, and John T. Brown, citizens of the state of Pennsylvania, against the Grand Rapids Parlor Furniture Company, a corporation of Michigan, and other defendants, the beneficiaries of certain mortgages made by the furniture company to secure debts owing to them. The bill was for the purpose of setting aside these mortgages, as made by the furniture company to hinder, delay, and defraud creditors, and also as being assignments in violation of the assignment law of Michigan, and, further, as invalid because made by the directors of the furniture company to secure debts, in the payment of which the directors had a personal interest. The Grand Rapids Parlor Furniture Company had been organized in April, 1896, in the name of the Strahan & Long Furniture Company, with a

NOTE.—The above case with the one preceding present the extremes of doctrine on the subject of preferences among creditors of insolvent corporations. The above case is unquestionably correct as an exposition of Michigan law, but is contrary to the overwhelming weight of authority so far as it allows preferences to directors of an insolvent corporation. The theory that such directors constitute trustees for creditors after the insolvency is 22 L. R. A.

adopted in all but a very few jurisdictions, as is shown in the note to the Texas case, preceding (LYONS-THOMAS HARDWARE CO. V. PERRY & SONS MFG. CO. ante, 802). The Texas case on the other hand goes to the other extreme and is also in conflict with the weight of authority in denying the right of an insolvent corporation to make preferences in favor of any creditors, although there is no statutory restriction on the subject.

capital stock of about \$10,000. The company was organized by Harry W. Long, defendant herein, and others. Long's share of the stock was \$5,000, to pay for which he borrowed money of his wife, Margaret, another defendant, to whom he gave his note for the amount. In January, 1889, the name of the company was changed to the Grand Rapids Parlor Furniture Company. The capital of the company was increased so that the paid-up capital amounted to \$21,500. Harry Long presented his wife with 128 shares. She became the owner of 40 other shares, making her the holder of 168 shares. Her husband, then, was the owner of 282 shares; she held 168; W. J. Long, Jr., brother of Harry, held 189 shares; James M. Pierce, 200 shares; Harry Hubbard, 20 shares; and John E. Moore, 1 share. The Long brothers and Thomas M. Pierce were directors. At various times, Harry Long had loaned the company money, so that in March, 1891, he held its notes for \$6,800. In that month, Mrs. Long, who held separate property of her own, received from her father and her uncle, and managed by J. W. Champlin, became nervous lest the ownership of the stock might subject her to a liability, under the statutes of Michigan, to the payment of labor claims against the corporation, and she therefore desired to part with her stock. Her husband purchased the stock, and paid off an obligation of his own, owing to his wife, by transferring all the notes which he held against the corporation, for \$6,800. A day or two after, a bank in Grand Rapids having refused to renew a note of the company for \$3,000, upon which Harry Long was indorser, Mrs. Long was induced to give to the company some street-railway stock which she owned, valued at \$8,000, to enable the company to renew the notes with the collateral, and, further, to agree to let the company have \$1,000 additional when needed, on condition that it would give her security, whenever she might demand it, for the entire debt, including the \$6,800 as well as the new loans. At a stockholders' meeting a resolution was passed, authorizing the directors to comply with this condition, and the \$3,000 of street-railway stock was delivered in March, 1891. The other \$1,000 was never called for. In July, 1891, the company was asked to pay a \$1,000 note held by Clara M. Pierce, wife of Thomas M. Pierce, one of the directors. Legal proceedings were threatened, to collect the note. The company had no money to pay it. Harry Long notified his wife, who was at Mackinac, that she ought to demand security, and she at once made such demand. Judge Champlin, also, was advised, and he superintended the obtaining of the security. The mortgage was drawn by Moore & Wilson, and covered all the merchandise and assets of the company, with the exception of the bills receivable. On the same day, somewhat later, Harry Long directed Moore & Wilson to make a mortgage to Charles M. Wilson, trustee, to secure labor debts; a note to the Fifth National Bank for \$1,000; a note to the Fourth National Bank for \$5,000; Clara M. Pierce, \$1,000; Asa Denison, \$1,000; Northwestern Trimming Company, \$383; J. V.

Farwell Company, \$307; W. and J. Sloan, \$667. Harry Long was indorser on the notes for \$6,800 held by his wife, and also upon the notes held by the Fifth and Fourth National Banks; and upon those held by Denison, the Northwestern Trimming Company, J. V. Farwell Company, and by Sloans. W. J. Long was indorser on the paper at the Fourth National Bank. All the stockholders, as has been already stated, were personally liable for the labor debts. The two mortgages were executed July 18, and were filed July 20; the one at 9:25 A. M., and the other at 9:28 A. M. July 21. Judge Champlin, as the agent for Mrs. Long, and Wilson, as the trustee for the creditors named in the mortgage to him, took possession, jointly. On the 28th of July the complainants filed this bill on behalf of themselves, and other creditors similarly situated. Wilson, the trustee, was appointed receiver, and has brought into court \$21,500 as the fund realized from the assets of the defunct corporation. The debts of the corporation amount to about \$37,000. If both mortgages are sustained as valid, they will more than consume the assets of the corporation. The circuit court held that the mortgages were valid, and entered a decree dismissing the bill.

Messrs. Edward Taggart and Arthur C. Denison, for appellants:

When the corporation becomes insolvent the stockholders cease to have any real interest, and the creditors become the actual beneficiaries. From that time on they are the real parties in interest, and it must be their privilege to avoid any irregular or unauthorized action by those in nominal charge of the assets. The election to avoid always rests with the principal, the beneficiary; and in this corporation the creditors, not the stockholders, occupy that position.

Hoyt v. Thompson, 5 N. Y. 332; *Despatch Line of Packets v. Bellamy Mfg. Co.* 12 N. H. 205, 37 Am. Dec. 203; *Wiggin v. First Freewill Baptist Church in Lowell*, 8 Met. 301; *Sweeney v. Sugar Ref. Co.* 80 W. Va. 443; *Lingle v. National Ins. Co.* 45 Mo. 109; *Thomas v. Brownville, Ft. K. & P. R. Co.* 109 U. S. 522, 27 L. ed. 1018; *Twin Lic. Oil Co. of West Virginia v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

The mortgages were, in fact, a secret lien, and invalid as such.

Smith v. Craft, 12 Fed. Rep. 861; *Gill v. Griffith*, 2 Md. Ch. 270; *Blennerhassett v. Sherman*, 105 U. S. 117, 26 L. ed. 1085.

The mortgages amounted to an assignment for the benefit of creditors, and, as preferences, were invalid.

1. The company was insolvent, and the business to be wound up.
2. The two mortgages were one transaction.
3. They covered all its property.
4. They were to a trustee for the benefit of creditors, with preferences.

The making of such conveyances as these has often been said to be a declaration of insolvency.

Two tests are given in the books. One is the ability to pay current debts as they become due.

Dutcher v. Wright, 94 U. S. 557, 24 L. ed. 181.

The other test is the comparative amounts of assets and liabilities.

Burrill on Assignments, 5th ed. § 2, defines voluntary assignments for the benefit of creditors as "transfers without compulsion of law, by debtors, of some or all of their property to an assignee or assignees in trust, to apply the same, or the proceeds thereof, to the payment of some or all of their debts."

The mortgage to Mrs. Long was a part of the same transaction with the trust mortgage, and the trust mortgage would never have been suspected to be anything but an assignment, except that it was marked "mortgage" on the back and contained a defeasance clause.

Danner v. Brewer, 69 Ala. 191; *Watts v. Bufaula Nat. Bank*, 76 Ala. 474; *Ordway v. White*, 80 Ala. 244; *Winner v. Hoyt*, 66 Wis. 227, 57 Am. Rep. 257; *Bonns v. Carter*, 23 Neb. 495; *Wilks v. Walker*, 22 S. C. 108, 53 Am. Rep. 706; *Austin v. Morris*, 23 S. C. 393; *Harkrader v. Leiby*, 4 Ohio St. 602; *Dickson v. Rawson*, 5 Ohio St. 218; *Straw v. Jenks*, 6 Dak. 414; *Penzel Co. v. Jelt*, 54 Ark. 428; *Maxwell v. Simonton*, 81 Wis. 635; *Marshall v. Livingston Nat. Bank*, 11 Mont. 351.

The question of what is an assignment, irrespective of any state statute, is one of general commercial law, and the Supreme Court of the United States has expressed a controlling opinion.

White v. Cotzhausen, 129 U. S. 329, 33 L. ed. 877.

Howell's Statutes, § 8739, says: "All assignments commonly called common-law assignments for the benefit of creditors shall be void, unless the same shall be without preferences, etc."

Although an instrument having a defeasance clause cannot, as matter of law, be said to be an assignment.

If facts appear outside of the instrument itself which tend to prove that the instrument was made with the intention of having the effect of a common-law assignment or with the intention of evading the statute, then it becomes a question of fact for the jury.

Warner v. Littlefield, 89 Mich. 329; *Fitzgerald v. McCandlish*, Id. 400.

There are several important features in the trust mortgage to Mr. Wilson which bear on the intent and serve to distinguish it from *Warner v. Littlefield*, *supra*.

1. The mortgage gave to the trustee the immediate right of possession.

Daggett v. McClintock, 56 Mich. 54; *Eggleston v. Mundy*, 4 Mich. 295.

2. It gave the power of private sale, full, perfect, and complete, to be instantly exercised, without any notice to anybody.

3. The so-called defeasance clause is made of no effect by the insecurity clause. The mortgagee may foreclose and sell at any moment.

4. It was intended to and did operate to end the company's business.

5. The mortgagor selected his own attorney as trustee.

6. In case of default, it was the duty, not the privilege, of the trustee to sell.

7. There was no defeasance. The condition was, "if the party of the first part shall pay or cause to be paid the debts above mentioned, 23 L. R. A.

at maturity, then this instrument shall be void, etc. One of these notes was to Clara M. Pierce, and was then three weeks past maturity, and the threat of its possible collection was the cause of the collapse.

The state rule is not obligatory upon this court.

Goddard v. Hapgood, 25 Vt. 360, 60 Am. Dec. 273; *Dickson v. Rawson*, 5 Ohio St. 224; *Goodrich v. Downs*, 6 Hill, 438; *Barney v. Griffin*, 2 N. Y. 371.

If the Michigan rule is to be followed, it must be that rule in force when the contract was made.

Thompson v. Perrine, 108 U. S. 806, 26 L. ed. 612; *Ober v. Gallagher*, 93 U. S. 207, 23 L. ed. 881; *Burgess v. Seligman*, 107 U. S. 38, 27 L. ed. 365; *Anderson v. Santa Anna Trop*, 116 U. S. 385, 29 L. ed. 636; *Bolles v. Brimfield*, 120 U. S. 764, 30 L. ed. 788.

The rule in the federal courts was settled at the time the rights here involved accrued that an insolvent debtor could not make a preferential assignment in the form of a mortgage.

Dwight v. Scranton & W. Lumber Co. 82 Mich. 624.

The rule in the state courts was also settled, and to the same effect.

The rule in the state court, if not so settled, was at least not definitely fixed against us, but was uncertain.

Frankfort Lumber Co. July, 1898; *Farmer Roller Mill*, May, 1890; *Merchants & Mfrs. Nat. Bank v. Kent Circuit Judge*, 43 Mich. 298; *Rollins v. Van Baalen*, 56 Mich. 610; *Dwight v. Scranton & W. Lumber Co.* 87 Mich. 507; *Kendall v. Bishop*, 76 Mich. 684; *Burnham v. Haskins*, 79 Mich. 35; *Atkinson v. Weidner*, Id. 575; *Sheldon v. Mann*, 85 Mich. 265.

The mortgages were invalid as being an attempt, by the managers of an insolvent corporation, to secure the debts upon which they were personally liable, to the exclusion of other creditors.

Wood v. Dummer, 3 Mason, 308; *Upton v. Tribblecock*, 91 U. S. 47, 23 L. ed. 204; *Union Nat. Bank of Chicago v. Douglass*, 1 McCrary, 90; *New Haven v. City Bank of New Haven*, 81 Conn. 106; *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 409, 19 L. ed. 120; *New Albany v. Burke*, 78 U. S. 11 Wall. 108, 30 L. ed. 159; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 594, 29 L. ed. 238; *Curran v. Arkansas*, 56 U. S. 15 How. 304, 14 L. ed. 705; *Sanger v. Upton*, 91 U. S. 61, 23 L. ed. 222; *Taylor, Priv. Corp.* § 654, *et seq.*; *Morawetz, Priv. Corp.* 2d ed. § 787.

Being themselves creditors or personally liable as indorsers, they cannot secure to themselves advantages not common to the others in equity.

Taylor, Priv. Corp. § 759; *Morawetz, Priv. Corp.* § 787; *Walt, Insolvent Corp.* § 162; *Cook, Stock & Stockholders*, § 661; *Beach, Priv. Corp.* § 241; *Richards v. New Hampshire Ins. Co.* 43 N. H. 263; *Smith v. Putnam*, 61 N. H. 632; *Olney v. Conanicut Land Co.* 5 L. R. A. 361, 16 R. L. 597; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Beach v. Miller* (Ill.) Jan. 19, 1888; *Marr v. Union Bank*, 4 Coldw. 484; *Roan v. Winn*, 98 Mo. 608; *Williams v. Jackson County Patrons of Husbandry*, 23 Mo. App. 132; *Lamb v.*

Loughlin, 25 W. Va. 321; *Pyles v. Riverside Furniture Co.* 30 W. Va. 123; *Taylor v. Taylor*, 74 Me. 582.

In the federal courts, the rule has been thought to be thoroughly settled, finding a sufficient basis in several cases in the supreme court.

Koshler v. Black River Falls Iron Co. 87 U. S. 2 Black, 715, 17 L. ed. 339; *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 40; *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 731.

The various circuit courts throughout the country in a series of decisions have recognized and applied the rule in question.

Bradley v. Farwell, Holmes, 433; *Bradley v. Converse*, 4 Cliff. 379; *Corbett v. Woodward*, 5 Sawy. 403; *Coons v. Tome*, 9 Fed. Rep. 532; *Stout v. Yaeger Milling Co.* 18 Fed. Rep. 302; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Adams v. Kehler Milling Co.* 35 Fed. Rep. 435; *Hove v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7.

Mr. John E. More, for defendant Long, and Messrs. Kingsley & Kleinhaus, for defendant Wilson, appellees:

Under the law of Michigan, an insolvent debtor may pay or secure one or more of his creditors in preference to others.

Sheldon v. Mann, 85 Mich. 285; *Warner v. Littlefield*, 89 Mich. 329; *Olmstead v. Mottison*, 45 Mich. 617; *Heineman v. Hart*, 55 Mich. 76; *Sweetzer v. Higby*, 63 Mich. 13; *Fieid v. Fisher*, 65 Mich. 606; *Whipple v. Stebbins*, 67 Mich. 507.

The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States.

South Branch Lumber Co. v. Ott, 142 U. S. 622, 35 L. ed. 1137.

The statute of Michigan relating to assignments provides that "all assignments, commonly called common-law assignments for the benefit of creditors, shall be void unless the same shall be without preferences between such creditors, etc."

Rollins v. Van Baalen, 56 Mich. 610, referring to this statute, says: "It should be construed as it reads, as applying only to what purport to be common-law assignments."

Prior to *Kendall v. Bishop*, 76 Mich. 634, it had been held in a number of cases that where an assignment had been in fact made and preferences had been given by way of mortgages immediately preceding the making of the assignment, the mortgages might, under certain circumstances, be treated as part and parcel of the assignment and therefore void under the statute; but in no case had the court so held, except where an instrument which on its face purported to be an assignment, had been in fact given. In *Kendall v. Bishop* a mortgage was made by a corporation to a trustee to secure certain indebtedness and contained some clauses which are not contained in an ordinary form of a chattel mortgage. Justice Campbell, delivering the opinion of the court, held this instrument to be a general assign-

ment, basing his determination upon differences between that instrument and an ordinary chattel mortgage.

See also *Atkinson v. Weidner*, 79 Mich. 575.

The decision of *Kendall v. Bishop* was a surprise to the profession, and in direct conflict with the former decisions of the court. It was a mistake of law which the court soon set about correcting.

Sheldon v. Mann, 85 Mich. 285; *Bresnon v. Musselman*, 86 Mich. 186; *Warner v. Littlefield*, 89 Mich. 329; *Fitzgerald v. McCandlish*, Id. 400; *Bank of Montreal v. The J. E. Potts Salt & Lumber Co.* 90 Mich. 345; *Weber v. Childs*, 90 Mich. 498; *Warren v. Dwyer*, 91 Mich. 414.

The position of the court now is that an instrument in form a mortgage cannot be held to be a general assignment.

It is contended that, inasmuch as the bill in this case was filed while *Kendall v. Bishop* and *Atkinson v. Weidner*, *supra*, stood as the latest exposition of the assignment law by the supreme court of Michigan, the doctrine therein announced should control in the determination of this case, instead of that announced in the later cases.

Defendants insisted that the court should follow the late cases, which have, in fact, overruled *Kendall v. Bishop*.

Leflingwell v. Warren, 67 U. S. 2 Black, 599, 17 L. ed. 261.

It was further urged that whether the mortgages in this case amounted to a general assignment or not, they were void for the reason that they were given by an insolvent corporation to certain of its creditors, while other creditors got nothing. This contention was based upon what is known as the "trust fund" theory, viz.: that the assets of an insolvent corporation are a trust fund which must be ratably distributed amongst all its creditors.

Walt, Insolvent Corp. § 162; *Rouse v. Merchants Nat. Bank*, 5 L. R. A. 378, 46 Ohio St. 493; *The George T. Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346; *Hospes v. Northwestern Mfg. & Car Co.* 15 L. R. A. 470, 48 Minn. 174.

The trust fund theory does not prevail in Michigan.

Town v. Bank of River Raisin, 9 Dougl. (Mich.) 530; *Turnbull v. Prentiss Lumber Co.* 55 Mich. 396; *Kendall v. Bishop*, and *Bank of Montreal v. The J. E. Potts Salt & Lumber Co.* *supra*.

The mortgages in this case are not bad because given by an insolvent corporation to secure some of its debts for which its directors are liable.

Twin-Lick Oil Co. of West Virginia v. Marbury, 91 U. S. 587, 23 L. ed. 323; *Green v. Chicago, S. & C. R. Co.* reported under the name of *Richardson v. Green*, 133 U. S. 30, 33 L. ed. 516; *Hills v. Stockwell & D. Furniture Co.* 23 Fed. Rep. 432; *Taylor County Ct. v. Baltimore & O. R. Co.* 35 Fed. Rep. 161; *Combination Trust Co. v. Weed*, 2 Fed. Rep. 24; *Gould v. Little Rock, M. R. & T. R. Co.* 53 Fed. Rep. 690.

In Michigan it is lawful for an insolvent corporation to prefer a stockholder or director.

Bank of Montreal v. The J. E. Potts Salt & Lumber Co., and *Kendall v. Bishop*, *supra*.

It was urged that the question here involved was the relation of a corporation to its directors and their respective rights and duties, and was, therefore, a question of general law, upon which the courts of the United States were at liberty to adopt their own rule of decision, regardless of the rule adopted by the highest court of the state. This contention cannot prevail.

Etheridge v. Sperry, 189 U. S. 266, 85 L. ed. 171; *Claiborne County v. Brooks*, 111 U. S. 400, 28 L. ed. 470; *Detroit v. Osborne*, 185 U. S. 492, 84 L. ed. 280; *Allen v. Fairbanks*, 45 Fed. Rep. 445, 85 Cent. L. J. 822.

It is now held with practical unanimity by all the courts that an insolvent corporation like an individual may prefer its creditors, in the absence of any statutory prohibition. It is also held with like unanimity in the later cases that a corporation may deal with its directors. If these two propositions be conceded to be law, it seems impossible to evade the conclusion that an insolvent corporation may prefer a director.

Bergen v. Porpoise Fishing Co. 43 N. J. Eq. 397; *Stratton v. Allen*, 16 N. J. Eq. 238; *Central R. & Bkg. Co. of Georgia v. Claghorn*, 1 Speers, Eq. 545; *Planters Bank of Farmville v. Whittle*, 78 Va. 737; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Hallam v. Indianola Hotel Co.* 56 Iowa, 179; *Whitwell v. Warner*, 20 Vt. 444; *Callin v. Eagle Bank of New Haven*, 6 Conn. 233; *Smith v. Skeary*, 47 Conn. 47; *Ashhurst's App.* 60 Pa. 290; *Gordon v. Preston*, 1 Watts, 885, 26 Am. Dec. 75; *Duncomb v. New York, H. & N. R. Co.* 84 N. Y. 190.

The following cases support the contention that an insolvent corporation cannot prefer its directors:

Stout v. Yaeger Milling Co. 18 Fed. Rep. 802; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Coons v. Tome*, 9 Fed. Rep. 532; *Corbett v. Woodward*, 5 Sawy. 408; *Bradley v. Converse*, 4 Cliff. 879; *Bradley v. Farwell*, Holmes, 433; *Adams v. Kehler Milling Co.* 35 Fed. Rep. 438; *House v. Sanford Fork & Tool Co.* 44 Fed. Rep. 231; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7; *Haywood v. Lincoln Lumber Co.* 64 Wis. 688; *Beach v. Miller* (Ill.) Jan. 19, 1888.

In all these cases will be found a misapplication of the trust-fund principle.

Taft, Circuit Judge, delivered the opinion of the court:

It is not contended on behalf of the complainants that the debts which the mortgages in question were given to secure are not valid debts of the company, with the exception of the note held by Clara M. Pierce for \$1,000. Whether the Pierce note is a valid obligation is not material on this issue, because the other secured debts, if the mortgages are held valid, are more than enough to consume the fund in court. There is no charge of actual bad faith made with reference to the giving of these mortgages. The contention of the complainants is that these mortgages should be held to be invalid—First, because they are, in effect, common-law assignments, with preferences, as between creditors, and are therefore void under the Statute of Michigan (2 How. Stat. § 8739) which provides

that "all assignments commonly called common-law assignments for the benefit of creditors shall be void unless the same shall be without preference as between such creditors, and shall be of all property of the assignor not exempt from execution;" second, because the mortgages were given by an insolvent corporation to secure debts in which the stockholders and directors, whose votes made the mortgages the act of the corporation, had a personal interest in them, as grantors thereof.

1. The question whether these chattel mortgages are void, as common-law assignments giving preference to creditors, under the statute of Michigan, is a question purely of local law. This is expressly decided by the Supreme Court of the United States in the case of *Etheridge v. Sperry*, 189 U. S. 266, 85 L. ed. 171. *Mr. Justice Brewer*, speaking for the court, said in that case:

"While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are, primarily, at least, a matter of state regulation. We are aware that there is a great diversity in the ruling on this question by the courts of the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

There can be no doubt that, under the decisions of the supreme court of Michigan, the mortgages in question here are not violations of the statute forbidding preferences in common-law assignments. It is said that at the time these mortgages were executed, under the then last decision of the supreme court of Michigan, in *Kendall v. Bishop*, 76 Mich. 634, these mortgages would have been invalid, and that the law of the state, which this court should follow with respect to the mortgages, is the law which was in force as then expounded by the supreme court. Conceding, for the purposes of the argument, that under the case of *Kendall v. Bishop*, *supra*, these mortgages must be held invalid, we are of opinion that, if subsequent decisions of the supreme court have reversed the principle announced in that case, we should follow those subsequent decisions. The right of the complainants and their general creditors to take the mortgages was a remedy, and not a contractual right; and there is nothing in this case to show, or justify a presumption, that the debts represented by the complainants and other unsecured general creditors were contracted on the faith of the inability of the corporation to prefer creditors by chattel mortgage. Certainly, it would not impair their contracts of indebtedness if the legislature of Michigan had repealed the statute making common-law assignments with preferences void. If so, the law of the state of Michigan, which we are to administer, is the law of the

state, as expounded by its highest tribunal, when the remedy comes to us for our enforcement. It was decided in *Warner v. Littlefield* that a debtor, though insolvent, might secure a creditor, for the payment of a pre-existing debt, by a mortgage upon all his property, although he should have numerous creditors who were unsecured, and that neither the fact of the debtor's insolvency, nor the knowledge of the creditor of that fact, would defeat or impair a mortgage security taken for an honest debt; that the fact that the mortgagee was not the creditor of the mortgagor, and that the mortgage was executed in trust to secure certain specified creditors the amounts of their several claims, did not tend, in any degree, to give the instrument the character of a common-law assignment; that if the instrument was a conveyance given upon condition, as a security for a pre-existing debt, and contained no trust in its body, whereby the property was withdrawn from the right of the mortgagor or others to redeem, who ordinarily have such right in cases of chattel mortgages, or whereby the title of the property was placed beyond the reach of execution as to any surplus, then the instrument was a chattel mortgage, but if it conveyed the absolute title to a trustee for the benefit of creditors, and thus placed the property and surplus beyond the reach of creditors, it was a common-law assignment; that the question whether the instrument was a chattel mortgage, or an assignment for the benefit of creditors, must in all cases be determined as a question of law, upon the contents of such instrument, and not from any outside testimony; and that unless the conveyance, upon its face, purported to convey all of the debtor's property to secure certain preferred creditors, by an absolute title, the court was not at liberty to declare it a common-law assignment. The case of *Warner v. Littlefield*, 89 Mich. 829, only followed the case of *Sheldon v. Mann*, 85 Mich. 265, and was followed by the supreme court in *Bank of Montreal v. The J. E. Potts Salt & Lumber Co.*, 90 Mich. 845. It is not disputed that the mortgages in this case have the ordinary form of a chattel mortgage under the statutes of Michigan. They have the defeasance clause, and the necessary legal import of their language is that the absolute title does not pass to the person named as mortgagee, but only a title on condition; leaving in the mortgagor the right to redeem the same, and in the general creditors the right to levy upon the equity of redemption. Reliance is had on the fact that one of the notes under the second mortgage was due at the time the mortgage was given. The language of the defeasance clause of that mortgage was as follows: "To have and to hold the same forever; provided, always, and the condition of these presents is such, that if the said party of the first part shall pay or cause to be paid, the debts above mentioned, with interest thereon, at maturity, then this instrument and said notes shall be void and of no effect, and said party of the first part agrees to pay the same accordingly."

We do not think the defeasance clause is
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rendered null and void by reason of the fact that one of the debts secured by the mortgage was due at the time the mortgage was given. The sensible construction of the defeasance clause would seem to be that the mortgage would not become absolute until after demand for the payment of the note subsequent to the giving of the mortgage and a refusal to pay. Reliance is had by the complainants on certain language of the supreme court of Michigan in the case of *Warner v. Littlefield*, already referred to, as follows: "The question as to whether the instrument is a chattel mortgage, or an assignment for the benefit of creditors, must, in all cases, be determined as a question of law upon the contents of such instrument, and not upon any testimony which appears outside of such instrument; and unless the conveyance, upon its face, purports to convey all of the debtor's property to secure some creditors, in preference to others, by an absolute title, the court is not at liberty to declare it a common-law assignment; and if the facts appear outside of the instrument itself, and tend to prove that the instrument was made with the intention of having the effect of a common-law assignment, or with the intention of evading the statute, then it becomes a question of fact, for the jury to decide, and not for the court."

It is said here that the facts *dehors* the instrument show that it was intended by the parties to be a common-law assignment, though on its face it was only a chattel mortgage. That the effect of a mortgage which conveys all the property of an insolvent debtor to a trustee, with power to sell, and distribute the proceeds among the preferred creditors, whose claims exceed the value of the property conveyed, is practically the same as a common-law assignment, was, of course, obvious to the court rendering the above opinion. It cannot, therefore, be construed to mean that because a chattel mortgage has the effect of a common-law assignment, in that it disposes of all the property of the debtor, with preference to certain creditors, the debtor himself intended a common-law assignment. It may be a little difficult to say what distinction the court did have in mind, in the above language. It was probably referring to a case where there is some secret agreement between the debtor and the mortgage creditors, dispensing with the obligation of the defeasance clause, so that the mortgage, on its face, does not express the real agreement between the parties. There is nothing in this case to show that the mortgage was not a bona fide attempt to secure pre-existing indebtedness. Its effect, in view of the impossibility and improbability that the corporation could ever redeem the property, was necessarily to transfer the property to a trustee, who should sell it, and distribute the proceeds as an assignee under a common-law assignment would. But it is not shown, and we cannot infer, that, if the corporation or any attaching creditor had seen fit to redeem the property by paying the debts secured by the mortgage, there would have been resistance on the part of any secured creditors to an enforcement of this right se-

cured by the mortgage. We are very clear, under the cases cited, that in Michigan the mortgages are valid.

Objection is made that the mortgages were not authorized by the directors and stockholders, as given. It seems to us that they are quite within the resolution passed by the stockholders. The recital in the resolution made the consideration for giving the mortgage the advancing of the additional \$3,000 by Mrs. Long, to assist the corporation, and the agreement to advance \$1,000 more, when required. The other \$1,000 was not required by any one connected with the corporation, and it cannot be said, therefore, that she did not comply with her full contract, entitling her to the mortgage. The resolution authorized the secretary and treasurer to secure any and all other creditors by mortgages subject to, and subsequent to, the mortgage to Mrs. Long. It is said that this required a mortgage which should secure all other creditors. We do not think so. It was evidently the intention to give the right to secure any other creditors, the word "and" having the meaning of "or," in that connection.

2. We now come to the question whether the fact that Harry and W. J. Long, directors, were interested as guarantors and indorsers upon most of the notes secured by the mortgages, and were directors and stockholders in the corporation, and as such voted to give the mortgages, renders the mortgages invalid. The question has been directly decided by the supreme court of Michigan against the contention of the complainants. In the case of *Bank of Montreal v. The J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, mortgages which secured directors, given by an insolvent corporation, were held to be valid. Said the supreme court (Montgomery, J.): "Nor is the law of this state that, as soon as a corporation becomes insolvent, the directors of the corporation become trustees for all the creditors alike, in such sense as to prevent their giving valid security by way of preference to one of the directors or stockholders. We are aware that the decisions of the various states are not uniform as to this question, and that a number of very eminent text-writers have deprecated a state of the law which admits of such preferences. But, to adopt the language of Dillon, J., in *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516, this condition of the law 'may constitute a good legislative reason for giving priority to outside creditors, but the legislature must furnish the remedy.' In the case referred to, it was held that being an officer of the corporation did not deprive Buell of the right to enter into competition with other creditors and run a race of diligence with them. See also, *Hallam v. Indianola Hotel Co.* 56 Iowa, 179; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461; *Smith v. Skeary*, 47 Conn. 54; *Callin v. Eagle Bank of New Haven*, 6 Conn. 233; *Central R. & Bkg. Co. of Georgia v. Claghorn*, 1 Speers, Eq. 545; *Planters Bank of Farmville v. Whittle*, 78 Va. 789; *Leavitt v. Oxford & G. Silver Min. Co.* 8 Utah, 265; *Whitwell v. Warner*, 20 Vt. 44; *Holt v. Bennett*, 146 Mass. 437; *Twin-Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 587, 23 22 L. R. A.

L. ed. 328; *Wilkinson v. Bauerle*, 41 N. J. Eq. 685."

To the cases cited in the above opinion may be also added *Hills v. Stockwell & D. Furniture Co.* 28 Fed. Rep. 482; *Taylor County Ct. v. Baltimore & O. R. Co.* 35 Fed. Rep. 161; *Gould v. Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680; *Stratton v. Allen*, 16 N. J. Eq. 233; *Duncomb v. New York & H. R. Co.* 84 N. Y. 190.

Several cases have been cited, some of them decisions of circuit courts of the United States, in which it has been held that, while it is lawful for a corporation to prefer creditors, it is not equitable or permissible for directors of a corporation to prefer themselves, even if they are bona fide creditors, because they are trustees. It may be conceded that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends.

There are, as has been said, several decisions in the federal courts upholding the opposite doctrine, but no such decision has been rendered by the Supreme Court of the United States. The Supreme Court of the United States, in several cases, has held that the subscriptions of its stockholders are a trust fund for the payment of its creditors, in so far that the corporation may not release stockholders from payment thereof (*Scott v. Thayer*, 105 U. S. 143, 26 L. ed. 969); but it has as yet not announced the doctrine that the assets of a corporation are a trust fund for equal distribution among its creditors. For a full review of the cases, see the opinion of Mr. Justice Brewer in *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. ed. 1113 (decided by the Supreme Court of the United States November 20, 1893). That court has not announced the doctrine that a corporation may not prefer one of its creditors, and it has not announced the doctrine that a corporation may not prefer as a creditor one of its directors. In the case of *The George T. Smith Middlings Purifier Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346, the Supreme Court of the United States followed the supreme court of Ohio in holding that the assets of an insolvent corporation were a trust fund for equal distribution among its creditors; but they did so expressly on the ground that this was the decision of the supreme court of Ohio, founded on the constitution and statute law of that state with reference to corporations. The opinion of Mr. Justice Gray contains a very broad intimation that there is no general equitable principle requiring such equal distribution among the creditors of the corporation. All the decisions of the Supreme Court of the United States relied on and referred to as sustaining the view that the bona

lide debt of a director of a corporation may not be paid in preference to the debt of some other creditor are cases where the directors were guilty of fraud in procuring the payment of their own debts by fraudulent wasting of the assets to accomplish the preference. Such were the cases of *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 40; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715, 17 L. ed. 839; *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 402. There is no such element in this case.

It has been argued that upon this question the court should reach a conclusion as upon a doctrine of general law, and not be governed by the decisions of the supreme court of Michigan. Whether this be true or not, it is the duty of the court, where the matter is one of doubt, to lean towards the decision of the state court.

The decree of the court below is affirmed, at the costs of the appellants.

VERMONT SUPREME COURT.

Mary E. BATES, *Appt.*,

v.

E. W. HORNER *et al.*

(65 Vt. 471.)

Trustees of a village in purchasing a ledge of rock and voting to locate a

stone crusher there act officially, and are not personally liable to one whose horse was frightened by the stone crusher, where they did not participate as laborers, operatives, or superintendents in setting up and operating the crusher.

(May 26, 1893.)

NOTE—Personal liability of highway officers for negligence.

1. *Nature of their office.*
2. *Capacity in which liable.*
3. *Duties required of them.*
4. *Ministerial duties.*
5. *Foundation of liability.*
6. *Principles exempting from liability.*
 - a. *General.*
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 - e. *Order of the court.*
7. *Necessity of notice.*
 - a. *To officers.*
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8. *Principles sustaining liability.*
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10. *For acts of predecessors or successors.*
11. *For acts of employees.*
12. *Adjoining towns.*
13. *Canals.*
14. *Criminal liability.*

1. *Nature of their office.*

Road supervisors are public officers and not mere agents of the county commissioners. *Anne Arundel County Comrs. v. Duvall*, 54 Md. 360, 39 Am. Rep. 396.

Highway surveyors are public officers, whose duties and authority are prescribed by statute, and are not by statute agents of their towns. *White v. Philipston*, 10 Met. 108; *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570.

In *Bates v. Rutland*, 9 L. R. A. 368, 65 Vt. 178 street commissioners were held public officers and not agents or servants of the municipality.

Their powers and duties being prescribed by statute are independent of the town, and cannot be directed, controlled, or removed by the town, and the officers are not amenable to the town for the manner in which they discharge the trust reposed in them by law, nor can the town exercise any right of selecting the servants or agents by whom surveyors shall perform their work. *Walcott v. Swampscott*, *supra*; *Waldron v. Haverhill*, 143 Mass. 582.

Highway commissioners are a quasi corporation, and suit by or against them should be brought in their official and not in their individual names. *Lang v. Soffell*, 33 Ill. App. 624; *Rutland Highway Comrs. v. Dayton Highway Comrs.* 60 Ill. 53.

No execution should issue against highway commissioners, they being a municipal corporation. 23 L. R. A.

Lange v. Soffell, *supra*; *Kansas v. Juntgen*, 84 Ill. 360.

2. *Capacity in which liable.*

As public officers acting for the public alone, they are exempt from personal liability, but if engaged in special employment with duties of a more private character concerning individuals, as well as the public, they are liable to private actions. *Robinson v. Rohr*, 2 L. R. A. 365, 73 Wis. 436.

They must act as independent public officers, and not as the agents of the corporation. *Conrad v. Ithaca Village Trustees*, 16 N. Y. 158; *Hickok v. Plattsburgh Village Trustees*, reported in *note*, 16 N. Y. 158.

The responsibility for repairs in highways in general rests upon the officers individually having charge thereof, and not upon the townships. *Leon Twp. v. Taylor*, 20 Mich. 153; *Marathon Twp. v. Oregon Twp.* 8 Mich. 379.

The civil remedy for misconduct in office is restricted, and depends exclusively upon the nature of the duty which has been violated. *Wilson v. New York*, 1 Denio, 695, 43 Am. Dec. 719.

3. *Duties required of them.*

Commissioners of highways are charged with the duty of acting with vigilance and watchfulness in ascertaining the condition of the highways, and they must exercise proper care in their maintenance in a reasonably safe condition for all ordinary travel. *Embler v. Walkill*, 57 Hun, 384.

A reasonable degree of watchfulness in ascertaining the condition of their roads and preventing their dilapidation is all that is required by law of highway commissioners. *Hicks v. Chaffee*, 12 Hun, 293, where an inspection of a bridge failed to disclose a defect, which nothing but the total removal of the bridge could have shown.

To the same effect, *Barton v. Syracuse*, 36 N. Y. 57; *McCarthy v. Syracuse*, 46 N. Y. 194; *Hover v. Barkhoof*, 44 N. Y. 113; *Bostwick v. Barlow*, 14 Hun, 177.

Such degree of watchfulness extends to ascertaining the condition of the structure from time to time and preventing the same from becoming dilapidated or obstructed. *McCarthy v. Syracuse*, 46 N. Y. 196.

They must, with reasonable care and fidelity, discharge the duties they have solemnly sworn to perform. *Hover v. Barkhoof*, *supra*.

They are bound to make repairs and remove obstructions interrupting and impeding traffic. *Griffith v. Follett*, 20 Barb. 630.

A PPEAL by plaintiff from a judgment of the Rutland County Court in favor of defendants in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. George E. Lawrence and J. C. Baker for appellant.

Messrs. Butler & Moloney for appellees.

A person assuming the duties and powers of a public officer by contract with the state becomes responsible for special damage occasioned by his negligence. *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 643; *Johnson v. Belden*, 47 N. Y. 130.

They are required to direct the work, to make repairs, as determined. *McCord v. High*, 24 Iowa, 336; *Lacour v. New York*, 3 Duer, 406; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Camden v. Mulford*, 26 N. J. L. 53; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 466, 53 Am. Dec. 316.

Surveyors of highways have a right to remove soil or gravel from one part of the highway to another, for the making of a public road and for the repair of the same, so as to make it safe and convenient for public travel without liability to the owner of the soil. *Denniston v. Clark*, 125 Mass. 216; *Adams v. Emerson*, 6 Pick. 53; *Phillips v. Bowlers*, 7 Gray, 21; *Burr v. Leicester*, 121 Mass. 241; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Fish v. Rochester*, 6 Paige, 263, 3 L. ed. 931; *Bissell v. Collins*, 23 Mich. 277, 15 Am. Rep. 217; *Baxter v. Winoski Turnp. Co.* 22 Vt. 114, 52 Am. Dec. 84; *Cole v. Drew*, 44 Vt. 49, 8 Am. Rep. 363; *Chapin v. Sullivan Railroad*, 39 N. H. 534, 75 Am. Dec. 237; *Aldrich v. Drury*, 3 R. I. 554, 5 Am. Rep. 624; *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 390.

In *Hovey v. Mayo*, 43 Me. 323, the right was extended to the removal of soil from one highway to another within their jurisdiction.

If the authority of a public officer to act is defined by statute, all who contract with him will be presumed to know the extent of his authority and cannot allege ignorance as a ground for charging him with excessive duty or authority, unless such officer knowingly mislead the other party. *Newman v. Sylvester*, 42 Ind. 106.

A commissioner obeying the demands of a valid statute is not liable in damages for the error of assessors. *Hampton v. Hamsher*, 35 N. Y. S. R. 341.

They have no authority, excepting as to highways and roads upon land. *Austin v. Carter*, 1 Mass. 281.

The duty imposed upon such officers should be a personal one, and not only one which he is under obligation, but clothed with ability, to perform both in the means furnished to him and the legal authority to act irrespective of superior officers. *Nowell v. Wright*, 3 Allen, 106, 30 Am. Dec. 62.

The General Statutes of Massachusetts, chap. 44, § 8, give surveyors of highways authority to remove obstructions such as buildings upon a highway. *Morrison v. Howe*, *Morrison v. Clemence*, 120 Mass. 565.

In an action of trespass against the commissioners of a highway for the alteration of a road, it was held that the act of such commissioners in laying out the same was not a special and statutory authority, and that, therefore, it must appear by the proceedings or by proof *alunde*, that they had jurisdiction. *Miller v. Brown*, 56 N. Y. 383.

4. Ministerial duties.

The work of repairing highways is ministerial. *Harris v. Carson*, 40 Ill. App. 147.

Where ministerial duties are cast upon officers 22 U. R. A.

Start, J., delivered the opinion of the court:

The plaintiff's evidence tended to show that, while she was riding in the village of Rutland, her horse became frightened and unmanageable by reason of the appearance and noise caused by the operation of a stone crusher, located partly on the land of one Engram, and partly within the boundaries of the highway, and a little beyond the village limits; that the horse, by reason of be-

exercising judicial functions, the violation of such ministerial duty being absolute, certain, and imperative incurs a civil responsibility. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 713; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Hutson v. New York*, 5 Sandf. 239; *Peck v. Batavia*, 32 Barb. 634; *Olmsted v. Deunla*, 77 N. Y. 373; *Piercy v. Averill*, 37 Hun, 361; *White v. Phillipston*, 10 Met. 109; *Harris v. Carson*, *supra*; *McCord v. High*, 24 Iowa, 336; *Lacour v. New York*, 3 Duer, 406; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; *Camden v. Mulford*, 26 N. J. L. 53; *Tearney v. Smith*, 33 Ill. 391; *Mills v. Brooklyn*, 32 N. Y. 499; *Robinson v. Bohr*, 2 L. R. A. 366, 73 Wis. 456; *Hovey v. Barkhoof*, 42 N. Y. 113.

Even though by the Act of 1881, chap. 95, § 31, a city was declared not liable. *Piercy v. Averill*, *supra*.

For the neglect of an imperative duty there is a civil liability. *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 306; *Shepherd v. Lincoln*, 17 Wend. 250; *Robinson v. Chamberlain*, 34 N. Y. 397, 90 Am. Dec. 713; *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 643; *Hicks v. Dorn*, 42 N. Y. 47, 53.

They must discharge their ministerial duties in a careful, prudent manner, without infringing on the rights of others, or unnecessarily injuring them. *Hicks v. Dorn* and *Rochester White Lead Co. v. Rochester*, *supra*; *Robinson v. Chamberlain*, 34 N. Y. 399, 90 Am. Dec. 713; *Barton v. Syracuse*, 36 N. Y. 57.

The general principle is, that where a duty of a ministerial character is imposed by law upon a public officer or corporation a negligent omission to perform the duty creates a liability on the part of such officer or corporation for the damages which individuals may sustain by reason of such omission, and that such liability may be enforced in a civil action by the injured party. *McCarthy v. Syracuse*, 46 N. Y. 196.

When authorized by law to exercise a merely ministerial act within a certain limit, he must obey the law to the letter, otherwise he violates it. *Allen v. Com.* 33 Va. 94.

A ministerial officer charged by statute with an absolute and certain duty, is liable for negligence. *Clark v. Miller*, 54 N. Y. 523.

Even though he refrained from action upon the honest belief that the statute charging such duty was unconstitutional. *Ibid.*

The act of a public officer in changing the crossing of a stream is ministerial in its nature, and it is his duty to perform it so as not to injure others. *McCord v. High*, 24 Iowa, 336.

Persons with judicial functions exercising ministerial acts are liable for damages for neglect. *Ferguson v. Earl of Kinnoull*, 3 Clark & F. 251.

5. Foundation of liability.

Duty and responsibility go along with power and opportunity. *Harris v. Carson*, 40 Ill. App. 147.

A public officer who is bound to do for others that which is beneficial to them must so perform it. *Mason v. Pearson*, 50 U. S. 9 How. 243, 13 L. ed. 125.

coming so frightened and unmanageable, went down an embankment, overturned the carriage, and severely injured the plaintiff. The plaintiff's evidence also tended to show that the stone crusher, as erected, located, and operated, was a public nuisance to travelers upon the highway, and that the defendants had to do with its location, erection, and operation on that occasion. The right to maintain and keep in repair the streets and highways in the territory embraced

within the limits of the village of Rutland is given to the village by its charter, and the regular officers, elected by the village, having control of such maintenance and repair, are a president and eight trustees. The trustees are authorized by the charter to appoint a street commissioner, and, by the charter, it is made the duty of the street commissioner to superintend the construction and repair of streets, walks, culverts, sewers, and drains, subject to the authority and direction

Negligence is the gist of the action. *Warren v. Clement*, 24 Hun, 472.

It is not necessary to show that such officer acted willfully or maliciously. *Olmsted v. Dennis*, 77 N. Y. 389; *Day v. Crossman*, 1 Hun, 570; *Warren v. Clement*, *supra*.

Negligence may be predicated of an omission to perform a duty enjoining personal supervision and care, as well as of an improper performance of such duty. *Bostwick v. Barlow*, 14 Hun, 177.

The controlling element in the question of such liability is, that the act complained of was a misfeasance. *Nowell v. Wright*, 3 Allen, 161, 80 Am. Dec. 62; *Bell v. Josselyn*, 3 Gray, 309, 68 Am. Dec. 741.

Their liability depends upon the powers conferred and the duties imposed upon them, and the means at their command to perform such duties. *House v. Montgomery County Comrs.* 60 Ind. 580, 28 Am. Rep. 687; *Perry v. Barnett*, 65 Ind. 522.

A violation of the duty imposed by statute must be shown. *Smith v. Wright*, 27 Barb. 621.

The question in all cases is, What was the particular nature of the office or agency held by the defendant, and how far his personal responsibility attached in reference to the matter complained of as causing the injury. *Nowell v. Wright*, 3 Allen, 161, 80 Am. Dec. 62.

The belief of the commissioners that they have exercised and used all means necessary, or in the sufficiency of the structure, is of no consequence or materiality in a defense to such action. *Hover v. Barkhoof*, 44 N. Y. 113.

And it matters not that such belief controverts any question of *mala fides* or malice, the question being negligence or no negligence. *Ibid*.

Where the issue is negligence, motives of good faith are immaterial. *Ibid*; *Robinson v. Rohr*, 2 L. R. A. 366, 73 Wis. 436.

The question is one for the jury. *Stack v. Bangs*, 6 Lane. 263.

6. Principles exempting from liability.

a. General.

The principle giving the public the right to enter upon land adjoining the highway, doing as little damage as possible, and to remove an obstruction, is applicable to the case of the highway surveyor. *Johnson v. Dunn*, 184 Mass. 522, where such obstruction caused the highway to be flooded.

In *Sutton v. Clarke*, 6 Taunt. 29, it was held that they were not liable to an action where there was no emolument for their services, in the absence of malice where they acted to the best of their skill and diligence, and upon the best information they could procure.

Whenever a person sued sets up a defense that he was an officer of the government, acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the particular act in question to be done, and that he acted in good faith. *Flanders v. Tweed*, 83 U. S. 16 Wall. 504, 21 L. ed. 389; *Robinson v. Rohr*, 2 L. R. A. 366, 73 Wis. 436.

He must show that his acts were necessary for the construction, repair, or preservation of the

road, and that the work was done at the proper place. *Conwell v. Emrie*, 4 Ind. 209, a case of damage sustained through the construction of a culvert.

His actions must be within the scope of his authority, in order to free him from liability. *Ibid*.

He must exercise his powers bona fide, and in a proper discharge of his duty to the public. *Ibid*.

If the acts are done within the scope of his authority, they do not become illegal by reason of the motive influencing them. *Benjamin v. Wheeler*, 8 Gray, 409; *Denniston v. Clark*, 125 Mass. 216; *Upham v. Marsh*, 123 Mass. 546.

The duties of every public officer charged with having public work done to be paid for by public money, is to take care that the work is performed on terms most advantageous to the public. *State v. Kern*, 51 N. J. L. 259.

If such officers exercise reasonable diligence and effort, no wilful failure, neglect, or refusal to discharge his duty can be imputed to him. *Parker v. State*, 29 Tex. App. 372; *Moore v. State*, 27 Tex. App. 439.

There is no duty, however, imposed upon highway commissioners to use their own personal exertions to repair or to guard the defects, by means of information as to the defects. *Lament v. Haight*, 44 How. Pr. 1.

Commissioners were held to be exempt from private action, not being a corporation and having no corporate funds. *McKenzie v. Chovin*, 1 McMull. L. 222.

They are not liable for consequential injuries resulting from an act within their authority. *Bolton v. Crowther*, 4 Dowl. & R. 195, 2 Barn. & C. 703, a case of negligence under Turnpike Act.

The injuries must not be consequential. *East River Gas Light Co. v. Donnelly*, 93 N. Y. 561.

There is no liability when the injury is not proximate or consequent upon the defendant's act. *Day v. Crossman*, 1 Hun, 570, 4 Thomp. & C. 124.

No private action for want of repairs will lie against a commissioner of a district. *McKenzie v. Chovin*, *supra*.

When the surveyor has acted in good faith, the land owner's remedy is against the township trustees, under 1 Rev. Stat. 1876, § 16, p. 858. *Spitznogle v. Ward*, 64 Ind. 30, following *McOsker v. Burrell*, 55 Ind. 425.

Where a village charter made a village a separate road district with its trustees as commissioners of highways, with powers similar to town commissioners, it was held that they were not independent public officers but agents of the village. *Weed v. Ballston Spa*, 76 N. Y. 329.

b. Error of judgment.

Ministerial and other public officers, though not employed in the ordinary administration of justice, when called upon by law to exercise a deliberate judgment, are not responsible for mere errors of judgment in the absence of corruption or malice. *Austin v. Richardson*, 1 Gratt. 827; *Allen v. Com.* 33 Va. 94; *State v. Kern*, 51 N. J. L. 259; *State v. Starrup*, 80 N. J. L. 423.

If such officers' acts are within their jurisdiction,

of the trustees. By an ordinance adopted by the village, it is made the duty of the trustees to appoint a street commissioner, who shall have in charge the building and repairing of all streets and sidewalks in the village, the purchasing of material, and procuring of labor, under the direction of the trustees; and it is provided that all highway money shall be expended by orders drawn in favor of the street commissioners. The defendants were, at the time of the injury com-

plained of, trustees, and had been, with one other, appointed by the president, a street committee of the trustees. The trustees purchased stone to be crushed for use upon the streets and highways of the village, taken from the ledge where the crusher was set up and operated. It was conceded in argument that the trustees voted to locate the stone crusher at the ledge.

The case of *Bates v. Rutland*, 62 Vt. 178, 9 L. R. A. 868, was an action in which the

exercised with an honesty of purpose, with an intention of avoiding unnecessary injury, there is no personal liability for an error in judgment in the selection of location, or the mode of construction. *Smith v. Gould*, 59 Wis. 681, a case of construction of a ditch to preserve the highway under Wis. Rev. Stat. § 1238.

Malice, oppression, or arbitrary action must be shown. *Green v. Swift*, 47 Cal. 536, a case of a navigable river.

When bound under penalty to act, and that upon their own judgment in matters some whereof are quasi judicial it is unjust and contrary to public policy to hold them liable for an error of judgment. *McOsker v. Burrell*, 55 Ind. 425.

A supervisor acting within the scope of his authority, in good faith, is not liable to an action in his natural capacity for acts done in his official capacity. *Ibid.*

If his opinion is honest, he will not be liable even though it be erroneous. *Ibid.*

To the same effect are *Carter v. Harrison*, 5 Blackf. 138; *Boyd v. Blaisdell*, 15 Ind. 73; *Conwell v. Emrie*, 4 Ind. 208.

c. Matters of discretion.

The best judgment and discretion must be used, and though punishable for their corrupt acts, yet they are not civilly liable for the execution of the trust reposed in them. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

Where their powers are discretionary to be exercised or withheld according to the officer's own views of necessity and propriety, they are judicial, and he will be exempt from responsibility for the motive influencing him, and the manner of performance. *Ibid.*; *Cole v. Medina Village Trustees*, 27 Barb. 218; *Peck v. Batavia*, 32 Barb. 634. But see *McCord v. High*, 24 Iowa, 336.

Where the discretionary acts were done honestly, even though injury resulted, highway commissioners were held not liable for negligence, malice or wantonness not being shown. *Yealy v. Fink*, 43 Pa. 212, 32 Am. Dec. 556; a case of damages to water rights caused by the construction of a causeway instead of a bridge.

Commissioners are not liable for acts done within the scope of their authority, no malice being shown. *Burton v. Fulton*, 49 Pa. 151.

Such officers are not liable for an act, the doing of which lies in their discretion, unless they act with malice. *Edwards v. Ferguson*, 73 Mo. 686; *Reed v. Conway*, 20 Mo. 22; *Upham v. Marsh*, 128 Mass. 546; *Bay State Brick Co. v. Foster*, 115 Mass. 431; *Denniston v. Clark*, 125 Mass. 216; *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486; *Burr v. Leicester*, 121 Mass. 241; *Morrison v. Howe*, *Morrison v. Clemence*, 120 Mass. 565; *Johnson v. Dunn*, 184 Mass. 522; *Wilson v. New York*, *Cole v. Medina Village Trustees*, and *Peck v. Batavia*, *supra*; *Baker v. State*, 27 Ind. 485; *McOsker v. Burrell*, 55 Ind. 425; *Carter v. Harrison*, 5 Blackf. 138; *Boyd v. Blaisdell*, 15 Ind. 73; *Conwell v. Emrie*, 4 Ind. 208; *Tearney v. Smith*, 88 Ill. 391; *Cubit v. O'Dett*, 61 Mich. 247; *Kendall v. Stokes*, 4 U. S. 8 How. 101, 11 L. ed. 513; *Allen v. Com.* 88 Va. 94; *Lacour v. New York*, 3 Duer, 406; 22 L. R. A.

Griffith v. Follett, 20 Barb. 620; *Urquhart v. Ogdensburg*, 61 N. Y. 67, 43 Am. Rep. 655; *Hines v. Lockport*, 60 N. Y. 238; *Mills v. Brooklyn*, 22 N. Y. 490; *Waldron v. Berry*, 51 N. H. 136.

The exercise of good faith in the use of such discretion will be presumed. *Garlinghouse v. Jacobs*, 29 N. Y. 297.

In all such cases the question is, Did the surveyor or officer perform the act bona fide in the discharge of his duty "according to the best of his abilities." *Waldron v. Berry*, *supra*.

The discretion of a highway officer as to how and where he will expend highway labor is limited by the rights of individuals, for a violation whereof he is liable. *Tearney v. Smith*, and *Cubit v. O'Dett*, *supra*.

Where, however, the discretion has been exercised, and the improvement made, the duty to keep in repair is ministerial and for its neglect an action of damage will lie. *Hines v. Lockport*, *supra*.

For mere incidental damages, where their acts are exercised with discretion, such officers are not liable. *Rowe v. Addison*, 34 N. H. 306.

Aliter if wanton, malicious, or improper. *Ibid.*, a case of an improper bar across a highway.

The decision of such commissioners as to what constitutes an obstruction in a highway is conclusive. *Morrison v. Howe*, *Morrison v. Clemence*, *Denniston v. Clark*, and *Johnson v. Dunn*, *supra*.

And so with respect to the necessity of repairs, their motives not being important. *Denniston v. Clark*, and *Johnson v. Dunn*, *supra*.

The only remedy open to the land owner for an injury occasioned by their action, is under the statute. *Ibid.*

In a case where the surveyor of a highway took material from the body of the same and deposited it upon his own land for the purpose of lowering the road at that point, upon suit brought by adjoining owners for breaking and entering, the court held that the surveyor was not liable as he acted within the scope of his power and discretion, his decision that such removal was necessary being conclusive upon all parties. *Upham v. Marsh*, *Morrison v. Howe*, *Morrison v. Clemence*, and *Bay State Brick Co. v. Foster*, *supra*, to the same effect.

Their judgment as to the removal of earth or gravel from one portion of a highway to another, or to a different road within their jurisdiction, is also conclusive as to the necessity of the action. *Denniston v. Clark*, 125 Mass. 216; *Benjamin v. Wheeler*, 8 Gray, 409, 15 Gray, 486; *Bay State Brick Co. v. Foster*, 115 Mass. 431; *Morrison v. Howe*, *Morrison v. Clemence*, 120 Mass. 565; *Burr v. Leicester*, 121 Mass. 241.

Such officers were held not liable for damage occasioned by the flow of water on plaintiff's land through the raising of the grade of the street, the court holding that their powers were judicial and discretionary. *Wilson v. New York*, 1 Denio, 595, 43 Am. Dec. 719.

Where the members of a common council exercise a legal discretion, there is no individual liability, either civil or criminal, in the absence of corruption. *Baker v. State*, 77 Ind. 485.

The mere fact that an officer is clothed with dis-

plaintiff sought a recovery on account of the injury complained of in this case; and in that case it was held that the officers by whom the work was being prosecuted were, for this purpose, public officers, and that the village was not liable.

The liability of public officers to individuals for negligence in the exercise of official powers and the performance of official duties is fully discussed in *Daniels v. Hathaway*, 65 Vt.—, and it is unnecessary to repeat what

is there said. That case and the cases there cited are sufficient authority for holding that the defendants are not liable, provided, in the matter complained of, they were in the exercise of strictly official powers and the performance of strictly official duties. In the purchase of the ledge, and advising and voting to there locate the stone crusher, the defendants were in the exercise of strictly official powers and duties; and, if they acted without corruption or malice, they are not

cretion in the method of performing his work will not render his acts judicial. *McCord v. High*, 24 Iowa, 386.

d. Necessity of funds.

The duty of surveyors or commissioners of highways with respect to the repair of the same extends only so far as the funds will allow. *Garlinghouse v. Jacobs*, 29 N. Y. 297.

Their obligation is qualified and not absolute, depending upon funds or their means of acquiring them. *Smith v. Wright*, 27 Barb. 621; *Flynn v. Hurd*, 118 N. Y. 19; *Galen v. Clyde & Rose Pl. Road Co.* 27 Barb. 643; *Hutson v. New York*, 5 Sandf. 289.

If such officers have funds, or the authority to procure them, and neglect their duty, make no effort to procure them, they are liable for damages. *Warren v. Clement*, 24 Hun, 472; *Hover v. Barkhoof*, 44 N. Y. 113; *Olmsted v. Dennis*, 77 N. Y. 382; *Lament v. Haight*, 44 How. Pr. 3; *Hutson v. New York*, 9 N. Y. 168, 59 Am. Dec. 526; *Hazadorn v. Raux*, 72 N. Y. 583; *Adst v. Brady*, 4 Hill, 680, 40 Am. Dec. 305; *Garlinghouse v. Jacobs*, *supra*; *Robinson v. Chamberlain*, 34 N. Y. 402, 90 Am. Dec. 713.

Highway commissioners are responsible civilly for injuries resulting from neglect if funds are provided. *People v. Esopus Town Auditors*, 74 N. Y. 810; *People v. Little Valley Town Auditors*, 75 N. Y. 316.

Their liability is individual for any wrong they may commit or for any injury occasioned through neglect, provided they have funds sufficient for the purpose. *People v. Little Valley Town Auditors*, *supra*.

When the means are at hand, or under their control, their duty becomes absolute and they are liable for negligence. *Hutson v. New York*, 5 Sandf. 289.

To be liable they must be provided with funds by their towns, or specially commanded and empowered by the statute to perform the work. *Flynn v. Hurd*, and *Galen v. Clyde & Rose Pl. Road Co.* *supra*.

The absence of funds or the legal means of procuring them, will excuse their liability. *Hines v. Lockport*, 60 N. Y. 238.

Funds or the means of acquiring them must be provided. *Day v. Crossman*, 1 Hun, 570.

The general rule that the plaintiff must show adequate means in the defendant does not apply where the officer has been guilty of misfeasance to the special damage of the plaintiff. *Bennett v. Whitney*, 94 N. Y. 302; *Rector v. Pierce*, 8 Thomp. & C. 416 (where the plaintiff's intestate met death by being driven off the bridge in a carriage); *Shepherd v. Lincoln*, 17 Wend. 250.

Having the necessary funds in hand or under control, commissioners are bound to repair bridges that are out of repair, they having notice of their condition, with reasonable and ordinary care and diligence; and if they omit this duty they are liable to individuals who sustain special damage from such neglect. *Hover v. Barkhoof*, 44 N. Y. 113.

The commissioners of the highways in the city of New York have funds for the repair of highways within their control, or if not, have it within their

power to obtain them, and therefore their duty becomes absolute and they are liable for a neglect thereof. *Hutson v. New York*, 5 Sandf. 289.

A reasonable official diligence to obtain the funds when the power to apply them is conferred, should be shown in order to justify exoneration, when such commissioners have knowledge of defects and unsafe condition of roads or bridges, or the approaches thereto. *Lament v. Haight*, 44 How. Pr. 1; *Warren v. Clement*, 24 Hun, 472.

The neglect to acquire funds after notice of the defect, or to repair upon the town's credit where he can do so, will render the commissioner liable. *Lament v. Haight*, *supra*.

It is for the defendant to prove the want of means. *Weed v. Ballston Spa*, 78 N. Y. 329; *Adst v. Brady*, 4 Hill, 680, 40 Am. Dec. 305; *Hines v. Lockport*, 60 N. Y. 238; *Erie v. Schwingle*, 22 Pa. 384, 40 Am. Dec. 87.

If the defendant can show that he has no means or funds for repairs, and no power to repair upon credit, he has a good defense to an action for negligence. *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hover v. Barkhoof*, *supra*.

In order to escape liability they must not only show want of funds, but also the use of every endeavor to obtain the same. *Warren v. Clement*, *supra*.

Yet they have a discretion in the application of such funds. *Garlinghouse v. Jacobs*, *supra*.

Their discretion in the dispensation of such funds extends to the most urgent needs, in the exercise of which they are not liable. *Monk v. New Utrecht*, 104 N. Y. 552; *Garlinghouse v. Jacobs*, and *Hover v. Barkhoof*, *supra*.

In *People v. Adst*, 2 Hill, 619, it was held that it must be shown that the commissioners had funds or the means to defray expenses, before an indictment would lie against them.

Since the New York Act of 1861, Laws, chap. 750, it must be averred that the town had funds or the means of obtaining them. *Reveigh v. Hounsfield*, 34 Hun, 140.

The same principles were applied to a case where damages were claimed by reason of the stoppage of navigation, through the negligent acts of the defendant under a contract with the state inuring for the benefit of all. *Briggs v. New York Cent. & H. R. Co.* 80 Hun, 291.

An allegation of funds was held not necessary in an action for negligence against a canal commissioner. *Griffith v. Follett*, 20 Barb. 620.

Where the commissioners were clothed with the power to obtain the means for the rebuilding of a bridge, but refused to exercise it and resolved to put it off till the following spring, the court held them liable for damage to the plaintiff's horses occasioned by their negligence. *Hover v. Barkhoof*, 44 N. Y. 113, following *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 712; *Adst v. Brady*, 4 Hill, 680, 40 Am. Dec. 305.

Such liability exists in the absence of contributory negligence on the claimant's part. *Hover v. Barkhoof*, *supra*; *Warren v. Clement*, 24 Hun, 472; *Olmsted v. Dennis*, 77 N. Y. 382; *Lament v. Haight*, 44 How. Pr. 3; *Hutson v. New York*, 9 N. Y. 168, 59

accountable to an individual for damages resulting from such acts. In purchasing the ledge, and voting to locate the stone crusher, the trustees were adopting measures and plans for the improvement and repair of the streets and highways. It was their duty to adopt plans for this purpose. In so doing, they were required to exercise judgment and discretion; and if, by reason of their failure to exercise the highest degree of judgment and discretion, their plans were defective, and

could not be executed without creating a public nuisance, or endangering the traveling public, they are not accountable to a private person for damages resulting from the adoption of such plans.

In *Robinson v. Rohr*, 73 Wis. 486, 2 L. R. A. 366, it is said that a board of street commissioners, when they determine upon the work, and adopt plans and specifications of it, act as public officers, exercising judicial and legislative powers; and they are not

Am. Dec. 526; *Hagadorn v. Raux*, 72 N. Y. 535; 1 Rev. Stat. 807, § 26; 2 Rev. Stat. 150, §§ 84, 85; Laws 1874, chap. 260; Laws 1875, chap. 492.

Where such commissioners cannot be charged with any fault or negligence in respect to the funds there is no liability. *Smith v. Wright*, 27 Barb. 621.

The plaintiff must aver and prove the possession of funds. *Ibid.*

Such commissioners are liable, after sufficient notice of the defects, if they have or are able to procure the funds. *Babcock v. Gifford*, 29 Hun, 186; *Hover v. Barkhoof and Warren v. Clement*, *supra*; N. Y. Laws 1868, chap. 108.

e. Order of the court.

An order of the county court directing an overseer to open a road in his district protects him from an action of trespass and damage by the land owner. *Patten v. Weightman*, 51 Mo. 432.

Into the regularity of the proceedings of the county court in locating a road a jury, in a subsequent action by the land owner, have no power to look or inquire. *Ibid.*

If the court has power and nothing appears illegal, such officers ought not to be held for the court's errors. *Peery v. Gill*, 36 Mo. App. 686; *Howard v. Clark*, 43 Mo. 344; *Brown v. Harris*, 52 Mo. 303; *Patrick v. Von Gerichte*, 10 Mo. App. 425.

After a road has been laid out by viewers, and their report approved by the court, an order issues to the supervisors to open the same for public use, and in the execution of such order they are protected. *Wagner v. Salzburg*, 132 Pa. 636.

If they vary the directions or do not act lawfully, they are as liable to the party injured thereby as any other trespasser would be, but so long as they keep the terms of the order, neither they nor the township they represent are liable for what is lawfully done. *Ibid.*

Such officer is not presumed to know of an error in the order of the court directing improvements. *Peery v. Gill*, *supra*.

They are not liable for erroneous orders of the county courts opening a road. *Yeager v. Carpenter*, 8 Loigh, 154, 31 Am. Dec. 665.

The origin or cause of the irregularity or error in the judgment of the court cannot increase or lessen the officer's liability. *Crenshaw v. Snyder*, 117 Mo. 167; *Walker v. Likens*, 24 Mo. 298; *Evans v. Haefner*, 29 Mo. 141.

If an order of the county court opening a road is void, the entry of the overseers is a trespass upon realty over which a justice has no jurisdiction. *Cookrum v. Williamson*, 53 Ark. 131.

Where damages had not been assessed under the Missouri Act of March 3, 1851, it was held that the fact did not entitle the owner of the land to maintain trespass against those entering the land under an order of the county court and cutting timber upon the line of the located road. *Walker v. Likens*, *supra*.

In *Walker v. Likens*, *supra*, the owner of land was not allowed to maintain trespass against the overseer of a road, acting under the orders of the county court, in proceeding to open a road over the plaintiff's land, even though no consent of the

owner was shown upon the commissioners' report, or that proper steps had been taken to condemn the land.

In *Lingo v. Burford*, 112 Mo. 149, the court refused to restrain the overseer from proceeding to open a public road over and through the plaintiff's land, the county court having found that due notice had been given according to law, pursuant to section 7797 of the Revised Statutes of Missouri of 1860.

Where suit was brought for the removal of a fence, whereby the plaintiff's personal property was injured by stock trespassing, the court held that if the order of the county court opening the road was valid and binding upon the land owner, then the road overseer, who entered pursuant thereto, had authority to remove the fence where it obstructed the highway without becoming responsible. *Cookrum v. Williamson*, *supra*.

Where a constitutional safeguard was set at naught, the remedy was not considered as lying in an action against the officer who was acting in conformity to the orders of the court, having jurisdiction. *Walker v. Likens*, 24 Mo. 298.

7. Necessity of notice.

a. To officers.

A notice of defects is not necessary. *Conroy v. Gale*, 5 Lans. 344, 47 N. Y. 665; *Stack v. Bangs*, 6 Lans. 232; *McCarthy v. Syracuse*, 46 N. Y. 197.

Actual notice of a defect is not necessary. If such defect is notorious and presumably known, such notice will be presumed. *Requa v. Rochester*, 45 N. Y. 120, 6 Am. Rep. 52; *Weed v. Ballston Spa*, 78 N. Y. 323; *Diveny v. Elmira*, 51 N. Y. 506; *Hume v. New York*, 47 N. Y. 639.

The liability may be established without notice, as their ignorance would prove *per se* neglect of duty. *Bostwick v. Barlow*, 14 Hun, 177.

The rule is not limited to cases of actual notice, as their ignorance might be culpable. *Hover v. Barkhoof*, 44 N. Y. 113.

The duty imposed by 1 N. Y. Rev. Stat., 501, § 1, is not discharged by waiting for notice of defects and by repairing after notification. *Bostwick v. Barlow*, *supra*.

Where notice of the unsafe character of a bridge was received twelve months prior to the accident, the court held the commissioner liable for negligence, the neglect of duty being his own exclusive act and wrong. *Lament v. Haight*, 44 How. Pr. 1.

b. To land owner.

Before surveyors can remove a fence or obstruction in a public highway, other than an immediate obstruction, they are required, under section 905 of the Iowa Revised Statutes, to give six months' notice to the property owner. *Mosier v. Vincent*, 24 Iowa, 473.

No matter whether the fence existed prior or subsequent to the making of the highway. *Ibid.*

And such surveyors cannot justify their action by the map under § 890 of such Revised Statute, unless the road existed *de facto* or *de jure* in the *locus in quo*. *Ibid.*; *Campbell v. Kennedy*, 24 Iowa, 494.

amenable to any one except the public for any error, negligence, or mere misfeasance in matters within their jurisdiction.

In *Wheeler v. Worcester*, 10 Allen, 591, it is said that the city, by its properly authorized agents, is charged with the public duty of constructing and maintaining the public streets. It must construct and maintain them in such places and in such manner as the public convenience and necessity require. It must provide for the disposal of the surface

water which falls upon them, and, in the discharge of this duty, neither the city nor its agents can be proceeded against in an action of tort for damages sustained by a private citizen. In *Urquhart v. Ogdensburg*, 91 N. Y. 67, 43 Am. Rep. 655, it was held that a municipal corporation is not liable for an injury to a traveler upon its streets resulting from the construction of a sidewalk upon an erroneous plan prepared or approved by its common council; that the rule is well

And reasonable notice to remove a fence which causes an obstruction must be given. *Blackburn v. Powers*, 40 Iowa, 681.

Reasonable notice is such notice, and for such a length of time, as, under all the facts and circumstances of the case, may be found reasonably proper to enable the plaintiff in the ordinary manner to properly and carefully remove the fence without unnecessary injury thereto, or to the premises or crops enclosed thereby. *Ibid.*, following *Mosier v. Vincent*, *supra*.

Where notice was given the land owner of the filing of a petition for opening a road, and a final judgment had thereon, the court held that the land owner had no remedy against the overseer for damages, as depriving him of his property without due process of law, the order not being void upon its face, either through recital of relinquishment of the right of way, or failure to designate the time of taking possession, the latter being a mere irregularity. *Crenshaw v. Snyder*, 117 Mo. 167.

8. Principles sustaining liability.

An action will lie against the public officer for acts of omission or commission causing injury. *Henly v. Lyme Regis*, 5 Bing. 91.

They were held responsible for negligence, in *Rochester White Lead Co. v. Rochester*, 8 N. Y. 463, 53 Am. Dec. 316; *Bailey v. New York*, 8 Hill, 531, 38 Am. Dec. 609.

At common law, commissioners were personally liable for the consequence of their own negligence, and not the town for which they were neither agents nor servants; but by legislative enactments towns are now liable where commissioners would be. *Embler v. Wallkill*, 57 Hun, 384.

Where their acts are invasive of private rights they are liable personally in cases where there is no other remedy, and that, without proof of malice or an intention to injure. *McCord v. High*, 24 Iowa, 336.

But if their actions are not bona fide, but negligent and corrupt, they are personally liable for damages occasioned thereby, notwithstanding that under 1 Rev. Stat. 1876, p. 855 (§ 18 of the Act of March 5, 1859), the remedy is by way of assessment of damages. *McOsker v. Burrell*, 55 Ind. 425.

In *Bartlett v. Crozier*, 15 Johns. 250, it was held that where an injury is suffered by the act of a public officer, contrary to his duty, the injured party might maintain an action on the case against him.

The right of action should be confined to cases where the services of the officer are not gratuitous or coerced, but voluntary and attended with compensation, and also where the duty to be performed is entire, absolute, and perfect. *Bartlett v. Crozier*, 17 Johns. 450, 8 Am. Dec. 423.

The ground of reversal in *Bartlett v. Crozier*, 17 Johns. 450, 8 Am. Dec. 423, was not on account of the broad statement of the doctrine, as laid down in the court below, but because it did not apply to the case of overseers of highways, no such responsibility attaching, they not being clothed with authority or charged with an absolute duty.

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Where the breach is that of a private duty to an individual, an action lies for its abuse in case injury ensues, but if such duty is public, no private liability attaches at common law, even though the public be more or less injured. *Sussex County Chosen Freeholders v. Strader*, 18 N. J. L. 108, 35 Am. Dec. 630, where damages were sought for the value of a horse which fell off a bridge, but relief was denied, the only remedy being by presentment. To the same effect, *Cooley v. Essex Chosen Freeholders*, 27 N. J. L. 415.

For personal negligence in the performance of the work required of them, they are personally liable should injury occur. *Harris v. Carson*, 40 Ill. App. 147; *Tearney v. Smith*, 36 Ill. 391; *Skinner v. Morgan*, 21 Ill. App. 209; *Allen v. Michel*, 38 Ill. App. 313.

But at common law their action must be wanton, malicious, or improper. *Adams v. Richardson*, 43 N. H. 212.

A person assuming the duties and invested with the powers of a public officer is liable for injuries sustained through his negligence. *Bennett v. Whitney*, 94 N. Y. 302, a case of unguarded and unlighted opening temporarily made in the street.

The public officer who undertakes to destroy private property under the claim of great public or overruling necessity takes upon himself the burden of proving the necessity of his action. *Russell v. New York*, 2 Denio, 475; *Hicks v. Dorn*, 43 N. Y. 47, 53.

In *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305, public officers acting contrary to their duty, either by way of nonfeasance or misfeasance, were held liable for injuries occasioned thereby. *Bailey v. New York*, 8 Hill, 531, 38 Am. Dec. 609, to the same effect.

So they are liable for acts done outside their authority. *Bailey v. New York*, *supra*.

A civil action will lie by any one sustaining peculiar damages by reason of the nonfeasance wherever an indictment would lie. *Hutson v. New York*, 5 Sandf. 289.

Where an officer of a corporation performs an illegal act, resulting in injury to another, he is liable. *Peck v. Cooper*, 112 Ill. 192, 54 Am. Rep. 231; *Robinson v. Rohr*, 2 L. R. A. 306, 73 Wis. 436.

When the duties imposed by law upon highway officers are not discharged, and injury results to a traveler without his fault, he has a cause of action for the damages sustained. *Embler v. Wallkill*, 57 Hun, 384.

Where a statute imposed an affirmative duty to repair and to present vouchers, commissioners of highways were held liable as a quasi corporation, and that individually. *Babcock v. Gifford*, 29 Hun, 186.

In *Hathaway v. Hinton*, 46 N. C. 243, such officers were held liable for special damages.

In *Beardslee v. French*, 7 Conn. 125, 18 Am. Dec. 86, the court held the party removing an obstruction liable for wanton and unnecessary destruction of property.

When he is liable for a lawless act, all of his assistants are liable with him for the consequent injury. *Cubit v. O'Dett*, 51 Mich. 347.

settled that, where power is conferred upon public officers of a municipal corporation to make improvements, such as streets and sewers, and keep them in repair, the duty to make them is quasi judicial or discretionary, involving a determination as to their necessity, requisite capacity, and location; and that, for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action can be maintained.

In *Lansing v. Toolan*, 87 Mich. 152, Cooley,

Ch. J., in delivering the opinion of the court, said: "In planning public works, a municipal corporation must determine for itself to what extent it will guard against possible accidents. Courts and jurors are not to say it shall be punished in damages for not giving the public more complete protection, for that would be to take the administration of municipal affairs out of the hands to which it has been intrusted by law."

The evidence did not tend to show that the

The absence of bad faith is no excuse, but may be an aggravation. *Ibid.*

It is not necessary to prove such a defective condition as to be apparent. *Stack v. Bangs*, 6 Lana. 283.

It is sufficient if the defects could have been discovered by reasonable examination. *Ibid.*

A party contracting with a municipal corporation to keep any portion of a street in repair, contracts with the public and is liable for an injury sustained through his negligence. *McMahon v. Second Ave. R. Co.* 11 Hun, 347.

Drains cannot be cut so as to flood the property of private owners. *Cubit v. O'Dett, supra*; *Ashley v. Port Huron*, 36 Mich. 286, 24 Am. Rep. 552.

Such commissioners have power to remove trees which interfere with the making of a road, but are liable in trespass if they use the timber, and the value thereof may be assessed against them as damages. *Tucker v. Eldred*, 6 R. I. 404.

So street commissioners have been held liable for damages done by the removal of lateral support for adjacent lands. *Buskirk v. Strickland*, 47 Mich. 389, the injury being the direct and immediate result of their acts.

A road surveyor cannot justify his action in pulling down a house or building as an obstruction to a highway, upon the ground that it is done in the exercise of his duty, where he uses his cloak of office for the purpose of injuring the plaintiff. *Wilding v. Hough*, 37 Iowa, 448.

A state contractor, who has a right to do all that the state might do in the progress of work, would not be justified in casting material upon the premises of a private owner, as the state could not intrude upon the lawful possession of a citizen, except as provided by law. *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258; *Hay v. Cohoes*, 2 N. Y. 159, 51 Am. Dec. 279.

So where the obstruction or delapidated condition is the result of use which ought to have been anticipated, and could have been guarded against by occasional examination and cleansing, the omission to perform such duties was held a neglect of duty rendering the officer liable. *McCarthy v. Syracuse*, 46 N. Y. 196; *Barton v. Syracuse*, 36 N. Y. 54.

They are charged, as a public duty, with keeping public bridges in repair, and such duty is compulsory. *State v. Demaree*, 80 Ind. 522.

Where it is sought to recover for injuries sustained by the neglect of highway commissioners in the repairs of bridges, it must be alleged that the commissioners neglected to give directions for repairs, or that the bridge was over a stream intersecting the highway. *Smith v. Wright*, 27 Barb. 621.

The duty of such commissioners with respect to bridges not over a stream is simply one to give directions to repair, while as to those over streams intersecting highways, it is to cause them to be kept in repair. *Ibid.*

Where sewer commissioners acted carelessly and negligently in discharging their statutory duty, they were held liable for their acts in the absence of due care. *Jones v. Bird*, 5 Barn. & Ald. 837, 1 Dowl. & R. 497.

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9. State decisions.

Under the California Acts of March 26, 1855, § 9, and April 28, 1855, § 5, if any damage results from the neglect to keep county bridges in repair, it must be sought either against the road supervisors or the overseers personally. *Huffman v. San Joaquin County*, 21 Cal. 423.

The fact that an overseer has the authority of the road commissioners to open a road will not protect the former where the laying out is illegal. *Guptail v. Teft*, 16 Ill. 365.

Not only the commissioners themselves, but others who would seek a justification under their orders, must take the responsibility of showing that a case existed justifying the issuing of their order. *Ibid.*

And it has been held that they are liable even if misled as to the true line of a road which they are authorized to open. *Beyer v. Tanner*, 29 Ill. 136.

In *Tearney v. Smith*, 36 Ill. 391, they were held personally liable for the negligent construction of a drain or ditch and of a grade or embankment, which caused surface water to flow upon plaintiff's land.

Where highway commissioners cut down a fence, part of which was shown to be within the lines of the highway, the court held they could not justify the trespass as being done in the laying out or opening of the public way. *Shoup v. Shields*, 116 Ill. 488.

Under the Illinois statutes, the commissioners "have charge of the roads and bridges of their respective towns" and are required "to keep the same in repair and to improve them so far as practicable." *Hurd's Rev. Stat.* 1889, chap. 121, § 2; *Harris v. Carson*, 40 Ill. App. 147.

In *Lynn v. Adams*, 2 Ind. 143, it was held that the Indiana statute gave no right of personal action against an overseer of roads for damages resulting from neglect of duty. To the same effect, *Wabash & E. Canal Trustees v. Spears*, 16 Ind. 441, 79 Am. Dec. 444; *Morrison v. McFarland*, 51 Ind. 203.

Under Ind. Rev. Stat. 1843, chap. 16, §§ 86, 87, surveyors are required to keep highways in their districts in repair, and for that purpose have power to enter upon any lands adjoining or near to such highway, and to construct ditches and drains necessary for the construction or repair of such highway. *Conwell v. Emrie*, 4 Ind. 209.

Where by statute a surveyor's duty only extended to small repairs, he was held not bound to repair a defect involving extraordinary expenditure, a duty to make small repairs not embracing those requiring extraordinary expenditure. *Wilson v. Jefferson County*, 13 Iowa, 161.

In *McCord v. High*, 24 Iowa, 386, road supervisors were held liable for injuries done in the construction of a crossing by the diversion of a stream.

A statute authorizing road overseers to enter upon any uncultivated land, unincumbered by a crop, will not protect an entry of such overseers upon cultivated land, even though no crop be growing or standing thereon. *Barrett v. Nelson*, 29 Kan. 504, a case of trespass upon wheat stubble.

Where curb-stones, the original property of the plaintiff, were removed, carried away, and sold by

defendants acted corruptly or maliciously, or that they acted in a capacity other than that of public officers, in the exercise of strictly official powers and the performance of official duties; and the jury, by a special verdict, have found that the action of the defendants on that occasion, and in locating and operating the stone crusher, was taken in their capacity of street committee and trustees, in good faith, according to their best judgment. It is stated in the exceptions that the plain-

tiff's evidence tended to show that the defendants had to do with the location, erection, and operation of the stone crusher, but it does not appear that they had any more to do with it than other members of the board of trustees. For aught that appears in the exceptions, the acts of the defendants in respect to the location, erection, and operation of the stone crusher were all official acts. It appears that the trustees purchased the ledge, and voted to there locate the stone crusher.

the defendant, upon the construction of a drain ouivert, the court held the plaintiff entitled to recover. *Muzzey v. Davis*, 54 Me. 361.

Where the roads were charged by statute with in the care of such commissioners, they were held responsible, their duties being defined and the means of performance provided by the statute. *Anne Arundel County Comrs. v. Duckett*, 20 Md. 468, 38 Am. Dec. 557.

In Maryland their liability attaches, not by reason of the common law, but under the statute. *Anne Arundel County Comrs. v. Duvall*, 54 Md. 350, 39 Am. Rep. 398.

In Calvert County Comrs. v. Gibson, 36 Md. 229, the court held that such action was not taken away by § 8, chap. 299, of the Statutes of 1868, permitting the bond of a supervisor to be put in evidence for the benefit of those injured.

The only remedy in Massachusetts to a party who suffers damages from the action of a highway surveyor, is under Gen. Stat., chap. 44, §§ 19, 20.

If the town should be bound to pay a fine for any deficiency of such surveyor, the latter would be liable to the town therefor, if such deficiency was created by his fault or neglect. *White v. Phillipston*, 10 Met. 108; *Mass. Rev. Stat.* chap. 15, §§ 83, 84.

The only remedy allowed to a party injured by the action of a surveyor of highways, who without the written consent of the selectmen, causes a watercourse, occasioned by the wash of water from the highway, to be conducted along the highway and within its limits so as to injure the plaintiff in the use of his property, is under §§ 5 and 6 of chap. 25, Rev. Stat. *Benjamin v. Wheeler*, 15 Gray, 438.

And evidence that such work was done in a wanton and improper manner is not admissible. *Benjamin v. Wheeler*, 8 Gray, 409, his motives not making his actions illegal.

Where the defendant had exclusive management and direction in the attending of a drawbridge, his position not being merely honorary, or gratuitous, but a salaried one, with full control, the statutes requiring him to furnish all necessary assistance for the opening and closing of the drawbridge, and for the lighting thereof, the court held such defendant, not being dependent upon his superior, the means furnished him being ample, was personally liable for an injury sustained by the improper shutting of the gates and hanging out of lanterns, as required by the Statutes of 1856, chap. 282, and of 1859, chap. 184. *Nowell v. Wright*, 3 Allen, 166, 30 Am. Dec. 62.

And the wantonness or improper conduct of the highway surveyors in such an action, the court held, did not affect the plaintiff's right, and evidence thereof was not admissible. *Benjamin v. Wheeler*, 15 Met. 436.

Where under Stat. 1890, chap. 237, stones were removed with gravel from a gravel pit cut upon plaintiff's land by the selectmen and placed, some upon the roadside and some upon other land of plaintiff, the court held, the acts of the surveyor not having been wanton, but necessary and incidental to the convenient and proper use of such

pit, there was no liability. *Hatch v. Hawkes*, 128 Mass. 177.

Where the surveyor of highways removed stones from a gravel-pit laid out upon plaintiff's land, pursuant to Stat. 1890, chap. 237, for which the plaintiff claimed damages as not coming within the terms "earth and gravel," the court held such action would not lie, as the terms necessarily included stones suitable for the construction, repair, or improvement of such streets. *Ibid.*

As public officers highway surveyors are liable to severe penalties for failure to perform their official functions under Gen. Stat., chap. 18, §§ 74, 75. *Walcott v. Swamscott*, 1 Allen, 101; *Johnson v. Dunn*, 134 Mass. 522.

Where the acts of a surveyor of highways, in removing an obstruction upon plaintiff's land which flooded the highway, caused lands of the plaintiff to be flooded, the court held there was no liability, the acts of the surveyor being necessary and due care not to cause needless injury being exercised. *Johnson v. Dunn*, *supra*.

Where the committee of a school authorized the town surveyor, under the powers conferred upon them by Pub. Stat., chap. 44, § 46, to fell a tree upon its lot adjoining the highway, the court held there was no liability to the plaintiff at work upon the highway for injuries sustained by the fall of the tree. *McKenna v. Kimball*, 145 Mass. 555.

Where a general direction is given to the selectmen over the work of highway surveyors in their respective districts, to see that the money appropriated to such districts is carefully and judiciously expended, the responsibility of doing the work, directing the laborers and taking charge of the repairs, is that of the highway surveyor. *Pratt v. Weymouth*, 147 Mass. 245; *Benjamin v. Wheeler*, 15 Gray, 438; *Pub. Stat.* chap. 62, § 2.

In *Nile's Highways Comrs. v. Martin*, 4 Mich. 557, 69 Am. Dec. 333, commissioners were sued as a quasi corporation under chapter 119 of the Revised Statutes, for the damages for the non-repair of a bridge on the highway, and the court held that the act did not authorize any action against township officers by their name of office, except for acts done or for contracts made by them while acting within the scope of their official duty and authority, and that the action being brought for neglect of official duty, they were only liable individually and not officially as a quasi corporation.

In *Sag v. Laurain*, 19 Mich. 137, highway commissioners were held not liable when acting within their jurisdiction and violating no law.

Where the board of works and contractors were sued for changing the grade of a street without the consent of council, they were held liable in trespass. *Larned v. Briscoe*, 62 Mich. 393.

Road overseers and not the county boards are liable for damages resulting from the non-repair of roads. *Sutton v. Carroll County Board of Police*, 41 Miss. 236.

The party contracting with the county police board for the repair of a bridge was held responsible. *Ibid.*

In *McConnell v. Dewey*, 5 Neb. 385, the court held

By this purchase and vote, it may be said that the defendants had to do with the location, erection, and operation of the stone crusher; but the act of purchasing the ledge and voting to there locate the stone crusher were official acts. It does not appear that there was any testimony tending to show that the defendants went upon the streets, and participated in the execution of the orders of the trustees, or that they aided, assisted, participated in, or superintended the

erection or operation of the stone crusher. We cannot presume that they performed other than strictly official acts for the purpose of finding error in the rulings of the court below. Error must affirmatively appear. If there was evidence tending to show that they became laborers, operatives, or superintendents in the matter of setting up and operating the stone crusher, it should be so stated in the exceptions. Unless there was such evidence, the court should have ordered a ver-

there was no private action against a supervisor, his acts and duties being of a public nature, the legislature alone defining and regulating the duties and responsibilities of such an officer.

Where a highway was laid out by the selectmen of the town for the expressed purpose of countenancing the nonpayment of toll, the court held them liable. *Third Turnp. Road Proprs. in New Hampshire v. Champney*, 2 N. H. 190.

Where plaintiff's contention was that the road was not within the route laid out, the court held that the monuments must govern and not courses and distances. *Miller v. Silsby*, 8 N. H. 474.

An injury sustained through the wrongful act of a surveyor may be compensated by action of trespass or by criminal indictment. *Adams v. Richardson*, 48 N. H. 212; *Comp. Stat. chap. 52, § 18*.

Where an act provided that any ditch next or opposite to a dwelling, yard, or private way must be properly covered so as not to obstruct, the court held the surveyor personally liable for an uncovered trench or ditch which obstructed the passage of the highway, his acts being in violation of law. *Waldron v. Berry*, 51 N. H. 188.

The duty of overseers to open, clear out, and work the roads is imposed, not by an order of the township committee, but by an act of the legislature, and the act not the order of the committee enjoins the overseer to open, clear out, amend, or repair, as the exigency of the case may require. *State v. Monmouth Plank Road Co.* 28 N. J. L. 99; *State v. Holliday*, 8 N. J. L. 232.

Commissioners of highways were held liable in *Clark v. Phelps*, 4 Cow. 190, for laying out and opening a road through the plaintiff's buildings and property, the Act, 2 Rev. Laws, 270, §§ 1, 10, regulating highways not authorizing such steps.

The duty of repairing was expressly enjoined upon them by the second section of the New York Laws of 1853, chap. 609, p. 1140, in case of an unsafe bridge or culvert. *Hover v. Barkhoof*, 44 N. Y. 113.

Now the Laws of New York of 1881, chap. 700, § 1, impose the liability of all damages to persons or property, by reason of defective highways or bridges in cases where the commissioner of highways would previously have been liable, upon the several towns, instead of upon such commissioners, and by section 2 of the same Act such damages are a charge upon the town.

Section three gives a right of action by the town over and against the commissioners in cases where the defect in a highway or bridge has been caused by the misconduct or neglect of the commissioner of highways.

By section four, if the commissioners have acted in good faith and the defects have not been caused by their willful misconduct or neglect, the board of town auditors have power to audit and allow such judgment.

Section five provides that such commissioners shall not be relieved from any criminal liability in cases where by law they were previously subject thereto.

A party recovering a judgment against such commissioners cannot compel the board of town auditors to audit and allow such judgment as a valid
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claim against the town. *People v. Little Valley Town Auditors*, 75 N. Y. 318; *People v. Esopus Town Auditors*, 74 N. Y. 310.

Where the facts showed that the relator was the chief engineer of certain work, and also engineer of the department of public works, by the action of the chief of that department and his own concurrence, it was held that he was responsible for acts done in the duty he had assumed and might have refused. *People v. Campbell*, 82 N. Y. 247.

Where a city charter provided that its officers should be liable for damages "sustained by reason of wilful neglect" the court held the common-law liability for simple negligence still remained. *Bennett v. Whitney*, 94 N. Y. 902.

The responsibility attaches for the non-performance of any duty imposed by law. In *Dunlap v. Knapp*, 14 Ohio St. 64, 82 Am. Dec. 468, the court held that the only remedy against such an officer was under the statute for the penalty imposed, and not civilly.

But in *Beckwith v. Beckwith*, 22 Ohio St. 180, the supervisors were held liable in trespass for entering and digging upon plaintiff's land under the resurvey for the straightening of a road, the record of resurvey not protecting them, no order being given as in a case of a new road opened.

Where a ditch was constructed so as to divert the waters of a river from one part of a riparian proprietor's land to another, thereby changing the condition and cutting away part of the bank, compensation was allowed as the taking was within sections 1236, 1237, Wis. Rev. Stat. *Smith v. Gould*, 61 Wis. 81.

10. For acts of predecessors or successors.

The successors in office are not liable for the defaults of their predecessors. *Lament v. Haight*, 44 How. Pr. 1.

The misconduct of predecessors in office is not chargeable upon public officers acting as quasi trustees, each being answerable for his own defaults. *Vose v. Reed*, 54 N. Y. 657.

A supervisor will not be held liable for the negligence of his successor in not repairing a dam constructed by the former whereby the landowner's lands are flooded. *McOsker v. Burrell*, 55 Ind. 425.

11. For acts of employees.

Such officers are liable for the acts of their deputies. *Blunt v. Sheppard*, 1 Mo. 219.

The party authorizing a trespass is equally liable with him who occasions the act. *State v. Smith*, 78 Me. 280, 57 Am. Rep. 308.

A road supervisor is liable for the unskillful or negligent acts of persons employed by him in the repair of the road. *Anne Arundel County Comrs. v. Duval*, 54 Md. 350, 39 Am. Rep. 398.

If a public officer directs or authorizes the wrongful act of his sub-agent, or if the latter does not hold any office known to the law, but his appointment is private and discretionary with the officer, the latter is liable for such acts. *Ely v. Parsons*, 55 Conn. 83.

The superior officer cannot be indifferent or irresponsible for what he knows his inferior is do-

dict for the defendants, and the plaintiff has not been harmed by the failure of the court to charge as requested, or by the charge as

given. It does not affirmatively appear that there was any testimony tending to show that the defendants were ever at the ledge where

ing or intending to do, and cannot prevent or control. *Harris v. Carson*, 40 Ill. App. 147.

What is done by an overseer as such upon the highways in his district, with the knowledge of commissioners, must be presumed to have been done with their approval until the contrary is shown. *Ibid.*

But such officers are not responsible for the misconduct or malfeasance of those they are obliged to employ. *Bailey v. New York*, 3 Hill, 536, 38 Am. Dec. 669.

The relations of commissioners to overseers under the Illinois Statute, §§ 90, 91, are those of superiors. *Hizer v. Rockford*, 68 Ill. 325; *Harris v. Carson*, *supra*.

Where street commissioners disregard the city charter and adopt plans and specifications for certain work, undertake to carry them out practically, and do the work themselves, employing agents and servants to execute the plans and specifications manually, they act in a ministerial capacity and are liable for injuries sustained through the negligence of the employees of the board. *Robinson v. Rohr*, 2 L. R. A. 366, 73 Wis. 436.

Where notice of an obstruction to a highway was given to a selectman, who directed a private person "to cut the bush and trees and make the roads passable at as little expense as possible" leaving it to his discretion what to cut, such selectman was held liable to the land owner for unnecessary cutting. *Ely v. Parsons*, *supra*.

In *Anne Arundel County Comrs. v. Duvall*, *supra*, the county commissioners were held not liable for damages occasioned by the acts of a laborer employed upon the highway by the supervisor.

In trespass for breaking and entering, by taking a short cut over plaintiff's land, defendants acting, one as the officer of the town and the other as servant directing and assisting in repairs of a bridge, the court held the defendants not liable unless they authorized the action or directed it. *Bachelor v. Pinkham*, 68 Me. 253.

In *McGuire v. Grant*, 26 N. J. L. 856, 67 Am. Dec. 49, where committeemen ordered the doing of an act, lawful in itself, by workmen under orders and directions of an officer of the corporation, with whom the committeemen had no connection, they were held not liable for injuries resulting from the work.

In an action of trespass *quare clausum fregit* against the surveyor of highways, the defendant was held liable for damage done to plaintiff's grass through the felling of trees which fell and remained upon the latter's land, the acts being those of the surveyor's servants within the limits of the road, done within his view and impliedly assented to, no orders being given for their removal. *Elder v. Bemis*, 2 Met. 549.

The surveyors are responsible where the statute gives a remedy against them for the non-performance of those duties assigned to them, or for malfeasance in the discharge of them, but they are not responsible as the mere agents or servants of the town. *White v. Phillipston*, 10 Met. 108.

But the common-law rule, that the agent is liable over to his principal for damages occasioned through his negligence, does not apply to such a case, and a judgment against a town in a civil action is no ground for a suit against such officer. *Ibid.*

12. Adjoining towns.

In *Bryan v. Landon*, 5 Thomp. & C. 594, the highway commissioners of two adjoining towns were held jointly liable for the want of repair of a 22 L. R. A.

bridge over a stream dividing the two towns, they having sufficient funds.

Where a commissioner repaired a bridge without giving notice to the commissioners of the towns jointly liable, it was held that they could not recover the proportion of the expense, because of the failure to comply with the requirements of the state statute. *Flynn v. Hurd*, 118 N. Y. 19.

Even though the commissioners notified, consented to the making of the repairs and thereafter united in the operations. *Ibid.*

13. Canals.

The liability of a canal commissioner depends upon the nature of the duty imposed upon him by the statute, and if this be imperative he is liable for damages for negligence. *Griffith v. Follett*, 20 Barb. 620.

He is liable for the neglect of duty in his private capacity. *Ibid.*

Under the New York Act of 1867, chap. 577, § 3, canal contractors are liable to individuals for negligence in the repair of canal bridges. *Conroy v. Gale*, 5 Lans. 344, 47 N. Y. 665.

It is the duty of a contractor for canal repairs, under the New York Laws of 1866, chap. 836, § 9, to ascertain at his peril what ought to be done, not only to put, but to keep, the bridges in repair. *Ibid.*; *French v. Donaldson*, 57 N. Y. 496.

A contractor under a state contract for the enlargement of a canal cannot claim any delegation of sovereign power enabling him to confiscate property to public use permanently or temporarily, no right being given by the contract, and therefore his rights are no more than those of other individuals. *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258.

The mere fact that the act was necessary will not justify a canal contractor in trespassing upon private lands; he must have the right to use such lands. *Ibid.*

Superintendents of canal repairs must stop any breaches and remove obstructions without waiting orders from the commissioners, or, in default, will be held liable for damages occasioned. *Adsit v. Brady*, 4 Hill, 680, 40 Am. Dec. 305.

A canal contractor was held personally liable for damage done to plaintiff's land by reason of a blast from the canal bed, even though no negligence was shown. *St. Peter v. Denison*, *supra*.

It has been held that the liability of such contractor is not affected by the appointment of a superintendent. *French v. Donaldson*, *supra*.

In *Johnson v. Belden*, 2 Lans. 423, a canal contractor was held liable for negligence for non-repair of the gates of a lock, although the same were opened by the boat captain, the latter believing the same unsafe.

The proprietors of a canal who were bound to construct it, so that rafts of a given size could pass, were held liable for damage done to plaintiff's raft which answered such description, by reason of the canal not being sufficient to pass such raft. *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, 5 Am. Dec. 35.

Where the defendant, a superintendent of canal repairs, was by law (1 Rev. Stat. Edm's ed. p. 236, § 100), bound to keep the canal in repair, there being no discretion about the matter, the court held his duty was imperative, for the neglect of which he was liable for damages, his acts being ministerial. *Hicks v. Dorn*, 42 N. Y. 45, 53.

Where such superintendent undertook to destroy the plaintiff's boat claiming the act as necessary, the court held that the right did not exist.

the stone crusher was set up and operated. It does appear, from one of the special verdicts, that the stone crusher was being operated by help hired by the street commissioner, in the interest of the village, on the afternoon of July 12, 1888, in the presence of

the street commissioner and the defendants, who were present as a street committee of the trustees to observe its operation, and to consult with the street commissioner about its work and other matters connected with the maintenance and repair of the highways,

simply on account of convenience or economy, as all other expedients should have been first tried, and further that such action cast upon him the burden of proving the expediency or necessity of his action. *Ibid.*; Russell v. New York, 2 Denio, 475.

Where the canal board had a statutory authority to contract for canal repairs and gave the contractor the like duties and powers that superintendents had, it was held that said contractor was liable for damage occasioned to plaintiff's boat through negligence in not repairing, after notice of defects. Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 718; Fulton F. Ins. Co. v. Baldwin, 87 N. Y. 648; Johnson v. Belden, 47 N. Y. 180.

14 Criminal Liability.

Public officers of every grade and description may be impeached or indicted for official misconduct and corruption. Wilson v. New York, 1 Denio, 595, 43 Am. Dec. 719.

Officers of municipal corporations may make themselves personally liable for their crimes or torts. Chandler v. Bay St. Louis, 57 Miss. 326.

A road overseer is only charged with reasonable diligence and effort in the discharge of his duty, and cannot be held criminally liable for failing to keep the road in repair, where it is shown that to do so with the means available to him is impossible. Parker v. State, 20 Tex. App. 372; Moore v. State, 27 Tex. App. 430.

A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment therefor and to an action at the suit of any one who has sustained special injury. Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 718; Lansing v. Smith, 8 Cow. 151; Smith v. Wright, 24 Barb. 170; Pierce v. Dart, 7 Cow. 608; Shepherd v. Lincoln, 17 Wend. 280; Adair v. Brady, 4 Hill, 690, 40 Am. Dec. 305; Lyme Regis v. Henley, 1 Bing. N. C. 222.

If a deficiency exists in the highways of a district, which is occasioned by the fault of such officer, he may be prosecuted by indictment. White v. Phillipston, 10 Met. 108.

They are bound to take the most advantageous terms for the performance of the work, and for any corrupt or willful dealing in the placing of a contract payable in public money, they are criminally liable. State v. Kern, 51 N. J. L. 259.

A willful and corrupt award of a contract for public work, on terms less advantageous than others, would be a neglect and breach of duty, such as would constitute official misbehavior indictable at common law. *Ibid.*; State v. Startup, 30 N. J. L. 423.

A corporation or individual who is bound to repair a public highway or navigable river, is liable to indictment for the neglect of such duty. People v. Albany, 11 Wend. 539, 27 Am. Dec. 85.

Supervisors are liable to indictment for neglecting to open a public highway, duly laid out in their respective townships. Com. v. Reiter, 78 Pa. 161; Graffins v. Com. 8 Penn. & W. 502; Edge v. Com. 7 Pa. 275; Phillips v. Com. 44 Pa. 197.

The opening of a wrong road is no defense to an indictment for neglect to open a highway there being no compliance with the legal duty of supervisors. Com. v. Johnson, 134 Pa. 635.

For any material change in the line of a road directed by an order of the court, supervisors are liable to indictment, although they follow lines made by their predecessors. *Ibid.*

If such judicial acts are corrupt, such officer is liable to be impeached or indicted, but no civil action will lie on behalf of the party injured. Wilson v. New York, 1 Denio, 595, 43 Am. Dec. 719.

If the board of public works has been forbidden by statute to contract for cleaning the streets without previous advertisement of the same, the doing of such prohibited act willfully and with evil intent constitutes a criminal offense and an indictment charging the members of the board engaged thereon is sufficient. State v. Startup, and State v. Kern, *supra*.

And in New Jersey, this liability is not taken away or affected by section 159 of the Statute of March 31, 1871, Pamph. Laws, p. 1094. State v. Kern, 51 N. J. L. 260.

Indictment against commissioners of a town for neglecting to keep the highways in order must set forth the matters by reason of which the obligation has been imposed on them, when there is no public law imposing the duty upon them. State v. Halifax, 15 N. C. 245.

The indictment must also charge specifically which of the duties imposed has been neglected. *Ibid.*

Where the information charged the defendants with permitting a nuisance by reason of non-repair of a bridge, so that it became unfit for public use describing them as "trustees of the Wabash & Erie Canal," the court held the same bad as not showing that the road or the bridge crossed the canal, and for not showing how they became possessed of the right or duty to repair. Butler v. State, 17 Ind. 450.

The duty is imposed by statute, under a penalty, and indictable under the South Carolina Act of 1825. McKenzie v. Chovin, 1 McMull. L. 223.

In Hill v. State, 4 Sneed, 442, they were held individually liable to indictment for neglect of repairs, their action being an official nonfeasance.

But in State v. Barksdale, 5 Humph. 154, they were held not liable to indictment.

The latter case is distinguished from Hill v. State, *supra*, the presentment not setting out the names of the persons or board holding office nor charging neglect of official duty.

In order to warrant a conviction of an overseer of a public road under article 409 of the Texas Penal Code, for failure, neglect, or refusal to perform the duties of his office, it must be shown that such failure, neglect, or refusal on his part was willful, that is, done with evil intent, with legal malice, without legal justification, and with no reasonable ground to believe his action legal. Parker v. State, 29 Tex. App. 372; Moore v. State, 27 Tex. App. 430.

In Thornton v. Springer, 5 Tex. 587, they were held not liable in damages, but only for the penalty imposed by Stat. 1848, § 4, § 5, p. 99.

The motion should state the appointment and notification thereof and continuous non-repair for twenty days. Thornton v. Springer, *supra*.

In Rex v. Dean, 2 Maule & S. 80, they were held liable to indictment for not obeying the order of the sessions court, directing the laying out of a road as a public road, and also to proceedings by way of a mandamus by the party entitled to the road. E. W.

streets, and lanes. There is nothing in this finding that shows that the testimony tended to prove that the defendants participated in the operation of the stone crusher, or that they acted other than in an official capacity. It was their duty to inform themselves in regard to the necessity of repairs upon the streets and the best methods of making them, in order that they might act intelligently as members of the board of trustees. It is un-

necessary to pass upon the rulings of the court upon questions relating to the admission and rejection of evidence. If all the evidence offered by the plaintiff had been admitted, and all evidence objected to by the plaintiff had been excluded, it would still have been the duty of the court to have ordered a verdict for the defendants.

Judgment affirmed.

OREGON SUPREME COURT.

Emma COOPER, *Respt.*,
v.
Callista PHIPPS *et al.*, *Appts.*

(.....Or.....)

1. Evidence is inadmissible, in an action for libel in charging the plaintiff with uncharity, of her general reputation for virtue and chastity, where no attack is made upon it.
2. A witness in an action is not liable for libel, unless it is shown affirmatively that her statements were not pertinent to the matter in progress, and were spoken maliciously and with a view to defame the one claiming to be injured thereby.

(July 17, 1893.)

A PPEAL by defendants from a judgment of the Circuit Court for Jackson County in

favor of plaintiff in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. William M. Colvig and P. P. Prim & Son*, for appellants:

The law presumes the character and public reputation of the plaintiff to be good, and of the best, until it is attacked, and she can safely rest upon that presumption. Without introducing any evidence, her reputation and character stood without qualification or defect and no evidence that she could offer could add to or increase its force and virtue.

Hitchcock v. Moore, 70 Mich. 112; *Cornwall v. Richardson*, Ryan & M. 805; *Mattheus v. Huntley*, 9 N. H. 146; *Stow v. Converse*, 3 Conn. 325, 8 Am. Dec. 189; *Bamfield v. Massey*, 1 Campb. 460; *Dodd v. Norris*, 3 Campb. 519; *Boughtaling v. Kelderhouse*, 3 Barb. 149; New-

NOTE.—Privilege of witness as to defamatory testimony.

The general doctrine of American cases, like that above reported, is that the testimony of a witness is privileged so long as it is pertinent to the case, or, as expressed in some cases, unless he wander from the point and maliciously heap slander on another. *Morgan v. Booth*, 13 Bush, 480.

So the defendant in a slander suit may show to negative malice that the words were spoken by him as a witness in a judicial proceeding. *Nelson v. Robe*, 6 Blackf. 204.

The pertinent testimony of a witness is absolutely privileged. *Hutchinson v. Lewis*, 75 Ind. 55.

And it is sufficient prima facie as a defense for uttering defamatory words to show that they were spoken by a defendant as a witness. *Ibid.*

The belief of a witness that his answers are pertinent relieves him from liability for an action of slander. *Stelnecke v. Marx*, 10 Mo. App. 581; *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 533. See also *Suydam v. Moffatt*, *infra*.

A witness is absolutely privileged in making answers material to the case and believed to be true, even though he is actuated by malice as well as by purpose to perform his duty as a witness. *Liles v. Gaster*, 42 Ohio St. 681.

The belief of a witness as to the relevancy of his testimony in such a case is a question for the jury. *White v. Carroll*, *supra*.

Answers of a witness which are relevant and honestly made are privileged. *Lanning v. Christy*, 30 Ohio St. 115, 27 Am. Rep. 431.

Pertinent testimony of a witness is privileged, no matter if the witness is actuated by ill will. *Calkins v. Sumner*, 13 Wis. 193, 30 Am. Dec. 733.

For pertinent answers a witness can claim privilege, but not so as to voluntary slander which is not pertinent to the case. *Barnes v. McCrate*, 32 Me. 442.

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But a witness is liable for impertinent, malignant words spoken by him without believing them to be true. *Smith v. Howard*, 28 Iowa, 61.

Words spoken by a witness with malicious intent to defame and which are not pertinent to the case may constitute slander. *Hastings v. Lusk*, 22 Wend. 410, 34 Am. Dec. 380.

Defamatory statements not pertinent to the issues nor believed to be so by the witness, but injected by him voluntarily and maliciously for the purpose of defaming and injuring another, are not privileged. *Shadden v. McElwee*, 36 Tenn. 146.

In *Grove v. Brandenburg*, 7 Blatchf. 234, defamatory words spoken by a witness were held on demurrer to be privileged, although it was alleged that the witness did "falsely, corruptly, and maliciously swear." But see later Indiana case, *supra*.

A declaration for slander in testimony as to the character of a witness on an attempt at impeachment was held in *Cook v. Cook*, 100 Mass. 194, to be insufficient for lack of necessary averments as to damages, but the question of privilege was not considered.

Testimony of a witness, who is also the defendant, in a suit for damages for discharging an employé, as to his reason for such discharge, is privileged. *Fagan v. Fries*, 90 Ill. App. 238.

A malicious statement by a witness which is not necessary to the answer of a question, but made to show excuse for failure to remember certain matter, is privileged. *Hunkel v. Voneiff*, 69 Md. 179, affirmed on rehearing, *Id.* 195.

In this case a majority of the court approves the English rule of absolute privilege for a witness from a civil action for libel for anything stated in the character of a witness, even though false and malicious, but the case does not necessarily decide what would be the result if a witness volunteered utterly irrelevant defamation which could in no respect be regarded as testimony in the case. *Ibid.*

ell, Defamation, Slander & Libel, p. 828; *Gough v. St. John*, 16 Wend. 646; *Anderson v. Long*, 10 Serg. & R. 55; 1 Whart. Ev. 2d ed. §§ 47-50; *Miles v. Vanhorn*, 17 Ind. 245, 79 Am. Dec. 477; *McCabe v. Platter*, 6 Blackf. 405; *Howard v. Patrick*, 43 Mich. 121; *Fahey v. Crotty*, 68 Mich. 883; *Lotto v. Davenport*, 50 Minn. 99; *Croasdale v. Bright*, 6 Houst. (Del.) 52.

The rule of evidence as to such cases is to impose on the plaintiff the *onus* of rebutting those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice that is malice in fact, as the true motive of his conduct.

Townshend, Slander & Libel, 4th ed. § 209, p. 296; *King v. Root*, 4 Wend. 118, 21 Am. Dec. 109.

Under the allegations of plaintiff's complaint, it is shown therein that Calistia Phipps was conditionally privileged when she uttered and published the alleged libel, and the plaintiff could not recover any damages in this case, unless the plaintiff could show by a preponderance of the evidence that Calistia Phipps was actuated by actual malice, or malice in fact against plaintiff.

See *Kent v. Bongarts*, 15 R. I. 72; Folkard's Starkie, Slander & Libel, p. 255.

Under the pleadings, the plaintiff was not entitled to recover at all, without proving that the words were uttered and published with actual malice against said plaintiff.

Hastings v. Lusk, 22 Wend. 410, 84 Am. Dec. 380; Townshend, Slander & Libel, p. 296,

§ 209; Cooke, Defamation, 28, 31, 60; Newell, Defamation, Slander & Libel, p. 324, § 28; Starkie, Slander & Libel, 229, 292. See Folkard's Starkie, Slander & Libel, p. 262, note 6; *Lawson v. Hicks*, 88 Ala. 279, 81 Am. Dec. 49; *Calkins v. Sumner*, 18 Wis. 193, 80 Am. Dec. 788; *Faris v. Starke*, 9 Dana, 128, 88 Am. Dec. 588; *King v. Root*, *supra*.

Messrs. Lionel R. Webster and Francis Fitch, for respondent:

A witness testifying in a court who maliciously defames another with the intent to injure the reputation of such other, or expose him or her to public hatred, contempt, or ridicule, if such testimony is false and its falsity is known by the witness, is not protected from civil action for libel because of the privilege of a witness.

Townshend, Slander & Libel, § 223; *Shadden v. McElwee*, 86 Tenn. 146; *Hutchinson v. Lewis*, 75 Ind. 55; 1 Hilliard, Torts, 322; Cooley, Torts, 210; *Nelson v. Robe*, 6 Blackf. 204; *Grove v. Brandenburg*, 7 Blackf. 234; *Mower v. Watson*, 11 Vt. 536, 84 Am. Dec. 704.

The American rule modifies that enforced in England.

White v. Carroll, 42 N. Y. 161, 1 Am. Rep. 505; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 32 Me. 442.

In slander and libel charging plaintiff with being unchaste she may prove on her direct case that her general reputation for chastity and virtue is good.

1. To support the presumption that it is good.

2. Cases of slander and libel are exceptions

A witness who is obliged to answer interrogatories of a legislative committee is privileged in giving his answers, although they are defamatory. *Terry v. Fellows*, 21 La. Ann. 376.

Testimony given in an investigation legally held by the common council of a city is privileged, so that it cannot be deemed a repetition of a previous slander by the witness, showing express malice. *McLaughlin v. Charles*, 60 Hun, 236.

The immunity of a witness in a judicial proceeding from an action for defamation is not affected by Miss. Code, § 1004, which makes insulting words actionable. *Verner v. Verner*, 64 Miss. 321.

English cases.

Early English cases considered the relevancy or pertinency of testimony as material in determining the question of privilege.

It was held in *Revis v. Smith*, 18 C. B. 123, that words of a witness relevant to a case are privileged, and that the testimony of a witness is *prima facie* privileged.

So testimony in a slander case, that the plaintiff is a common liar, given to reduce the amount of his recovery, is privileged. *Harding v. Bulman*, Brownl. 2; *Harding v. Bodman*, Hutton, 11.

And a witness who on a former trial had testified as an expert that a certain signature was a forgery, and had been severely criticised by the judge in that case, and when asked in the later trial if he had read what the judge said persisted in saying, although the court tried to stop him, that the signature was forged, is within the rule giving privilege for words spoken in testimony, as these words were a part of his evidence and spoken in defense of his own character, which was in some degree impugned by the question asked him. *Seaman v. Netherclift*, L. R. 2 C. P. Div. 58, affirming, L. R. 1 C. P. Div. 540.

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Butin Kennedy v. Hilliard, 10 Ir. C. L. Rep. 195, 1 L. T. N. S. 578, it is declared more broadly that an action will not lie for words spoken in evidence.

And in *Dawkins v. Rokeby*, L. R. 7 H. L. 744, affirming L. R. 8 Q. B. 255, the testimony of a witness is held to be absolutely privileged, although it is immaterial, irrelevant, and given *malà fide*, without reasonable or probable cause. In this case it is expressly declared that the same rule of privilege exists as to judges, counsel, witnesses, and parties.

This is in accord with the absolute privilege, declared in *Munster v. Lamb*, L. R. 11 Q. B. Div. 588, to exist in respect to words of counsel, even if both malicious and irrelevant.

The privilege of witnesses extends to a person testifying before a committee of the house of commons. *Goffin v. Donnelly*, L. R. 6 Q. B. Div. 307. See also *Terry v. Fellows*, 21 La. Ann. 376.

Also to testimony of a person taken before a military court of inquiry, which has no power to administer an oath. *Dawkins v. Rokeby*, *supra*.

Affidavits and depositions.

Statements in a deposition, tending to charge a person with arson, made by a witness, subpoenaed before a fire marshal having jurisdiction of the matter, are privileged. *Newfield v. Copperman*, 10 Jones & S. 302.

Words spoken in an affidavit pertinent to the matter involved in a judicial proceeding are privileged. *Warner v. Paine*, 2 Sandf. 195.

Thus an affidavit for attachment which is pertinent is privileged. *Johnson v. King*, 64 Tex. 232; *Spaids v. Barrett*, 37 Ill. 229, 11 Am. Rep. 10.

So an affidavit in chancery is privileged. *Dawling v. Wenman*, 2 Show. 446.

And an affidavit in support of an answer to an application for injunction is privileged, if pertinent. *Hart v. Baxter*, 47 Mich. 193.

to the general rule forbidding such proof in civil actions.

3. To enhance damages.

3 Sutherland, Damages, p. 665; 2 Greenl. Ev. § 275; 1 Whart. Ev. 3d ed. §§ 47-50; 1 Sedgw. Damages, 8th ed. § 52; 2 Sedgw. Damages, 8th ed. §§ 445-452; 3 Am. & Eng. Encyclop. Law, 112, and note; *O'Bryan v. O'Bryan*, 18 Mo. 16, 53 Am. Dec. 128; *Williams v. Haig*, 3 Rich. L. 362, 45 Am. Dec. 774; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455; *Stone v. Varney*, 7 Met. 86, 39 Am. Dec. 762.

Actual ill will or malice will enhance the damages, but need not be shown to entitle plaintiff to recover.

3 Sutherland, Damages, p. 642; Hill's Code, § 2029.

Defendants are presumed to have used the words in the meaning in which they would ordinarily be accepted and understood, under the circumstances and in the connection in which they were used. If under these conditions the words would convey to a person of ordinary understanding the charge of unchastity, such meaning must be accepted.

Townshend, Slander & Libel, p. 144, §§ 140, note 1, 144, 262, 384, 391; *Wilcox v. Moon*, 68 Vt. 481; 13 Am. & Eng. Encyclop. Law, 379-381; *Kedrolicansky v. Niebaum*, 70 Cal. 216; *Davis v. Sladden*, 17 Or. 259; *Proctor v. Owens*, 18 Ind. 21, 81 Am. Dec. 341; *Goodrich v. Hooper*, 97 Mass. 1, 93 Am. Dec. 50; *Stallings v. Newman*, 26 Ala. 300, 62 Am. Dec. 723; *Little v. Barlow*, 26 Ga. 423, 71 Am. Dec. 219.

Bean, J., delivered the opinion of the court:

This appeal is brought to reverse a judg-

ment for \$5,000 recovered by plaintiff in an action for libel against the defendants. It is charged that in a certain suit for divorce and for the custody of a minor child, pending in the superior court for the county of San Francisco, state of California, between the defendant William Phipps, as plaintiff, and Minnie Phipps, a sister of the plaintiff herein, as defendant, Calistia Phipps, one of the defendants herein, was called and testified as a witness, and in response to the following interrogatory of counsel, "Has the defendant been in the habit of running around with other men?" answered: "Yes, sir; two young men came and rented a house, and she and her sister [meaning this plaintiff] lived with them, and kept house for them: did this about two months. All the neighbors talked about their scandalous conduct." That this testimony was reduced to writing by the court commissioner, and was duly filed, at the instance of the defendant William Phipps, and became a part of the records and files of said court. That defendant meant by said words to accuse the plaintiff of being an unchaste woman, and of having lived in notorious, lewd, and lascivious cohabitation with some man to plaintiff unknown. That such statement was false, malicious, and defamatory, and was made with malice, and with the intent to defame the plaintiff, and at the instigation and request of the defendant William Phipps. The answer admits that the defendant Calistia Phipps testified as alleged in the divorce suit, but denies the other allegations of the complaint, and affirmatively alleges that such testimony was given with a firm belief in its truth, in answer to an interrogatory propounded to her by counsel,

And the belief of the affiant that the matter in his affidavit for a motion is pertinent makes it privileged. *Suydam v. Moffat*, 1 Sandf. 459.

But a witness may be charged with criminal libel in making malicious defamation in an affidavit which is not pertinent to the matter involved in the proceeding although the presumption in respect to testimony is in favor of the privilege. *Com. v. Culver*, 1 Pa. L. J. Rep. 361.

The charge in an affidavit that another witness is guilty of perjury is privileged. *Warner v. Paine*, *supra*.

An affidavit to support a motion for a new trial attacking the character of a witness for veracity is privileged. *Burke v. Ryan*, 36 La. Ann. 951.

In *Rex v. Salisbury*, 1 Ld. Raym. 341, it was held that the publication of an affidavit containing scandal was indictable as tending to a breach of the peace; but the report does not show what is meant by the publication, whether it was published otherwise than by pleading or affidavit in court or not.

An affidavit in support of a summons, though defamatory as to a third person, is not actionable. *Henderson v. Broomhead*, 4 Hurlst. & N. 569.

Erle, J., said in respect to this affidavit that it did not appear certain that it was irrelevant. Other judges spoke generally as to the privilege of words used in judicial proceedings. But see *Dawkins v. Rokeby*, L. R. 7 H. L. 744, affg. 3 Q. B. 255.

An affidavit filed in support of a motion is privileged so far as it is pertinent, or believed to be so by the affiant upon reasonable grounds. *Hyde v. McCabe*, 100 Mo. 412.

A charge in an affidavit filed in opposition to a motion for security for costs to the effect that the person who made the affidavit in favor of the motion is a

person alleging insolvency was corruptly guilty of willfully false swearing, is not sufficiently relevant to be privileged, and the belief in its relevancy, which can excuse the person who made it, is a question of fact. *Ibid*.

An affidavit showing cause against a rule nisi for criminal information for sending a challenge to a person who obtains the rule is privileged in setting forth any matters respecting the past conduct of such person as the affiant may think would disinculcate the court to favor the application. *Doyle v. O'Doherty*, Car. & M. 418.

Pertinent allegations in an affidavit were also held privileged in *Astley v. Younge*, 3 Burr. 807.

An affidavit that an attorney had disclosed confidential communications is relevant and therefore privileged, when presented in defense of a motion to strike out an allegation of the defendant in a suit for compensation, that the attorney's services were abortive and of no value. *Garr v. Seiden*, 4 N. Y. 91.

An affidavit volunteered for the purpose of inducing a governor to revoke a warrant issued to the agent of another state in proceedings for the rendition of a fugitive, being a proceeding *coram non iudice*, is not privileged. *Hosmer v. Loveland*, 19 Barb. 116.

An affidavit by a physician that a person is insane, made in a proceeding properly and legally instituted under the statute, is privileged, but it is otherwise with a certificate to that effect voluntarily made by a physician and not required or authorized by law. *Perkins v. Mitchell*, 81 Barb. 461.

An affidavit presented to a magistrate accusing a person of crime is privileged. *Hartscock v. Red-*

and without malice or ill will towards plaintiff herein, and that such testimony was relevant to the issue involved in said suit.

The first assignment of error necessary for us to consider is that, as a part of plaintiff's case in chief, evidence in her behalf was admitted, tending to show that her general reputation for virtue and chastity was good. At the time this evidence was offered and admitted, no attack had been made by defendants, either in the pleadings or otherwise, upon the character of the plaintiff; and it was then and there stated by their counsel, in open court, and in the hearing of the jury, that her reputation for virtue and chastity was admitted to be of the best, and that no attack would be made thereon during the trial, nor was any such attack made. There is some conflict in the authorities as to whether, in an action for libel or slander, the plaintiff may give in evidence his good character, without it first having been attacked by the defendant either in the pleadings or evidence. "But the better opinion," says Mr. Wharton, "is against this concession, on the ground that the law presumes a party's character good, and that it is superfluous for him to prove that which is presumed." Whart. Ev. § 47. And again says the same author: "It would be manifestly improper to permit a party suing for damages to put in evidence, as reason why he should have heavy damages, that his character is good: First, the law assumes all characters to be good, and there is no use in proving that which is thus assumed; secondly, to make good character the basis of recovery would be equivalent to saying that a person with a bad character can be injured with impunity; thirdly, a collateral issue

would be provoked, which would bear hard upon many deserving cases. For these and other reasons the courts have refused to permit such evidence to be put in." Section 50. This we think the better doctrine, and the one supported by the weight of authority. The law presumes the plaintiff's character to be good until it is attacked, and she may safely rest upon this presumption, and no evidence that she may offer can add to or increase its force or virtue. See *Hitchcock v. Moore*, 70 Mich. 112, and *note*, and 3 Am. & Eng. Encyclop. Law, 112, where the authorities are fully collated, and to which reference may be had by any one desiring to pursue the investigation.

The next assignment of error is in the instruction to the jury that "actual ill will or malice will enhance the damages, and may be shown for that purpose, but need not be shown to entitle the plaintiff to recover." This was manifest error, under all the authorities. While there is some conflict in the adjudged cases as to whether witnesses are absolutely exempt from liability to an action for defamatory words uttered or published in the course of judicial proceedings, it is agreed by all the authorities that they are presumptively so; and before a witness can be held liable in a civil action this presumption must be overcome, by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and not in response to questions asked by counsel. It seems to be the settled doctrine of the English courts that statements made by a witness in the course of a judicial investigation are absolutely privileged, to that extent that no action for libel or slander will lie therefor.

dict, 6 Blackf. 256, 38 Am. Dec. 141; *Sanders v. Rollinson*, 2 Strobb. L. 447; *Briggs v. Byrd*, 34 N. C. 377.

In *Sanders v. Rollinson* the decision is put on the ground that the remedy, if any, is for malicious prosecution.

In *Shock v. McChesney*, 4 Yeates, 507, 2 Am. Dec. 415, also it was held that words charging a crime as the basis of an action by a justice of the peace are not the basis of an action for slander, although the defendant is discharged without an indictment, but the remedy is by malicious prosecution.

So an affidavit for a search warrant is held in *Vause v. Lee*, 1 Hill, L. 197, 26 Am. Dec. 168, not to create a liability for libel, because the remedy, if any, is for malicious prosecution.

And words spoken to a magistrate on application for a warrant for felony are not actionable, if spoken in good faith for the purpose of instituting proceedings. *Bunton v. Worley*, 4 Bibb, 88, 7 Am. Dec. 735.

So a complaint to the grand jury charging perjury cannot constitute an actionable libel. *Kidder v. Parkhurst*, 3 Allen, 383.

An affidavit charging perjury as the foundation of a warrant for an arrest is not the basis of an action for libel, even if false and malicious. *Francis v. Wood*, 75 Ga. 648.

But in *Pierce v. Oard*, 23 Neb. 323, it is held that reasonable and probable grounds for believing that a crime has been committed are necessary to create a privilege in statements charging a crime made on application to a magistrate for a warrant.

And a complaint to a magistrate of felony to obtain a warrant not made in belief of its truth, but 22 L. R. A.

for an ulterior private purpose, such as the enforcement of a personal claim, is held libelous. *Hill v. Miles*, 9 N. H. 14.

The exhibition of articles of peace to a magistrate, being a proceeding in a court of justice, is privileged. *Cutler v. Dixon*, 4 Co. Rep. 14.

So defamatory declarations to the magistrate in swearing articles of peace against a person were held privileged, even if malicious, although they could be used to show malice in slander made outside the court. *Goslin v. Cannon*, 1 Harr. (Del.) 3.

Words spoken in good faith to an officer for the purpose of giving a person accused into his custody, or in making a complaint to a magistrate, were held not actionable, in *Johnson v. Evans*, 8 Esp. 32.

Words spoken by the complainant in a criminal case, reiterating the charge when the parties are brought before the magistrate, made in answer to the defendant's questions, will be regarded as spoken in the judicial proceeding and subject to the privilege. *Allen v. Crofoot*, 2 Wend. 515, 20 Am. Dec. 647.

Although a person may be privileged in charging another with felony before a magistrate, he is liable for slander if he, before commencing the prosecution, stated the same charge to other persons and also repeated them after an acquittal of the person charged before the magistrate, whether the charges are made to those present at the examination or others. *Burlingame v. Burlingame*, 8 Cow. 141.

For libel by defamatory words in pleading, see *note to Randall v. Hamilton* (La.) ante, 649, B. A. R.

Townshend, Slander & Libel, § 228; *Goffin v. Donnelly*, L. R. 6 Q. B. Div. 907; *Seaman v. Netherclift*, L. R. 2 C. P. Div. 53; *Davkins v. Rokeby*, L. R. 8 Q. B. 255, L. R. 7 H. L. 744.

In this country, many, and perhaps a majority, of the courts have refused to adopt the absolute and unqualified privilege of a witness, as laid down by the English courts; but it is agreed that a witness is absolutely privileged as to everything said by him, having relation or reference to the subject-matter of inquiry before the court, or in response to questions asked by counsel, and presumptively so as to all his statements. But some of the cases hold that if he abuse his privilege by making false statements, which he knows to be impertinent and immaterial, and not responsive to questions propounded to him, for the purpose of malicious defamation, he may, upon an affirmative showing to that effect, be held in damages for libel or slander. *Rice v. Coolidge*, 121 Mass. 898, 23 Am. Rep. 279; *White v. Carroll*, 42 N. Y. 161, 1 Am. Rep. 508; *Smith v. Howard*, 28 Iowa, 51; *Barnes v. McCrate*, 82 Me. 442; *Hutchinson v. Lewis*, 75 Ind. 55; *Cooley, Torts*, 211; *Newell, Defamation, Slander & Libel*, 449; *Hoar v. Wood*, 8 Met. 193; *Mower v. Watson*, 11 Vt. 586, 84 Am. Dec. 704; *Shadden v. McElwee*, 86 Tenn. 146.

In *Odgers on Libel and Slander* (page 191), it is said: "A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side; and, even if he volunteers an observation (a practice much to be discouraged), still, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously, for his own purposes, would not be privileged, and would also, probably, be a contempt of court." So, also, in *Hoar v. Wood*, *supra*, Chief Justice Shaw said: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice, and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such case, is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relative and pertinent to the cause or subject of inquiry." And in *Mower v. Watson*, *supra*, Mr. Chief Justice Redfield, after an extended examination of the authorities, says: "From the foregoing cases the true ground of the privilege is readily deduced. Prima facie, the party or his counsel is privileged for everything spoken in court. If any one considers himself aggrieved, in order to sustain an action for slander, he must show that the words

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spoken were not pertinent to the matter then in progress, and that they were spoken maliciously, and with a view to defame him. So that if the words spoken were pertinent to the matter in hand the party and counsel may claim full immunity from an action of slander, however malicious might have been his motive in speaking them. So, too, if the words were not pertinent to the matter in issue, yet if the party spoke them bona fide, believing them to be pertinent, no action of slander will lie. So that the plaintiff, in order to maintain this action, must prove—First, that the words spoken were not pertinent to the matter then in hand; and, secondly, that they were not spoken bona fide."

So that whether we adopt the rule as prevailing in England, or as modified by some of the courts of this country, it is apparent that under either view the instruction that proof of actual malice was not necessary to enable plaintiff to maintain this action was clearly erroneous. The words complained of were spoken by defendant when a witness in a judicial proceeding, in response to an interrogatory of counsel, and, under the rule most favorable to the plaintiff's contention, were presumptively privileged, and before this presumption can be overcome the plaintiff must show affirmatively that they "were not pertinent to the matter then in progress, and that they were spoken maliciously, and with a view to defame her."

We think it unnecessary to notice at this time the other assignments of error, and *the judgment of the court below will be reversed, and a new trial ordered.*

STATE of Oregon, *Resp't.*,
v.

A. J. ADAMS, *Appt.*

(.....Or.....)

Seduction accomplished on promise of marriage conditioned on pregnancy resulting is not within a statute making seduction under promise of marriage a criminal offense.

(December 26, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County convicting defendant of seduction under promise of marriage. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. M. L. Pipes for appellant.
Messrs. George E. Chamberlain, Atty-Gen., and W. T. Hume, Dist. Atty., for the State.

Bean, J., delivered the opinion of the court:

The defendant brings this appeal from a judgment of conviction of the crime of seduc-

NOTE.—The above case seems to be very nearly novel and disapproves the only case cited on the subject. The court says it has been unable to find any other case in point. The decision is therefore an important addition to the law of the subject.

tion under promise of marriage. The evidence shows that the prosecutrix, who is about twenty-seven years of age, came to Portland in January, 1891, from Council Bluffs, in Iowa, where some two years before she had been acquainted and had kept company for a few months with defendant. In April or May after her arrival in Portland, she again met the defendant on several occasions at the home of a mutual friend, where she was accustomed to visit, and was frequently accompanied by him on her return after these visits to the place where she was working as a domestic. On one of these occasions, in either April or May, 1891, the defendant solicited her to go with him to Portland Heights, to which she first objected, but finally consented, and, after arriving at the end of the car line, they walked around the heights, and what occurred, as told in her own language, is that "he teased me and teased me until he induced me to give up to him. He said, if he hurt me in any way, he would see me through and marry me. If he got me in a family way, he would marry me. I told him my intention was not to marry at all. He promised, if he hurt me, if he got me in any different way, he would see me through, or see that I was cared for, and do what was right; promised just as much as to say, 'I will marry you.' Said he never would hurt me. He promised both before and after that, if he hurt me in any way, he would see me through, and see that I was taken care of; just as much as to say, 'I will marry you.'" The immoral relations thus established continued at frequent intervals until a few months before the trial, in July, 1893, and resulted in pregnancy, and the birth of a stillborn child on the 4th of May, 1893. The only evidence given on the trial of a promise of marriage or of the seduction was that of the prosecutrix, as above detailed, and which defendant contends is insufficient to prove the crime charged, because, as he contends, seduction accomplished under a promise of marriage, to be performed only on condition that pregnancy resulted from the intercourse, is not within the statute. The statute provides that "if any person, under promise of marriage, shall seduce and have illicit intercourse with any unmarried female of previous chaste character, such person, upon conviction, shall be punished, etc. And a subsequent marriage of the parties is a defense to the violation of this section."

It will be observed that mere illicit intercourse is not an offense under this statute, nor is seduction alone made a crime, but the seduction under a subsisting promise of marriage of an unmarried woman of previous chaste character. The gist of the offense is that the seduction shall be accomplished under or by means of a promise of marriage which is unfulfilled. Without the promise there can be no crime under this statute, however reprehensible the conduct of the man may be. A promise of marriage, and her reliance upon it, must be the means of inducing the woman to surrender her virtue. She must be drawn aside from the path of virtue she is then pursuing and induced to yield to the solicitations of her seducer, by means of

and under the influence of a promise of marriage, upon the performance of which she in good faith had a right to rely. Nothing less will satisfy this statute. Its object is not to punish illicit intercourse, but the seducer who by means of a promise of marriage destroys the chastity of an unmarried female of previous chaste character, and who thus draws her aside from the path of virtue and rectitude, and then fails and refuses to fulfill his promise. It is, however, not necessary that the promise should be so technically valid as to sustain a civil action for breach of promise; and although it may be conditioned upon immediate intercourse, thus rendering it void in a civil proceeding, because founded upon an immoral consideration, it is still held sufficient to sustain a criminal prosecution if the woman in good faith relied upon it and was thereby deceived. *Kenyon v. People*, 26 N. Y. 208, 84 Am. Dec. 177; *Boyce v. People*, 55 N. Y. 644; *Callahan v. State*, 63 Ind. 198, 80 Am. Rep. 211; *People v. De Fore*, 64 Mich. 698. In such case, the mutual promise of the woman is implied from her yielding to the solicitations of her seducer under his promise of marriage and the promise becomes absolute. But when the seduction is accomplished by means of a promise of marriage, to be performed only upon the condition that the intercourse results in pregnancy, no promise of the woman can be implied from such yielding, and it seems to us the contract smacks too much of a corrupt and licentious bargain to fall within the statute. How can it be claimed that a pure-minded woman is led astray and her ruin accomplished under a promise of marriage which, with her assent, amounts to nothing more than a mutual agreement to engage in illicit relations so long as pregnancy does not result, and which neither party expects nor intends shall be fulfilled except upon the happening of an event which may never occur? Take the case of a woman who yields under a promise of marriage by a married man, to be performed on the death of his wife, could it be seriously contended that such a case would be within the statute? And yet it is difficult to conceive any difference in principle between the case suggested and the one at bar. The statute is not intended as an act to punish a man who prevails upon a woman to gratify his lust by a promise of marriage of such a character. Its plain object is to protect the innocent and confiding from being betrayed, and surrendering to her destroyer all that is estimable in woman, under the belief, based upon what she supposes to be an honorable proposal of marriage, to be performed in any event, that to yield is but to anticipate the time when the act will be lawful. Its design is to protect the chaste woman from the assaults of a wicked and designing man, who makes use of the most potent of all seductive arts to win the love and confidence of a woman by professions of love and marriage, and not one who is willing to gratify her own lustful desires, stipulating only that, if her shame is likely to become exposed, it shall be shielded by marriage. It recognizes that a woman, confiding in what she supposes to be

an honorable promise of a future marriage, and relying upon it, is peculiarly defenseless against the solicitations and persuasions of him to whom she is betrothed, and has consequently provided for the punishment of him who, by means of such a promise, is guilty of betraying that confidence to the utter ruin and disgrace of the female, and the scandal of society. It was passed in the interest of good morals, and not as a cover for licentiousness. The words, "under promise of marriage, seduce," it seems to us, manifestly contemplate that the seduction must be accomplished by means of an absolute promise of marriage, or one which becomes absolute the moment the woman yields. Any other construction would defeat the purpose of the statute, and render it a cover for licentiousness. In this case the improper relations continued between the prosecutrix and defendant, apparently without objection on her part, for more than a year after she is alleged to have been seduced, and yet during all that time there was no subsisting promise of marriage. The defendant, under such circumstances, was guilty of no crime for which he could be punished under the statute, for the condition upon which his promise was to be performed had not happened, and there was consequently no broken promise for which he could be punished. The object of the statute is not to punish a man who seduces a woman, and then marries her, but to punish one who uses the promise as a means of inducing the woman to submit to his lustful desires, and, after his purpose is accomplished, abandons his victim to her disgrace and shame. If the prosecutrix was seduced at all, it was at the time the first connection took place, but there was no promise of marriage then, for the contingency upon which it was to become absolute did not happen

until long after, and consequently the promise did not precede the intercourse, which is essential to constitute the crime. The only case cited, or which we have been able to find, on the question presented by this record, is *People v. Hustis*, 82 Hun, 58, in which two of the three judges of the second department of the supreme court of the state of New York, in a very brief opinion, held that seduction accomplished under a promise of marriage conditioned on pregnancy resulting thereafter is within a statute similar to ours. This decision seems to have been based upon the proposition that the question had already been decided by the court of appeals in *Kenyon v. People*, *supra*, and in *Boyce v. People*, *supra*; but neither of these cases go to the extent of holding the doctrine for which they are cited, but only that a promise of marriage on condition of immediate intercourse is sufficient, because the law implies a mutual promise by the woman from her yielding, and, the condition being thereby fulfilled, the promise becomes absolute. But when the promise is conditional, depending on pregnancy, the condition may never happen, and consequently the defendant may never be under any obligation to marry the prosecutrix. He is not under a promise to marry at the time of the seduction, and may in fact never be. And hence it seems to us the cases referred to do not sustain the doctrine announced in *People v. Hustis*, and we are unwilling to regard that case as controlling authority.

This conclusion renders unnecessary an examination of any of the other questions raised on this appeal, and the judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

MICHIGAN SUPREME COURT.

John J. SPEED, Relator,
v.
Common Council of the City of DETROIT
et al.

(.....Mich.....)

1. A writ of prohibition lies to prevent a common council from proceeding to remove a city counselor without any lawful power to do so.
2. Misconduct of a person before appointment to office constitutes no ground for his removal.
3. Power to remove a city counselor is not implied in Act 1893, § 8, providing that on expiration of the term of office "of the city counselor or the city attorney or their resignation

NOTE.—The right of summary removal of officers is annotated with the case of *Trainer v. Wayne County Auditors* (Mich.) 15 L. R. A. 26, and the question is presented also in the more recent case of *State v. Johnson* (Fla.) 18 L. R. A. 410.

For the removal by a city council of the president of the body, see *State v. Klichil* (Minn.) 19 L. R. A. 779.

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thereof or removal therefrom" such officer shall deliver papers and books to his successor, especially since the city attorney is by law subject to removal.

4. Power to remove a city counselor is not inherent in the common council of a city where the appointment of the counselor for a definite term is given to the mayor absolutely without providing for his removal.

(January 5, 1894.)

APPLICATION for a writ of prohibition to prevent the defendants from proceeding with an investigation of charges preferred against petitioner for the purpose of having him removed from the office of counselor to the city of Detroit. *Writ granted and motion to vacate denied.*

Messrs. Hoyt Post and John D. Conely, for relator:

The power of suspension and removal referred to in chapter 4 covers all officers appointed or elected under the charter of 1893. The conferring of express authority in relation to a certain subject excludes any im-

plication that a different and additional authority exists not fairly within the limits of the terms in which the express authority is conferred.

McClintock v. Laing, 19 Mich. 800; *Galpin v. Abbott*, 6 Mich. 43; *Perry v. Cheboygan*, 55 Mich. 250; *Crawford v. Scio and Webster Twp. Boards*, 24 Mich. 248; *People v. Ingham County Treasurer*, 86 Mich. 416.

Although the power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents of all corporations, it is universally held that it is a power which is possessed only by the whole body of corporators which can only be exercised by any representative body or committee, like directors, trustees, or the common council, or anything short of the whole body of corporators, when it has been expressly delegated to them by the whole body or by the charter.

State v. Jersey City, 25 N. J. L. 580; 19 Am. & Eng. Encyclop. Law, 582a; *State v. Milwaukee Chamber of Commerce*, 20 Wis. 64; *Willcock, Mun. Corp.* pp. 246, 247, §§ 629, 634, 635; *People v. Hurlbut*, 24 Mich. 69, 9 Am. Rep. 103.

The power of removal is not the exercise of a legislative function but is in its essence of a judicial character.

Dullam v. Willson, 58 Mich. 392, 51 Am. Rep. 128; *Stockwell v. White Lake Twp. Board*, 22 Mich. 341; *People v. Stuart*, 74 Mich. 411.

The exercise of the power of removal of an officer being of a judicial nature, while all the formalities of court need not be observed, the essential requisites of judicial procedure must be observed.

Dullam v. Willson, and *People v. Stuart*, *supra*.

It may be fairly presumed as to all of the matters charged excepting as to the occurrence on the 14th of October, that they all transpired during the petitioner's former term of office. As such they are not the subject of charges for misconduct during his present term and he cannot now be removed therefor.

State v. Jersey City, 25 N. J. L. 536; *Com. v. Shaver*, 8 Watts & S. 333.

The trial body in case of removal for cause must consist of all the officers in whom the power of removal is vested. He cannot be tried by a committee of the common council.

Jacksonville v. Allen, 25 Ill. App. 54; *Andreus v. King*, 77 Me. 224.

Messrs. Jasper C. Gates and Charles Flowers, with *Mr. Edwin F. Conely* for defendants.

Grant, J., delivered the opinion of the court:

The relator, Speed, was duly appointed city counselor and head of the department of law in the city of Detroit, July 16, 1893, and entered upon the duties of the office. This appointment was made under Act No. 419 of the Local Acts of 1893, entitled "An Act Supplementary to the Charter of the City of Detroit, and to Provide for a Law Department of Said City." Under the decision in *Speed v. Detroit*, 97 Mich. 198 (rendered Oct. 27, 1893), Mr. Speed's appointment was de-

clared valid, and the council directed to approve his bond. Thereafter the mayor of the city lodged charges with the common council against Mr. Speed, for which he asked said council to remove him. The council appointed a committee to investigate these charges, whereupon the relator filed this petition, asking for the writ of prohibition against the procedure of the council. The writ was granted, subject, however, to a motion to vacate it on cause shown. The respondents made answer to the petition, and moved to vacate the order. The principal question in the case is the power of the council to remove the city counselor for cause, but two preliminary matters will be first determined.

1. It is suggested, rather than seriously insisted, by the learned counsel for the respondents, that the writ of prohibition does not lie in the present case, for the reason that the common council was proceeding in a political or administrative way, rather than in any other. They cite *Mechem, Pub. Off.* 1019, 1020; *High, Extr. Legal Rem.* 783, 769; *Burch v. Hardwicke*, 28 Gratt. 51; *People v. Lake County Dist. Ct.* 6 Colo. 534; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601. The rule laid down by these learned authors is that the writ lies only to prevent the unauthorized exercise by courts and officers of judicial powers, and does not lie to restrain executive or ministerial action; and the authorities above cited, together with others, are cited in support of the proposition. In *People v. Lake County Dist. Ct.* the power to remove for certain causes was expressly conferred upon the city council of Leadville. No doubt, therefore, existed of the jurisdiction of the council in the matter. In *Burch v. Hardwicke*, the power was also expressly conferred by the charter upon the mayor to suspend or remove officers for misconduct in office or neglect of duty. In *Smith v. Whitney*, the writ was invoked to prohibit the secretary of the navy, and a general court martial of naval officers, to try the relator upon charges which had been preferred against him. In all these cases the respondents were proceeding under the express authority of law, and they are therefore clearly inapplicable to the present case. The writ lies "to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not legally vested," and "to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful jurisdiction shall be exercised." *Mechem, Pub. Off.* 1013, 1014.

Under the constitution the legislature may provide for the removal of municipal officers. It certainly has never been regarded in this state that the officer or body upon whom this power is conferred acts in a purely political, administrative, or legislative capacity. Such officer or body acts, and must of necessity act, in a quasi judicial capacity, and the method of procedure must be of quasi judicial character. *Stockwell v. White Lake Twp. Board*, 22 Mich. 341; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 178; *People v. Stuart*, 74 Mich. 411; *Fuller v. Ellis*

(Mich.) 57 N. W. Rep. 33. Such officer or body then becomes an inferior tribunal, amenable to the writ of prohibition, when acting in exercise of the jurisdiction conferred. In such cases it is of little consequence what name is given to the power conferred. The name cannot relieve it of its essential character. It would be a reproach to the law if it did not provide a speedy remedy by which such tribunals can be prohibited from the exercise of an excess of authority, or of an authority which they do not possess. We are of the opinion that the writ lies in the present case. *State v. Duluth* (Minn.) 55 N. W. Rep. 118; *People v. Cooper*, 57 How. Pr. 416; 1 Dill. Mun. Corp. 253.

2. While it appeared, upon the argument, to be conceded that the sufficiency of the charges is not here in issue, still we deem it proper to say that the charges preferred, so far as they relate to the acts of Mr. Speed committed before his appointment to, and induction into, this office, are clearly beyond the jurisdiction of the respondents to determine. There is no provision in the constitution nor in the laws which prevents a person from holding office for misconduct in another office which he held prior to the one to which he was elected or appointed. We have been unable to find any authority which justifies a removal for such previous misconduct. The misconduct for which any officer may be removed must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office. There is no restriction upon the power of the people to elect, or the appointing power to appoint, any citizen to office, notwithstanding his previous character, habits, or official misconduct. *State v. Jersey City*, 25 N. J. L. 536; *Com. v. Shaver*, 3 Watts & S. 388. In *Com. v. Shaver* it was held that the trial, conviction, and sentence of a sheriff for the offense of bribing a voter previously to his election to the office did not disqualify him. In *State v. Jersey City* it was held that the expulsion of an alderman for receiving bribes did not disqualify him for election to the same office. See also *State v. Duluth*, *supra*; *Crawford v. Scio and Webster Twp. Boards*, 24 Mich. 248; *Richards v. Clarkburg*, 30 W. Va. 502; 1 Dill. Mun. Corp. § 252, and *note*; *State v. Jersey City*, 25 N. J. L. 536. This may be a proper subject for legislative consideration, but, until the legislature shall choose to disqualify persons from holding office for such reasons, they can constitute no cause for removal. It was settled in the case of *Speed v. Detroit*, *supra*, that the mayor could not revoke the appointment when once made, and that neither he nor the common council possessed the power to remove at will. That case was ably argued, and received the most careful examination by this court. We see no occasion to change our views, or to question the soundness of the conclusions then reached. Counsel for respondents, in their brief upon the application for a rehearing, concede that "there is no provision whatever for the removal of an appointive officer upon charges, nor for the trial of such charges;"

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but they contend (1) that the power of removal is necessarily implied from the language used in the Acts of 1893; and (2) that the power of removal for cause is implied from the charter and from the nature of the municipal organization. The only reference to removal from office in the Act of 1893 is found in section 8, which reads as follows: "Upon the expiration of the term of office of the city counselor and the city attorney, or their resignation thereof or removal therefrom, such officer shall forthwith, on demand, deliver to his successor in office all deeds, leases, contracts, and other papers and books in his hands belonging to the corporation, or delivered to him by the corporation or any of its officers, and all papers in actions prosecuted or defended by him, or which are pending and undetermined." From this language it is argued that the power of removal for cause is necessarily implied, and the case of *State v. Somers* (Neb.) 53 N. W. Rep. 146, is cited in support of the proposition. The provision of the statute of Nebraska then before the court for construction reads as follows: "Said commissioner of health shall be appointed by the mayor, subject to the approval of a majority of the council, and shall hold office for a term of two years from the date of appointment, unless sooner removed or retired." This statute was amended so as to read as follows: "All officers appointed by the mayor and confirmed by the council shall hold the office to which they may be appointed until the end of the mayor's term of office and until their successors are appointed and qualified, unless sooner removed or the ordinance creating the office shall be repealed, except as otherwise provided in section 104." Construing these provisions together, it was held that the right of removal was impliedly retained in the hands of the mayor, not in the council. The difference between the two statutes is apparent. In that case the appointment was until the end of the mayor's term, unless sooner removed, while, in the present case, section 2 of the Act conferring the power of appointment is as follows: "He (the city counselor and the head of the legal department of the city) shall be appointed by the mayor on or before the third Tuesday in June for the term of three years from the 1st day of July next succeeding his appointment." In *State v. Somers* the clause in regard to removal is coupled directly with the appointment, in the same section, and no other object than the removal of the officer is apparent from the language. But in this case it is obvious that the sole purpose of section 8 is to provide for a surrender of the books and papers to their proper custodian in the event of a lawful successor to the office, and it is fairly to be inferred that this purpose was in the legislative mind in adopting the enactment. Any other conclusion would do violence to the rules of construction. This act was supplementary to the charter of the city of Detroit, and its sole object was the creation of a new department. It is, in its character, an independent act, and, in the absence of controlling language referring to the charter, the language of the act must prevail. The

character of this department and the office of the city counselor will be referred to hereafter. There would be more force in this proposition of counsel if there were no officer mentioned in the act to which the term "removal" might apply, but the city attorney is elected, and, under the express provisions of the charter, may be removed "for corrupt or willful malfeasance or misfeasance in office, or for willful neglect of duty, upon charges which must be tried, and to which the officer shall have the right to make his defense." Charter, § 18. This act recognizes the city attorney in his status as an elective officer, and therefore the provisions of the charter to his motion apply. But, as to the city counselor and the head of the legal department, he is a new officer created by the act, to be appointed under the act, whose duties are specifically defined by it, whose term of office is fixed, and whose appointment is lodged solely in the mayor. If the Nebraska case were applicable to the facts of this case, it would follow that the power of motion was lodged in the mayor to remove at will, and this question has been decided in *Speed v. Detroit*, *supra*.

Is the power to remove the city counselor appointed under this act inherent in the municipal corporation or in its governing body, the common council? Judge Dillon, in his valuable work on Municipal Corporations (sec. 181; Id. 4th ed. § 242), states that the question of implied removal by municipal corporations has not been judicially settled in this country, and ventures the opinion that, in the absence of any express or implied restrictions in the charter, such power exists. It is also stated in the opinion in *Richards v. Clarksburg*, 30 W. Va. 496, which is largely relied on by respondents' counsel, decided in 1887, that the court was unable to find a single case in the United States where this question has been decided. The charter, in that case, appears to have been entirely silent in regard to the removal of officers, and particular stress seems to have been laid upon the broad powers conferred by the statutes of West Virginia upon the common councils of towns and villages. Under the facts of this case, however, we are not required to enter upon an extended discussion or determination of this question. The tendency of the decisions in this country is to regard municipal corporations as an aid to the state government, and to limit their powers to those which are expressly derived from the constitution and from legislative enactments, and to those implied powers only which are necessary to carry out the powers thus conferred. The highest tribunal in this country has declared the well-established rule on this subject in *Ottawa v. Carey*, 108 U. S. 121, 27 L. ed. 674. Chief Justice Waite, speaking for the court in that case, said: "Municipal corporations are created to aid the state government in the regulation and administration of local affairs. They have only such powers of government as are expressly granted to them, or such powers as are necessary to carry into effect those that are granted. No powers can be implied, except such as are essential to the objects and purposes of the

corporation as created and established." See also, *Taylor v. Bay City Street R. Co.*, 80 Mich. 77; *People v. Huribut*, 24 Mich. 69, 9 Am. Rep. 108. In this last case Justice Christy said: "But the common council of the city is not the city, nor the legal entity known as the corporation of the city. It is itself but a public board for municipal purposes, with just such powers (not forbidden by the constitution) as the legislature have thought, or may hereafter think, proper to confer." In discussing the power of a common council to expel a member, the supreme court of New Jersey recognized the power of a corporation at common law to expel a member for sufficient cause, and in its opinion said: "But the jurisdiction exercised in this case is not derived from the common law. The common council is not the corporation, and, whatever powers a municipal corporation may have to remove or expel a member for cause at common law, it is clear that the corporation itself has not by any by-law delegated any of them to the common council, and that body, therefore, cannot avail itself of the common-law jurisdiction vested as an inherent right in the corporation itself to expel a member of their own body. The council derives its jurisdiction from the charter of the corporation." It is argued that the power of removal of the city counselor is necessary in order to protect the interests of the city from an incompetent or corrupt incumbent, and therefore it must be inferred that the legislature recognized this power as existing. Courts may not surmise or speculate as to legislative enactments. With the reasons for conferring or withholding a power the courts have no concern. They must interpret the statute as they find it. The same argument was made in *People v. Woodruff*, 32 N. Y. 355. After stating the serious consequences which it was claimed would be entailed upon the community under the interpretation given, the court said: "To obviate these alarming and startling results it is contended that we are to imply and infer an intent on the part of the legislature to have the power lodged in the comptroller, in the first instance, remain with and to be exercised by him whenever the exigency should arise which might call for it. It is a dangerous principle to imply power when it is not conferred by legislative authority in clear and distinct terms. It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of the act, rather than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave to the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction."

The position, character, and duties of the officer created by the act are important considerations upon the principle under discussion. He is required to be an attorney of five years' practice, to give a bond of \$5,000 for the faithful performance of his duties, and to devote his entire time to the duties of the

office. He must therefore abandon all his other legal business. He is made the legal adviser, not only of the common council, but of all the other departments of the city government and the boards thereof, except the board of police commissioners. It is apparent that the legislature contemplated that a man of high standing and character in his profession should be appointed to this important position. Is it reasonable to infer that the legislature intended to place this important office beyond the control or fear of any other department? That such a man should become incompetent, corrupt, and neglectful of his duties would be an exception to the rule. If it be said that the exception might arise, it may likewise be said that in the change of administrations, when the political complexion of the common council might change, false charges might be made for political purposes in order to remove the incumbent, and replace him by another of the same political faith as the council. Experience has demonstrated that there is at least as much danger of the one as of the other. These considerations may have had weight with the legislature. The reasons for a fixed term without the power to remove may have had greater weight with legislators than the risk of malfeasance or misfeasance on the part of the officer. They may well have deemed it important that the head of such a department should be free from all fear of removal or interference on the part of the common council. If, however, it was *casus omissus* on the part of the legislature, it is one which the legislature and not the courts must supply.

No support for the position of respondents can, we think, be found in the charter itself. The subject of removals is completely covered by its provisions, and excludes removals in any other manner than is there provided. Elective officers, with few exceptions, can be removed for cause. This, under the well-established rule, excludes the power to remove at will. Certain appointive officers, under the charter, can be removed at will

"without charges or trial." Charter, § 19. This likewise excludes the power to remove for cause. Where the power to remove at will is given, the law does not contemplate that the officer may be put to the expense of a trial for cause, and have charges of official misconduct placed before the public. Dill. Mun. Corp. § 245; *State v. Jersey City*, 23 N. J. L. 538; *Speed v. Detroit*, *supra*, and authorities there cited; *State v. Somers*, *supra*; *Crawford v. Seio and Webster Twp. Boards*, 24 Mich. 248.

In *People v. Ingham County Treasurer*, 36 Mich. 416, it is said: "The general statute concerning removals contains no provision applicable to superintendents of the poor. Hence, there would seem to be no provision for the removal of these officers except the specific regulation in the supervisors' act. It would seem that the legislature meant to confer on the supervisors a power to remove on the two specified grounds, but had no intention to give the right on any other ground, or to delegate to the supervisors a discretionary general power to remove. The provision in the supervisors' act, in so far as it applies to superintendents of the poor, would be rendered entirely gratuitous if a general authority to remove were to be implied, or should be considered as a consequence of the power to appoint." It is also significant that the act gives the common council no voice, either in the appointment or confirmation of the city counselor. The absolute authority and the entire responsibility of his appointment are given to the mayor without power of removal at will or for a cause. There is nothing in the act which shows any intention on the part of the legislature to confer such power upon the common council; nor do we think such power is inherent in the council, which is the governing body of the municipal corporation, and derives its powers from express legislative enactment.

The motion to vacate the order must therefore be denied, with costs.

The other Justices concur.

OHIO SUPREME COURT.

Cyrus B. BAIRD, *Plff. in Err.*,
v.

Lewis B. HOWARD.

(51 Ohio St. —.)

*1. Where possession of personal property has been obtained by means of a contract made with one who, by reason

*Headnotes by the COURT.

NOTE.—As to the right of a person to recover for property obtained from him by fraudulent purchase, without formal rescission of the invalid contract or returning the consideration that he may have received, the above case is somewhat analogous to a replevin suit by such a defrauded vendor. As to replevin in such a case, without returning consideration, see note to *Sisson v. Hill* (R. L.) 21 L. R. A. 206.

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See also 25 L. R. A. 37.

of his intoxication, was without capacity to enter into a valid agreement, and the person obtaining the property knew of the other's incapacity when the contract was made, the transaction is fraudulent: The party thus deprived of his property may regard the possession as wrongful; and if the possessor claims, or exercises dominion over the property, to the exclusion of the right of the other, the latter, at his election, may treat the transaction as a conversion of the property, and the institution of an action to recover the value of the property so converted constitutes such an election.

2. In such case no formal rescission of the invalid contract is necessary before bringing the action; and if the consideration, in whole or in part, has been paid to the party deprived of his property, no offer to return it is necessary to enable him to maintain the action, but the measure of damages will be

the difference between the value of the property delivered and consideration received.

3. In such case, upon the trial of an issue respecting the capacity of a party, by reason of his intoxication, to enter into a contract, it is competent to introduce, in his behalf, evidence of declarations, respecting the value of the property, made by him recently before the contract was made, while he was sober.

(February 27, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to set aside a contract by which plaintiff sold to defendant certain property, on the ground that at the time of the transaction he was so intoxicated as to be incapacitated to do business.

Reversed.

The facts are stated in the opinion.

Mr. Frank Taggart, with **Mr. E. S. Dowell,** for plaintiff in error:

A contract made in such a state of intoxication as to deprive the party of his discretion and ordinary judgment will be set aside in equity, although the other party had no agency in producing the intoxication.

French v. French, 8 Ohio, 214, 31 Am. Dec. 441; *Holland v. Barnes*, 58 Ala. 83, 25 Am. Rep. 595.

A drunkard is not incompetent like an idiot or one generally insane. He is simply incompetent upon proof that at the time of the act challenged his understanding was clouded or his reason dethroned by actual intoxication.

Van Wyck v. Brasher, 81 N. Y. 260.

A contract made by one who is drunk, or of unsound mind, so as to be incapable of understanding its effect while not void is generally voidable at his option.

Pollock, Cont. ed. 1885, by Wald, p. 93, note *22* and cases cited; also p. 94, note *a* and cases cited. See also 7 Wait, Act. & Def. pp. 167-169, subject *Intoxication*.

Intoxication to such an extent as to deprive a contracting party of the use of his reason has in many cases been treated as a temporary insanity, having the same effect upon a contract entered into during its continuance as if arising from any other cause.

Miller v. Finley, 26 Mich. 249, 12 Am. Rep. 306; *Johnson v. Harmon*, 94 U. S. 373, 24 L. ed. 271.

One who executes a contract for the purpose of defrauding another will not be protected against it when it is used against himself.

5 Lawson, Rights, Rem. & Pr. § 2358; *Ran-kin v. Simpson*, 19 Pa. 471, 57 Am. Dec. 663; *Columbus & T. R. Co. v. Steinfeld*, 42 Ohio St. 455; *Gould v. Cayuga County Nat. Bank of Auburn*, 99 N. Y. 333; *Strong v. Strong*, 102 N. Y. 69; *Boven v. Mandeville*, 95 N. Y. 237; *Krumm v. Beach*, 96 N. Y. 398; *Whitney v. Allaire*, 4 Denio, 554; *Kerr, Fraud & Mistake*, ed. 1872, by Bump, p. 330; *Smith v. Patterson*, 83 Ohio St. 70.

When there is evidence tending to show fraud or undue influence then the conduct and declarations of the testator not only at the time of its execution but before and after are relevant for the purpose of manifesting his mental

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qualities and disposition and consequent susceptibility to the fraud or undue influence.

Abbott, Trial Ev. ed. 1880, p. 122, ¶ 70; Id. § 63, pp. 115, 116; *Mooney v. Olsen*, 22 Kan. 69; *Whart. Ev. §§ 268, 269*; *Packer v. Lockman*, 115 Mass. 72; *Potter v. Baldwin*, 183 Mass. 427; *Kent v. State*, 42 Ohio St. 426.

Mr. A. D. Metz, for defendant in error:

Vendor cannot sue to recover damages by reason of intoxication or fraud. His remedy is to sue to rescind contract; and he must return purchase money if paid and demand his property back; if not returned he must reclaim his property by electing: First, to replevy; second, sue for value of his property held by vendee.

Weed v. Page, 7 Wis. 503; *Bliss v. Cottle*, 32 Barb. 323; *Lacker v. Rhoades*, 45 Barb. 499; *Rouley v. Bigelow*, 12 Pick. 312, 23 Am. Dec. 607; *Masson v. Boret*, 1 Denio, 73, 43 Am. Dec. 651; *Lloyd v. Brewster*, 4 Paige, 540, 8 L. ed. 553, 27 Am. Dec. 88; *Stewart v. Emerson*, 52 N. H. 801; *Ryan v. Brant*, 42 Ill. 78; *Moriarty v. Stofferan*, 89 Ill. 528; 1 Benjamin, Sales, Corbin's ed. p. 569, § 649, note 14; Newmark, Sales, § 395; *Carnahan v. Hughes*, 108 Ind. 225; *Dietz v. Suldiffe*, 80 Ky. 650, 8 Am. & Eng. Encyclop. Law, p. 847; Chitty, Cont. 8th Am. ed. p. 356.

The vendor must exercise his right to rescind for fraud on the vendee's part within a reasonable time, and he cannot affirm in part and rescind in part.

Lapp v. Ryan, 23 Mo. App. 436; *Baird v. New York*, 96 N. Y. 567; 8 Am. & Eng. Encyclop. Law, p. 805; *Wingate v. King*, 23 Me. 35; *Key v. Jennings*, 66 Mo. 356; *Bradshaw v. Yates*, 67 Mo. 221; *Eates v. Reynolds*, 75 Mo. 563; *Campau v. Van Dyke*, 15 Mich. 371; *Kribbs v. Downing*, 25 Pa. 399; *Davis v. Stuard*, 99 Pa. 295; *Willoughby v. Moulton*, 47 N. H. 205; *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 277, 29 N. J. Eq. 311; *Clough v. London & N. W. R. Co. L. R. 7 Exch. 34*; *Cobb v. Hatfield*, 46 N. Y. 536; *Masson v. Boret*, 1 Denio, 69, 43 Am. Dec. 651; *Voorhees v. Earl*, 2 Hill, 288, 38 Am. Dec. 588.

Vendor cannot rescind the contract and at the same time retain the consideration in whole or in part; he must rescind *in toto*. Where the vendor would rescind the contract on account of the fraud of the purchaser, it is his duty to restore what he has received in payment before he can sustain an action or recover the goods sold.

Coolidge v. Brigham, 1 Met. p. 547; *Miner v. Bradley*, 22 Pick. 457; *Perley v. Balch*, 23 Pick. 286, 84 Am. Dec. 56; *Voorhees v. Earl*, *supra*; *Baker v. Robbins*, 2 Denio, 138; *Weed v. Page*, *supra*; *Cushing v. Wyman*, 38 Me. 589; *Cook v. Gilman*, 34 N. H. 556; Chitty, Cont. 11th Am. ed. 1092, note "A."

The law requires two persons at least to make a contract. If Baird was entirely incapacitated, by reason of intoxication, to make a contract, then there never was a valid contract between Baird and Howard, and which Baird could elect to repudiate for fraud or affirm it. But Baird could not afterwards ratify it and keep the \$1,000 and claim \$600 by way of damages. Or, in other words, say he was sober and the contract good for \$1,000, and that he was intoxicated and incapacitated for \$600.

1 Story, Eq. Jur. §§ 230, 231; Pom. Spec. Perf. § 184; 1 Addison, Cont. § 191.

Bradbury, J., delivered the opinion of the court:

The plaintiff, now plaintiff in error, set forth his claim in the court of common pleas in an amended petition as follows: "The plaintiff now comes and by leave of the court, first had and obtained, and files this his amended petition in this case, and says: That on the 18th day of August, A. D. 1886, the plaintiff was intoxicated to such an extent, that by reason thereof he was totally unable and unfit to make or enter into a valid contract of any kind. That the defendant, then well knowing the condition of the plaintiff, and that he was then intoxicated to such an extent that he was wholly unfit and unable by reason thereof to make or enter into a valid or binding contract, and then intending to cheat and defraud the plaintiff, bargained with, and then induced and procured the plaintiff, while so intoxicated, to sell and deliver to him, the defendant, the undivided one-half interest in all the livery stock, consisting of horses, carriages, harness, whips, robes and all other property then owned by the plaintiff and one Jerome T. Baird as partners under the firm name of Baird & Son. That said undivided one-half interest in said livery stock, so sold and delivered by the plaintiff to the defendant, was then of the value of \$1,600; yet the defendant, then well knowing that the said undivided one-half interest in said livery stock was of the value of \$1,600, and then intending to cheat and defraud the plaintiff, induced and procured the plaintiff, while so intoxicated as aforesaid, to sell and deliver said undivided one-half interest in said livery stock to the defendant for the sum of \$1,000 and no more; and while so intoxicated and intending to cheat and defraud the plaintiff, the defendant caused and procured the plaintiff to enter into a written contract between him and the plaintiff wherein and whereby it appears that the plaintiff sold and delivered said one undivided half interest in said livery stock to the defendant for the sum of \$1,000 and no more. The plaintiff says that if he had been sober and capable of transacting such business on said 18th day of August, 1886, he would not have entered into said written contract with the defendant, and would not have then sold and delivered his said undivided one-half interest in said livery stock to the defendant for less than \$1,600 cash. That his said undivided one-half interest in said livery stock was then worth the sum of \$1,600 cash, and that the sum of \$1,000, the amount paid by the defendant to the plaintiff therefor at the time and in the manner aforesaid, was a grossly inadequate price and consideration therefor and the defendant then well knew it. That the defendant then well knew that \$1,000 was a grossly inadequate price and consideration for the said undivided one-half of said livery stock, and then knew that if the plaintiff was sober and capable of transacting such business as that of selling and disposing of his interest in said livery stock, that the plain-

tiff would not then have accepted the sum of \$1,000 as a full consideration for his interest in said livery stock, which he had sold and delivered to defendant as aforesaid, but intending to cheat and defraud the plaintiff, the defendant purchased from the plaintiff, the said interest in said livery stock for the sum of \$1,000 as in the manner aforesaid, and which stock the plaintiff then delivered to defendant. The plaintiff says that by reason of the premises he has been cheated, wronged, and defrauded by the defendant out of the sum of \$600.

"The plaintiff therefore prays judgment against the defendant for the sum of six hundred dollars with interest from August 18, 1886."

To this petition a demurrer was interposed by the defendant, which the court of common pleas overruled, and to which ruling the defendant excepted. An issue of fact was then joined between the parties, upon the trial of which the plaintiff offered to prove the price that he had placed upon the livery stock before the sale, while sober. The defendant objected to its admission; his objection being overruled and the evidence admitted, he entered an exception thereto. It was upon these two grounds that the circuit court reversed the judgment; that court holding that the amended petition, as above set forth, did not disclose a cause of action, and that evidence of the value the plaintiff had, while sober, placed upon the property just previous to the sale was not admissible.

1. In support of the holding of the circuit court that the amended petition did not state a cause of action, counsel contends that plaintiff's only remedy was to rescind the contract, which he could accomplish in either of two ways: 1, by a suit in equity; 2, by an offer to return the consideration he had received, coupled with a demand for the restoration of his own property, after which, if the defendant did not consent to a restoration, an action in replevin, or in trover would lie. That these remedies were open to the plaintiff is apparent, and is in fact admitted by his counsel; but he contends for still another, namely the right, without a prior formal rescission of the contract, to maintain an action to recover the difference between the value of the property and the price received. Such an action could not be regarded as being on the contract; for instituting an action directly on the contract would be an affirmation of it, and if the contract should be affirmed he could not recover; for, according to its terms, he had been fully paid. The institution of such an action might be regarded, perhaps, as a rescission; but if the defendant's possession was rightful, up to the moment of the filing of the petition, the principle upon which that possession would be instantly transformed into a wrongful one, is not very apparent. If its unlawful character grew out of the rescission, the defendant should have been afforded an opportunity to restore the property before being held a wrongdoer. If, however, the method by which the defendant obtained possession was wrongful, there would be consistency in holding the possession thus ob-

tained to have been wrongful at its inception.

The petition avers that the defendant, with intent to cheat and defraud the plaintiff, induced the latter to enter into the contract under consideration, and to deliver to the defendant the property involved in the controversy, with knowledge that the plaintiff was "unfit and unable to make or enter into a valid contract," because his senses were dulled by intoxication. The demurrer admitted this to be true. It thus appeared not merely that a contract had been made, but that the defendant had secured the possession of the plaintiff's property by knowingly taking advantage of the latter's temporary incapacity. Had possession been taken while the plaintiff's senses were overcome by sleep, no one would deny that such a possession was wrongful. The difference between the character of a possession secured by the latter method, and one deliberately obtained through the medium of an invalid contract, made with one whose senses the possessor knew at the time were stupefied by excessive intoxication, is one of degree rather than principle. That in the former case the transaction would involve a trespass, and present none of the features peculiar to contracts, while in the latter case it took the form of a contract, is a distinction possessing little if any materiality in this connection. The fraud inhering in the one, should be deemed a substantial equivalent to the force involved in the other, method of obtaining possession. Each is wrongful. To secure the possession of property by means of a contract made with its owner, by one who at the time knew him to be incapable of entering into a contract, constitutes a fraud.

In such case, it is true, a contract exists which the incapacitated party has an option to affirm or rescind. But because the one party may exercise this option, it does not follow that the other party may compel its exercise as a condition precedent to obtaining any relief. If, when restored to capacity, the former is satisfied with the contract, and wished to enforce its provisions, he can affirm and maintain an action upon it; if he had, in fact, received a substantial part of the consideration secured to him by the contract, and wished to recover possession of the property with which he had been induced to part, he should be required to rescind the contract and restore that part of the consideration which had been paid him, for he should not be allowed to retain the latter and at the same time recover possession of the former.

Where one person, ignorant of the incapacity of another person deals with the latter and obtains possession of his property, the possession of the former should not be deemed wrongful until the contract was rescinded and a demand for the property made upon him. The mutual rights or liabilities of persons thus situated, however, should not be the measure of the rights and liabilities of parties, where the possession of the property of one has been wrongfully obtained by the other. The wrongful acts by which possession was secured became material factors in

determining the question. If a possession thus obtained is continued under circumstances from which it may be fairly inferred that the party in possession is exercising dominion over the property to the exclusion of the right of the party wrongfully dispossessed, the latter may regard such acts as constituting a conversion of the property.

We have found no case in all respects similar to the one under consideration, but in a number of well-considered cases, courts have held that where the purchase of goods has been effected by false representations the vendor may maintain trover against the vendee without demand. *Thurston v. Blanchard*, 22 Pick. 18, 83 Am. Dec. 700; *Green v. Russell*, 5 Hill, 188; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilmore*, 2 Dowl. & R. 755.

In the procedure prescribed by our civil code all the ancient common-law actions are abolished; all are merged into one "civil action", and even if the facts stated in the petition did not disclose a technical conversion they constitute fraud to the injury of the plaintiff, as we have seen. The remedy should be as broad as the injury. The party guilty of the fraud should not be allowed to shield himself by a contract procured in this way and insist upon immunity for the fraud until the contract has been formally rescinded.

2. The principal dispute between the parties at the trial in the court of common pleas related to the competency of the plaintiff to make a contract at the time the one in contention was entered into. One means of ascertaining this, was to contrast him, as he conducted and expressed himself on that day, with himself as, according to his conduct, his opinions and expressions, he appeared on other days when known to be duly sober. That a few days before the sale, at a time when he was sober, he had placed upon the property a value that widely varied from that at which it was sold, reflected upon the extent that his judgment had been affected by the liquor he had drank.

That such evidence might be considered by the jury for some other and improper purpose, as, for instance, in determining the value of the property and the damages, does not render its admission erroneous. If competent for any purpose it was admissible.

Whenever it becomes necessary to inquire into the mental condition of a person, and there are other issues in the cause, much evidence is usually admitted which, but for that issue, would be incompetent; and in such cases the court, upon the request of a party, should caution the jury to limit its effect to the issue to which it is lawfully applicable.

The charge of the court is not printed in the record; but we should presume that the trial court did its duty, and therefore either limited to its proper office the evidence objected to, or if requested by the defendant, would have done so.

Judgment of the Circuit Court reversed and that of the Common Pleas affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

BARNES SAFE & LOCK CO., *Plff. in Err.*,

v.

BLOCH BROS. TOBACCO CO.

(..... W. Va.)

1. If a contract of agency is entered into, and the principal agrees to furnish to the agent on consignment certain manufactured articles, at a stipulated price, to be paid for when sold, such articles, when so furnished, remain the property of the principal until sold to a bona fide purchaser, and they cannot be executed and sold to pay the debts of the agent, and, if so sold, the purchaser gets no title to any such articles as against such principal.

2. The agent's right to a lien for commission and expenditures is one personal to himself, not transferable, and he alone has the right to take advantage of it.

(November 4, 1898.)

ERROR to the Circuit Court for Ohio County to review a judgment in favor of defendant in an action brought to recover for a safe, or its value. *Reversed.*

Statement by **Dent, J.:**

On the 21st day of April, 1890, the Barnes Safe & Lock Company entered into a written

*Headnotes by **DENT, J.**

NOTE.—*Reservation of title in bailments for sale, as against creditors of bailor and bailee.*

Conditional sales of goods to be resold.

Generally a wholesale dealer furnishing goods on a contract that the title should not pass until the goods are paid for will be protected as against the creditors of the party receiving the same. *Rogers v. Whitehouse, 71 Me. 222; Powell v. Preston, 1 Hun, 513.*

Each case must largely depend, however, on the particular wording of the contract and the circumstances under which it was made.

And the same was held where a purchaser in good faith bought out an entire stock of the retailer. *Burbank v. Crooker, 7 Gray, 168, 66 Am. Dec. 470.*

So where goods are held by a peddler on a contract of sale, he to account for all goods sold, the goods unsold are not liable for his debts. *Mores v. Stone, 5 Barb. 516.*

So the title does not pass in a contract appointing a party an agent to sell machines, the agent guaranteeing the payment for all machines, and to pay for all unsold machines at the end of the contract, in good notes, the machines to remain the property of the shipper until paid for under the contract. *South Bend Iron Works v. Cottrell, 81 Fed. Rep. 254; Conable v. Lynch, 45 Iowa, 84.*

And wherever the property of the principal can be specifically distinguished from that of the factor the right of the principal shall prevail over the possession of the latter. *Price v. Ralston, 2 Dall. 60, 1 Am. Dec. 280.*

And where liquor was furnished to a retail dealer on a contract to pay for all sold, and the profits of the retail trade to belong to him, the losses to be borne by him, and all unsold beer to be returned, the title did not pass so as to subject the beer held by the retailer to his debts. *Meldrum v. Snow, 9 Pick. 441, 20 Am. Dec. 438; Lewis v. McCabe, 49 Conn. 141, 44 Am. Rep. 217; Mack v. Story, 57 Conn. 407.*

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contract of agency with the Globe Contract Company as follows, to wit:

"Articles of agreement between the Barnes Safe & Lock Company, of Pittsburgh, Pa., composed of Thomas Barnes, of the first part, and the Globe Contract Company, of Wheeling, W. Va., a corporation of the state of West Virginia, of the second part, witnesseth, that, for and in consideration of the party of the second part assuming the agency for the manufactures of the party of the first part in the territory hereinafter mentioned, the party of the first part hereby agrees that the party of the second part shall have the privilege of selling their fire and burglar proof safes, vault doors, etc., in the city of Wheeling, W. Va.; also throughout the state of West Virginia; also in Green, Fayette, and Washington counties, in the state of Pennsylvania; and also in Belmont, Jefferson, and Columbiana counties, in the state of Ohio,—the state of West Va. and Belmont, Jefferson, and Columbiana counties, Ohio, to be considered as exclusive territory of the party of the second part, but Green, Fayette, and Washington counties, in the state of Pennsylvania, to be considered as open territory: and the party of the first part shall credit the party of the second part with the regular discounts as hereinafter set forth upon all work shipped into the exclusive territory before mentioned during the con-

But in *Ludden v. Hazen, 81 Barb. 650*, a delivery of liquor to be retailed and to be paid for when sold, the title to remain in wholesale dealer until sold, was held to be fraudulent as against the creditors of the retailer, and subject to his debts. The contract was held merely colorable, with a view to the suit after levy, the court saying: "The retaining of the renewed ownership by the plaintiff was a mere farce, and could have served no honest purpose;" and the retailer was not to sell as agent or on commission, but was to deal with the goods as his own, and such dealing was inconsistent with the ownership of the seller.

This case was followed by *Bonesteel v. Flack, 41 Barb. 435*. A similar case where the court held the bill of sale, as set out in the invoice, to be absolute and not susceptible of parol proof contradicting its terms.

In the case of *Meldrum v. Snow, supra*, some stress was laid on the custom of brewers and the fact that a stock had to be supplied in cold weather as it cannot be removed in warm weather without injury. The court further said: "And it being beneficial to the community to introduce the use of beer, public policy would justify us in favoring the custom."

And under an order, "F. B. . . . ship us . . . for which we agree to pay for as stated below . . . F. B. are not responsible for overcharges in freight, injury or losses in transit . . . we agree to pay for all wagons sold for cash as soon as sold; if sold on time we will indorse and forward the notes . . . If any wagons remain unsold twelve months from invoice to pay for the same, and close the consignment," the goods were liable for debts of retail dealer. *Fish v. Benedict, 74 N. Y. 613.*

And under a contract of delivery of goods the title not to pass until resold, where the original owners agreed with the assignee for creditors of retailer, that the goods on hand should be sold but not to release the claim of any creditor for goods

tinuance of this agreement, whether the orders therefor shall come through the party of the second part or otherwise. The party of the first part further agrees that on all safes or other work sold by the party of the first part from the date hereof to the Westinghouse interests of Pittsburgh, Pa., the party of the second part is to be credited with one half the amount received over the discounts hereinafter set forth, less the cost of delivering the safes on upper floors, no charge to be made party of the second part by party of the first on safes delivered to the Westinghouse interests on the ground floors in Pittsburgh only. The party of the first part grants to the party of the second part the following discounts from their regular price list, copy of which is hereto attached and

made part hereof, viz.: From the prices mentioned in pages nine, eleven, and thirteen, seventy per cent, and fifteen per cent off, and the same discounts from any other prices named in said price list, except that the burglar-proof part of any combination, fire and burglar-proof safes shall be calculated at ten cents per pound of actual weight, and except, further, that four tumbler iron-case locks for burglar-proof work shall be charged for extra, at twelve dollars each; four tumbler brass-case locks for burglar-proof work shall be charged for extra, at fourteen dollars each; and end-gear burglar-proof locks shall also be charged for extra. The party of the first part further agrees to furnish the party of the second part with a stock of safes on consignment, said safes to

in consignee's hands on commission, the claim of the wholesale dealer against the goods was gone, as these goods were not held on commission. *Jordan v. Easter*, 2 Ill. App. 73.

Consignments.

Generally the title does not pass to consignee when goods are consigned to be sold and if sold to be accounted for at a given price, and the goods are not liable for consignee's debts. *Colorado Soap Co. v. Burns*, 2 Colo. App. 89; *Converseville Co. v. Chambersburg Woolen Co.* 14 Hun, 609; *Chesterfield Mfg. Co. v. Dehon*, 5 Pick. 7. 16 Am. Dec. 337; *Walker v. Butterick*, 106 Mass. 237.

So where the goods consigned are to be held as the property of the consignor. *Blood v. Palmer*, 11 Me. 414, 23 Am. Dec. 547.

So where the goods did not reach consignee. *Alexander v. Tomlinson*, 40 Ark. 216.

So where the consignee was to receive, hold, sell, account for, and pay over the proceeds less his compensation as agent, and cash sales only were contemplated, no title passed, notwithstanding invoices sent denoted terms of a sale. *National Bank of Augusta v. Goodyear*, 90 Ga. —.

So where consignor was to stock consignee with coal, wood, and bark to be sold at retail, the consignee to be paid 90 cents a ton for doing the business and the consignee to purchase from the consignor such as may be required, and to account monthly, and consignor to fix the price, retail and wholesale not above the lowest market price. *Audenried v. Betteley*, 8 Allen, 302.

And title did not pass to consignee where he was to sell at a certain price and to have a commission on each machine sold and to guarantee the notes taken and unsold machines to be paid for in notes or stored for consignor at his option. *Weir Plow Co. v. Porter*, 32 Mo. 23.

The title does not pass in a shipment of bullion made without notice to consignee, the proceeds to be credited when a sale shall be made, to advances previously made by the consignee, and the consignee cannot replevy the same from the sheriff attaching for the debts of the shipper, before delivery. *First Nat. Bank of Helena v. McAndrews*, 5 Mont. 325, 51 Am. Rep. 51.

The main case is supported by the decisions above.

And the question of title was for the jury where consignor contracted to supply and ship \$1,500 worth of goods to be insured for the consignor and if consignment exceeded \$1,500 the consignee was to execute notes for the same, and at the end of two years the consignee was to keep all the goods on hand. *Reissner v. Oxley*, 30 Ind. 580.

So it is a question for the jury whether a shipment is a sale or consignment, where it was made 29 L. R. A.

on the following order: "Office of . . . general merchandise broker. Consignments solicited. And dealer in wagons, grain, hay, mill feed, etc. . . . Please send me following . . . ship as soon as possible, as I need the goods right now. Want fresh goods," etc. *Simpson v. Pegram*, 108 N. C. 407.

This appears to be an exceptional case, arising on the construction of printed letterheads.

And the provision of W. Va. Code, § 13, chap. 100, that if a person transacting business as a trader with the addition of the words "factor," "agent," etc., and shall fail to disclose his principal, the goods shall be liable for his debts, is not intended to include the case of an agent holding and selling machinery on commission with the business sign W. M., "Mfrs. Agent." *Brown Mfg. Co. v. Deering*, 35 W. Va. 255.

But where the contract said: "The agents of — are its customers who are engaged in selling its pianos . . . Such customers are not agents in any sense known to the law . . . it is agreed that the pianos specified in this bill are bought and sold upon the conditions herein set forth." Although the contract also said the goods were consigned to be sold for consignors and on their account, and the pianos to remain the exclusive property of the consignors, it was held to be a fraudulent agreement as to creditors of the consignee. *Chickering v. Bastress*, 130 Ill. 206.

And property held by consignees is liable for their debts where it was sold for cash to them with the privilege of returning the unsold part, although the contract read, "to act as agents and sell for our account such consignments as they might order from time to time." *Hadfield v. Berry*, 28 Ill. App. 376.

This was construed to mean that the consignees might pay for the unsold goods with the goods on hand, thus making it a sale.

So where consignee was to settle for all goods on hand at the end of the year by giving his note and the goods were furnished at scheduled prices f. o. b., the vendors could make no claim to the goods sold or removed from their warehouse by the bankrupt, or assert any specific claim to the proceeds. *Re Linforth*, 4 Sawy. 370.

And the title passed when consignee could sell at his own prices not less than trade price, and on sales made he was to pay a certain price, and he made a sale of goods ordering them shipped direct to third party, and bills were made out against consignee, who then failed. The consignor, having obtained possession of the proceeds of sale, was liable to bankrupt's assignee. *Mutter v. Wheeler*, 2 Low. Dec. 346.

In this note cases of deposit of grain with a miller or warehouseman to be mixed with other grain and cases of delivery of material to be manufactured before sale are omitted.

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be paid for to the party of the first part when sold by party of the second part, and all safes, etc., sold direct by party of the second part, to be paid for to party of the first part in thirty days, by New York draft. The party of the first part also agrees to paint the name, 'The Globe Contract Co., Genl. Agts., Wheeling, W. Va.,' beneath their own name, 'The Barnes Safe & Lock Co.,' on all safes and other work shipped under this agreement into the territory of the party of the second part. It is understood that all prices given in price list are f. o. b. cars at Pittsburgh, Pa. In consideration of the foregoing, the party of the second part hereby agrees to assume the agency for the manufactures of the party of the first part in the territory herein named, and agrees to work said territory with diligence during the continuance of this agreement. This agreement may be terminated by either party's giving to the other thirty days' written notice of their intention of so doing, and at the end of thirty days this agreement shall be considered as canceled. In witness whereof, the said parties have hereunto attached their hands and seals, this — day of —, 1890; the terms of this agreement, however, to have effect as if agreement were dated April 21, 1890. Barnes Safe & Lock Co. [Seal]. Thomas Barnes. Witness: John H. Newell. Attest: John M. Sweeney, Secy. Globe Contract Co. W. D. Updegraff, Prest. F. R. Stewart, Genl. Mgr."

This agency was continued until the 8d day of November, 1890, when the Barnes Safe & Lock Company sent the Globe Contract Company the following notice of the cancellation of the agency, to wit:

"Barnes Safe and Lock Company (Successors to Thomas Barnes & Burke & Barnes), Manufacturers of Improved Fire and Burglar Proof Safes, Vault Doors, and Bank Locks. 124, 126, 127, 129, and 181 Third Ave., between Wood and Smithfield Streets. (Dictated.) Pittsburgh, Pa., Nov. 8rd, 1890. The Globe Contract Co., Wheeling, W. Va.—Gentlemen: We hereby notify you in writing that the contract that exists between us under date of April 21st, 1890, is canceled, according to the terms of the said contract. Please send us statement by return mail of the safes that you now have on hand; also, at the same time, send us N. Y. draft for the safes you have already sold from those we have sent you from time to time; also please advise us what you intend doing about the safes you have left. We thought, in making this contract with you, that you would be able to do us some good work. We are sorry that this step has to be taken, but under the circumstances, and in justice to our interests in the territory we laid aside for you, we hereby notify you that the said contract is canceled. Yours, truly, Barnes Safe & Lock Co. Jno. H. Newell."

To which the following reply was sent:

"The Globe Contract Company, Wheeling, W. Va. Electrical and Mechanical Engineering and Contracting Plans and Estimates Furnished on Application. Wheeling, W. Va., Nov. 7, 1890. Barnes Safe & Lock Co., Pittsburgh, Pa.—Gentlemen: Yours of 3d 22 L. R. A.

inst. to hand, and contents noted. We will prepare statement of sales and safes on hand, and in mean time will expect statement from you of work sold in the territory held by us of which we have had no statement as yet, though we have asked for it repeatedly, and, while we have kept an account of such as came to our knowledge, we naturally reason that we have not all of it on our books. Please attend to this at once, and on receipt of same we will submit our statement. As to safes in stock, you are the party to decide as to them, since you wish to discontinue the agency. They will be at your disposal at any time after we have adjusted matters as outlined above. Very respectfully, etc., Globe Contract Co. F. R. Stewart, Genl. Mgr."

Thus matters were allowed to rest between them until the 9th day of July, 1891. The safe in controversy, being one of the safes consigned to the Globe Contract Company under the agreement aforesaid, was levied on and sold by an execution creditor as the property of the Globe Contract Company, and the defendant in error, Bloch Bros. Tobacco Company, became the purchaser thereof. The purchasers then wrote the following letter to the Barnes Safe & Lock Company:

"The Bloch Bros. Tobacco Co., Wheeling, W. Va. Wheeling, W. Va., July 17, 1891. Barnes Safe & Lock Co., Pittsburgh Pa.: We purchased the other day at constable sale, one of your safes that was owned by the Globe Contract Co., which company failed. The safe was never used. It is a burglar chest safe, No 30,255. We purchased the same to put in our vault, and, upon measuring the same, find it is about 8 inches too wide. The object of this letter is to inquire if we could not exchange this safe for another one of such a size that we could get in our vault. An early answer will oblige yours, truly, The Bloch Bros. Tobacco Co."

Thereupon the safe company immediately brought an action of detinue for the safe, or the value thereof, \$200,—before Justice George Arkle, who on the 12th day of October, 1891, rendered judgment for the plaintiff. From this judgment the defendant company appealed to the circuit court of Ohio county, and on the 18th day of February, 1892, the circuit court, neither party requiring a jury, heard the evidence, and gave judgment for the defendant. The plaintiff then applied for and obtained a writ of error, bringing the controversy before this court.

Messrs. White & Allen, for plaintiff in error:

Where a contract is to receive and sell goods it is a contract of bailment and not of sale.

Walker v. Butterick, 105 Mass. 238; *Weir v. Porter*, 82 Mo. 23; 2 Am. & Eng. Encyclop. Law, 42.

A contract obligating one of the parties to push the sale of the other's coal for one year and to pay for all he may order at an agreed price but not requiring him to take any definite amount, is not a contract of purchase and sale, but an agency.

Cannon Coal Co. v. Taggart, 1 Colo. App. 60.

The fact that the Globe Contract Company may have been required by the contract to collect in its own name from persons to whom it sold does not make it a purchaser.

Chesterfield Mfg. Co. v. Dehon, 5 Pick. 7, 16 Am. Dec. 367; *Price v. Ralston*, 2 Dall. 60, 1 Am. Dec. 260.

The testimony, in so far as it details facts, shows that this company, if engaged in business at all, was simply professing to act as agent for sale of safes, electrical instruments, etc., and was in the business of mechanical and civil engineering, constructing electrical apparatus, etc. This being so it was not a trader within the definition of that term.

Brown Mfg. Co. v. Deering, 85 W. Va. 259.

"The Globe Contract Company" was a West Virginia corporation.

The purposes for which it was chartered and to which it was limited are clearly set forth in its charter as follows: "for the purpose of contracting for and doing engineering work and construction of any and all kinds, and of conducting a general manufacturing business." How could it conduct the business of "a trader?"

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950.

A lien for commissions is a personal privilege and can only be enforced when the goods are in possession of the agent or factor, and not after possession in him has ceased. It is possession and possession alone, which gives the right and power to enforce such a lien. As soon as possession ends the lien ends.

Marseilles Mfg. Co. v. Morgan, 12 Neb. 68; *Robinson v. Larrabee*, 63 Me. 116; *Bailey v. Quint*, 22 Vt. 474; *Vinal v. Spofford*, 139 Mass. 127.

The factor's right to a lien is a personal privilege and cannot be transferred, nor can the question arise between any one but the principal and the factor.

8 Am. & Eng. Encyclop. Law, 839; *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 273; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Winter v. Coit*, 7 N. Y. 288, 57 Am. Dec. 522; *Holly v. Huggeford*, 8 Pick. 73, 19 Am. Dec. 308; *Jones v. Sinclair*, 3 N. H. 321, 9 Am. Dec. 75; *Daubigny v. Duval*, 5 T. R. 608.

Mr. W. F. Hubbard, for defendant in error:

1. This safe was sold by the plaintiff to the Globe Contract Company. This safe was furnished under the second part of the agreement, and that contract, whether we look at its language or real nature, constituted a sale and not an agency. Here the Globe Contract Company and not the final customer was to pay the plaintiff for the safe; it could sell at prices fixed by itself, its profits being the difference between that price and the price to it fixed by the contract; it was to pay the freight, for the prices of the plaintiff were f. o. b. cars at Pittsburgh. The Globe Contract Company had thirty days in which to pay, whether the customer paid it in cash or took a year's credit.

Braunn v. Keally, 148 Pa. 519; *Chickering v. Bustress*, 130 Ill. 206; *Blow v. Spear*, 43 Mo. 496, 97 Am. Dec. 412; *McArthur v. Wilder*, 3 Barb. 66; *Sterling Organ Co. v. House*, 25 W. Va. 90.

In determining whether the transaction be-

tween the plaintiff and the Globe Contract Company was a bailment or a sale, the rule applicable is that where the article delivered is to be returned, the transaction is a bailment, and the title remains with the bailor. Where there is no obligation to return the specific article, and another thing of equal value may be returned, the receiver becomes debtor to make the return, the transaction is a sale and the title is changed.

Reherd v. Clem, 86 Va. 374; *Loneragan v. Stewart*, 55 Ill. 44; *Hurd v. West*, 7 Cow. 752; *Mallory v. Willis*, 4 N. Y. 76; *Austin v. Seligman*, 18 Fed. Rep. 519; *Richardson v. Olmstead*, 74 Ill. 218.

2. Even if the safe could be considered not as sold but as in the hands of the Globe Contract Company as the plaintiff's agents, the latter had a lien for the balance due them, and the plaintiff not having paid that balance cannot recover.

Arthur v. Ingels, 11 L. R. A. 557, 34 W. Va. 642; *Minor*, Inst. p. 449; 1 Am. & Eng. Encyclop. Law, 428.

3. The plaintiff stood by and saw this safe sold to defendant as the property of the Globe Contract Company without making any claim.

4. If this safe was the property of the plaintiff in the hands of the Globe Contract Company, as his agent, it was liable to levy and sale as the property of the Globe Contract Company under chapter 100, section 18, of the Code. The Globe Contract Company was a person (Code, chap. 13, § 17, cl. 9) transacting business as a trader in its own name, and this safe was acquired or used in such business.

Even if the Globe Contract Company had not corporate capacity to buy and sell, the plaintiff would be estopped to say so.

5. If the effort of the plaintiff was to sell this safe, reserving the title until the same is paid for or otherwise, such reservation is void under section 8, chapter 74, of the Code.

Herryford v. Davis, 102 U. S. 235, 26 L. ed. 160.

Dent, J., delivered the opinion of the court:

The counsel for the defendant maintains that the judgment of the circuit court should be affirmed, because: (1) The safe had been sold by the plaintiff to the Globe Contract Company. (2) If that were not so, and the safe was in the hands of the Globe Contract Company as plaintiff's agents, the latter had a lien for the general balance due them, and the plaintiff, not having paid that balance, cannot recover. (3) The plaintiff stood by and saw the safe sold as property of the Globe Contract Company without making any claim. (4) The Globe Contract Company, a trader, not having complied with the provisions of section 13, chap. 100, of the Code, this safe, acquired and used in its business, was liable for its debts. (5) If the contract was as claimed by plaintiff, it was an attempt to sell goods, reserving the title, and such reservation is void, under section 3, chap. 74, of the Code.

On an examination of many decisions relating to contracts of this kind, we find them apparently contradictory and hard to reconcile; some holding that goods delivered un-

der similar contracts are mere bailments for the purpose of sale; others, that they are sales with reservation of title, and therefore void, under the usual recording acts, as to creditors. But from all the general rule is deducible that the court must determine, from the wording of the contract itself and the circumstances surrounding it, the true intention of the parties in making it; and if the contract was entered into in the form of an agency contract, for the purpose of evading the statute requiring all reservations of title to be recorded, then it should be held void as to creditors. Such was the determination of the court in the case of *Chickering v. Bantress*, 130 Ill. 206. But where there is no attempt at evasion, but the contract is one of pure agency, providing for a consignment of goods to be paid for, at a fixed price, out of the proceeds of the goods when sold, this is a bailment for sale, and not a sale with reservation of title, and the title remains in the consignor until the goods are sold to a bona fide purchaser for value. *Walker v. Butterick*, 105 Mass. 238; *Weir Plow Co. v. Porter*, 82 Mo. 23; *Middleton v. Stone*, 111 Pa. 589; *Dando v. Foulds*, 105 Pa. 74. "Ordinarily, if goods are 'consigned' for sale, it is a bailment, and not a sale to the consignee. The goods do not become his property or liable for his debts," "even though consigned on a *del credere* commission." And the fact that the goods consigned were invoiced at a stated price does not itself constitute the transaction a sale, unless the terms of the consignment be such as to make the consignee, when the goods are sold, the purchaser and principal debtor for the goods. Benjamin, Sales, 6th ed. p. 7; also, 3 Am. & Eng. Encyclop. Law, 840. Applying these principles to this case, we find that the contract entered into was one of pure agency, without any attempt or thought of evading the statutory law relating to the recordation of instruments when sales are made reserving the title, but a consignment of safes was made to the Globe Contract Company, as such agent, and not in any sense a purchaser, to have on hand to sell for the Barnes Safe & Lock Company, whenever a purchaser could be secured on not exceeding thirty days' time. If no sales were made, then there was no purchaser, and the safes could only be returned to the consignor. If a sale was made, the title passed, not through the consignee, but direct from the consignor to the purchaser; and the price passed through the hands of the consignee to the consignor, after deducting all over a given amount to pay commissions and expenses. It is true that the consignee could have become the purchaser of any of the safes, at any time it might wish to do so, by accounting for or paying the fixed price according to the contract to the consignor; and, when the consignor gave notice of cancellation, it gave the opportunity to the consignee to become the purchaser of any unsold safes, but this the consignee refused to do, but notified the consignor that the safes were at its disposal as soon as the accounts between them were properly adjusted. The consignor may have been guilty of some negligence in not taking

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steps at once after the cancellation of the contract to recover possession of the safes, but not so as to divest it of its title, as it was waiting for the statement from its agent. And there is no sufficient evidence to show that it stood by and saw the safe sold as the property of the Globe Contract Company without making claim. On the contrary, the proof clearly shows that it had no knowledge of the levy or sale until the letter written it by the defendant in this case, informing it of the purchase, and wanting to trade it for a different sized safe.

It is hardly worth while to notice the fourth proposition of defendant's counsel,—that the Globe Contract Company was a "trader," within the provisions of section 13, chap. 100, of the Code,—because the Globe Contract Company did not do business as a trader with the addition of the words "factor," "agent," and "company," or "& Co.," within the meaning and contemplation of the statute, but it was doing business in its corporate name, and, while transacting other business, it undertook to act as an agent for the Barnes Safe & Lock Company, which fact was plainly painted on every safe handled by it as such agents. This, being a bailment, and not a sale with reservation of title, as heretofore determined, does not come under the provisions of section 3, chap. 74, of the Code. To sustain the position taken by the defendant, his counsel quotes the law virtually as set out in syllabus 1, *Chickering v. Bantress*, 130 Ill. 206: "(1) Contract—Whether a Sale or Mere Bailment. Where the identical thing delivered is to be restored in the same or an altered form, the contract is one of bailment; but when there is no obligation to restore the specific article, and the person receiving it is at liberty to return another thing of equal value, he becomes a debtor to make a return, and the title to the property is changed,—it is a sale." The same law is laid down in Benjamin on Sales, 6th ed. p. 5, in these words: "On the other hand, it is now well settled that if the contract clearly contemplates, either by express provision or by established usage of the business, that the identical thing received will not be returned, but only its equivalent, either in the same form received, or in some manufactured condition, or else paid for in money, at the option of the receiver, the transaction is a sale or exchange. The title passes immediately on delivery, and the risk is on the receiver."

This law, while it holds good as to certain kinds of bailments, has no application whatever to that class of bailments known as "consignments for sale," and was therefore improperly applied in the Illinois case above referred to. To so apply it is to do away with all bailments with power to sell, because there is no obligation in such case to restore the specific article, but only the value thereof in money, after a sale is made by the factor or consignee, or, in case no sale is made, then to restore the specific article; and the law quoted above from the fifth page of Benjamin on Sales would be directly in conflict with the law quoted from the seventh page of the same work, but to give the con-

struction given in this opinion is to render both pages harmonious.

The only other point urged by the defendant's counsel is the one on which the circuit court, from the briefs, appears to have decided this case, and that is that the appellant was not entitled to recover possession of the safe in controversy, because the Globe Contract Company had a lien on it for unsettled commissions. It nowhere appears that such is the true state of affairs. Accounts appear to be unsettled, but which way the balance will fall is not made evident. Neither is the Globe Contract Company claiming any such lien. If it had one, it was personal to itself, and was waived when it permitted the safe to be taken from its custody, and it cannot be asserted by a third party. "None but the factor himself can set up this privilege against the owner. It is a personal privilege, and cannot be transferred, nor can the question upon it arise between any but the principal and the factor." 3 Am. & Eng. Encyclop. Law, p. 339; *Holly v. Huggeford*, 8 Pick. 73, 19 Am. Dec. 303. The constable in this case levied on the safe by direction of the general manager, and apparently the only secured creditor of the Globe Contract Company, then wholly insolvent. This is no protection to the officer, nor to the purchaser who bought at the sale, because the doctrine *caveat emptor* applies in such cases with full force, and the inscription on the safe, "The Barnes Safe & Lock Co.," "The Globe Contract Co., Genl. Agts., Wheeling, W. Va.," was sufficient to put any reasonable man on his guard, especially as it was a new safe that has never been used; and it can hardly be doubted that such shrewd business men as compose the defendant were not fully informed as to the true state of the title to the safe, and purchased

it as a matter of pure speculation. If not so informed, it was their own fault, as they knew where to find the owners of the safe. But whether they were or not does not alter the law of this case. "Persons dealing with factors concerning goods intrusted to them are charged with notice of the extent and limitations upon their powers; and if they deal with them as if they were acting for themselves, or as if they were dealing with their own property, such persons do so at their peril that such is the fact, or that the factor has special authority from the owner, or that, by the well-established and recognized usage and customs of trade in that line, the factor is authorized to deal with and dispose of the goods in the manner proposed. If the transaction is brought in question by the owner of the goods, the burden of proving the factor's authority is upon the party dealing with him." *Kauffman v. Beasley*, 54 Tex. 563; Story, Ag. § 235. There is no pretense or claim in this case that the Globe Contract Company, through its general manager, was authorized by the Barnes Safe & Lock Company to turn this safe over to the constable, to be sold and applied on the debts of the Globe Contract Company, and he, in so doing, acted wrongfully towards the true owners of the safe and the purchaser at the sale, but could not thereby deprive the true owners of their title, nor confer any title on the purchaser, because he was exceeding the authority conferred by the agency.

For the foregoing reasons, the judgment of the Circuit Court is reversed, and judgment is rendered for the appellant, the Barnes Safe & Lock Company, for the safe in question, or, in lieu thereof, the sum of \$125, the agreed value, with interest thereon until paid, and his costs in this and the circuit court and before the justice of the peace expended.

ARKANSAS SUPREME COURT.

W. C. SPEARMAN, *Appt.*,

v.

City of TEXARKANA.

(.....Ark.....)

A physician who is a member of a board of health may recover reasonable compensation for purely professional services which any other physician might render, rendered by him under direction of the board of health without any express agreement for compensation.

(January 13, 1894.)

A PPEAL by the plaintiff from a judgment of the Circuit Court for Miller County in favor of defendant in an action brought to recover compensation for services rendered by plaintiff in inspecting a certain house

alleged to have been infected with a contagious disease. *Reversed.*

The facts are stated in the opinion.

Messrs. Scott & Jones, for appellant:

When a civil engineer and two others are appointed by the city as a committee to superintend the construction of waterworks for the city, the members of the committee are not such public officers, as are required to perform their services without compensation, where no compensation had been previously provided for, but they are the agents and employes of the city, who may recover reasonable compensation for their services, after their services have all been performed and accepted by the city.

Ellsworth v. Rossiter, 45 Kan. 237; *David v. Portland Water Committee*, 14 Or. 98; *Bunn v. People*, 45 Ill. 397; *Butler v. Regents of the University*, 32 Wis. 124; *United States v. Maurice*, 2 Brock. 103; *State v. Wilson*, 29 Ohio St. 349; *Fister v. La Rue*, 15 Barb. 323; *Weeks v. Texarkana*, 50 Ark. 81.

The services rendered were beyond and outside the duties required to be performed. "When a town agent, acting for the town,

NOTE.—On the question of the right of an officer to recover for services under an employment by the official body to which he belongs, see, in connection with the above case, *Tippacanoe County Comrs. v. Mitchell* (Ind.) 15 L. R. A. 520, and *note*, 23 L. R. A.

or the town itself, employs an attorney at law to prosecute or defend suits against the town, the latter is liable for the services, and the rule is the same if the "town agent" being an attorney, renders for the town professional services, in suits which the proper authorities of the town direct to be instituted."

Langdon v. Castleton, 80 Vt. 285; 1 Dill. Mun. Corp. 4th ed. § 230, note 3.

Messrs. W. H. Arnold and John N. Cook for appellee.

Mansfield, J., delivered the opinion of the court:

By an ordinance duly passed, the city of Texarkana established a board of health, to be composed of the mayor, the city attorney, three aldermen, and one physician of the city. The board was invested with all the usual and necessary powers to effect the purpose of its organization, which was declared to be the protection of the city against "contagious, malignant, and infectious diseases;" and the ordinance provides that all expenses incurred by the board shall be certified to the city council by the president and secretary for allowance and payment, as other claims against the city. The appellant, a practicing physician of the city, and not one of its officers, was elected as the medical member of the board, and, while serving as such, was directed by the board to make personal examination of a case of diphtheria said to exist in the city, and the alleged existence of which had caused the closing of the public schools. He examined the case in person, and made a report upon it to the board. There was no express agreement for this service, and before rendering it the appellant did not inform the board that he would expect a compensation. Several months after the service was rendered, he brought this action in a justice's court to recover for it the sum of \$50. The case was taken by appeal to the circuit court, where a trial by jury resulted in a judgment for the city. The only ground on which a recovery by the plaintiff was resisted is indicated by an instruction given to the jury at the defendant's request, and which was that if they found "that the plaintiff was a member of the board of health

... when he was requested by said board to perform the services charged in the account sued on, and that he was a member of said board when he performed said services," their finding should be against him. This instruction was objected to by the plaintiff, who requested the court to charge that the verdict should be for the plaintiff if the jury found that the board had authority to employ a physician to render for the city a service similar to that charged for, and that the plaintiff performed the services sued for, under the board's employment, and by its direction. The latter request was refused, and these rulings of the court upon the two instructions mentioned are the grounds relied upon to reverse the judgment.

It is of no importance to decide whether the membership of the plaintiff on the board of health made him an officer of the city, or whether he is precluded from recovering for

his services on the board by the fact that the ordinance establishing it makes no provision for compensating its members. The service on which his claim is based was not performed as a member of the board, and was not a duty incumbent upon the board, or either of its members. It was independent of, and not incidental to, any such duty; and, if the city council itself had employed him to perform the service, the city would clearly have been liable on the contract. *Mechem*, Pub. Off. § 868; *Evans v. Trenton*, 24 N. J. L. 764; *McBride v. Grand Rapids*, 47 Mich. 286, 49 Mich. 289. But, as a member of the board, he was the agent of the city, to act for it, in conjunction with the other members, in taking such measures, by contract or otherwise, as it was competent and necessary to adopt in accomplishing the objects of the board; and, while he stood in that relation to the city, the law, as a means of securing fidelity to his trust, and to guard against any temptation to serve his own interest to the prejudice of his principals, disabled him from making any binding contract with the board. *Mechem*, Ag. §§ 713, 455, note 3. Such a contract by an agent, in his own behalf, with reference to the subject-matter of the agency, is not, however, absolutely void, but only voidable. *Story*, Ag. § 211, note 1.

As stated by the supreme court of Wisconsin, there is "a distinction between contracts which are held to be against public policy merely on account of the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class the parties acquire no rights which can be enforced either in the courts of law or equity. But in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it to accept and retain the benefit without any compensation at all." *Pickett v. Viola School Dist. No. 1*, 25 Wis. 558, 8 Am. Rep. 105.

A similar view is expressed in *Gardner v. Butler*, 80 N. J. Eq. 702, where it was held that while the directors of a corporation could not make an agreement, enforceable against the company, to pay themselves a stipulated sum for their services, they could recover on the *quantum meruit* for such services as they had rendered, and the benefit of which the company had received. The court said that, although the agreement was "of no binding force as a contract," the directors had "a right to serve the company in the capacity of officers, agents, or employes, and for such services the law will enable them to recover a just and reasonable compensation." To deny them this, it was said, would be "manifestly inequitable," and "would pervert a rule of law which is intended to guard against fraud and injustice." But their claim was not allowed to have any basis upon the contract they had undertaken to make with themselves, and the court declared that "it must rest exclusively upon its fairness and justice." The doctrine of these cases appears to be that the contract of the

agent being, as the Wisconsin court said, "rather voidable, in equity than absolutely void at law," the principal, in avoiding it, must himself do what equity requires. *Pickett v. Wiota School Dist. No. 1*, 25 Wis. 558. And it was palpably on the same ground that the supreme court of Michigan affirmed a judgment for the actual value of professional services rendered by a lawyer to a city, of which he was mayor, and under an employment by the common council, of which he was a member. *Niles v. Muzzey*, 83 Mich. 61, 20 Am. Rep. 670. See also *Macon v. Huff*, 60 Ga. 231.

The principle enforced by the authorities cited applies, we think, to the case which the testimony of the appellant here tends to make. He testified that the service charged for was strictly professional; and, if it was so, and was necessary, then, as it was one the board had authority to employ any other physician to perform, the plaintiff is entitled

to recover for it what he reasonably deserves to have. But the right to such recovery cannot result from any contract to be implied from the request or direction of the board to render the service; for, as the plaintiff could have made no express agreement with the board that would have been binding on the city, no binding agreement can arise by implication from anything that passed between him and the other members. His claim must be grounded solely on a contract created by the law in consideration of services shown to have benefited the city, and for which it ought, therefore, in justice, to pay. *Bishop*, Cont. § 188.

While it cannot be said, on the views indicated, that the instruction refused was a full and accurate statement of the law, there was positive error in giving the instruction requested by the defendant; and for that error the judgment will be reversed, and the cause remanded for a new trial.

MINNESOTA SUPREME COURT.

Henry RIPPE, *Appt.*,

v.

George L. BECKER, *et al.*, *Repts.*

(.....Minn.....)

1. Chapter 30, Laws 1893, entitled "An Act to Provide for the Purchase of a Site and for the Erection of a State Elevator or Warehouse at Duluth for Public Storage of Grain," etc., is not an exercise of the police power of the state to regulate the business of receiving, weighing, and inspecting grain in elevators. It has no relation to the regulation of the business, but provides for the state itself engaging in carrying it on.

2. The police power of the state to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it.

3. The act in question is in violation of section 5, article 9, of the Constitution, providing that "the state shall never contract any debts for works of internal improvements or be a party in carrying on such works."

4. "Works of internal improvement," as used in the Constitution, means not merely the construction or improvement of channels of trade and commerce, but any kind of public works except those used by and for the state in

*Headnotes by MITCHELL, J.

the performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government.

(January 5, 1894.)

A PPEAL by plaintiff from an order of the District Court for Ramsey County sustaining a demurrer to the complaint in an action brought to enjoin the erection of a state elevator. *Reversed.*

The facts are stated in the opinion.

Messrs. Wilson & Vanderlip, for appellant:

Almost contemporaneously with the adoption of our constitution the supreme court of Wisconsin, in *Clark v. Janesville*, 10 Wis. 186, used this language respecting it: "The object was to prevent the state, as a state, from becoming a party to such works. The history of other states had shown that for the state itself to engage in these works involved it in difficulty and embarrassment, and that the works could be better prosecuted by private enterprise. Hence the constitution prohibits the state to become a party to such works, or to loan its credit."

See also *State v. Farwell*, 8 Pinney, 898; *Sloan v. State*, 51 Wis. 638.

NOTE.—A constitutional question of the highest importance, considering the tendencies of the present time, is decided in the above case denying all power of the state to own and operate a grain elevator, although the decision is based particularly on a constitutional provision against carrying on works of internal improvements.

For questions somewhat akin to this in respect to the purposes for which public funds may be used, see cases in *note* to *Daggett v. Colgan* (Cal.) 14 L. R. A. 474, although these cases mostly relate to municipal action.

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As to the power of municipalities to engage in such enterprises as the management of electric light plants or waterworks, see *Crawfordsville v. Braden* (Ind.) 14 L. R. A. 268, and cases cited in that case and the *note* thereto.

For state regulation of elevators owned by private persons, see *People v. Budd* (N. Y.) 5 L. R. A. 559, and *note*, with the affirmation of this case in *Budd v. New York*, 148 U. S. 517, 36 L. ed. 247.

In *Anderson v. Hill*, 54 Mich. 477, the supreme court of Michigan, referring to a like provision in the constitution of that state, says: "The early history of this state need not here be referred to to show why such a clause was inserted in that instrument. Some of the reasons were briefly mentioned in *People v. State Treasurer*, 23 Mich. 499. Experience has demonstrated the wisdom of the policy adopted by the people when they framed the Constitution of 1850 and placed it beyond the power of the legislature to engage the state in works of internal improvement, except by the expenditure of grants of land or other property. This court has, on several occasions, been called upon to apply this provision of the constitution to legislation enacted in contravention of its terms."

See also *Sparrow v. State Land Office Comr.* 56 Mich. 567; *Leavenworth County Comrs. v. Miller*, 7 Kan. 493, 12 Am. Rep. 425.

The test for determining the character of an improvement of this kind is the use for which it is designed. If it is for public use, subject to the control and regulation of the legislature, it would seem to come within the meaning of the words "internal improvements."

Traver v. Merrick County Comrs. 14 Neb. 327, 45 Am. Rep. 111; *Burlington Twp. v. Beasley*, 94 U. S. 810, 24 L. ed. 161; *Blair v. Cuming County*, 111 U. S. 363, 28 L. ed. 457.

Messrs. H. W. Childs and George B. Edgerton, for respondents:

Many attempts have been made in this court and elsewhere, says *Chief Justice Waite* in *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079, to define the police power, but never with any success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate.

Police power is the right of the state functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in congress by the Federal Constitution.

New Orleans Gas Light Co. v. Hart, 40 La. Ann. 478.

Every law comes within this description, which concerns the welfare of the whole people of the state, or any individual within it, whether it relates to their rights or their duties; whether it respects them as men or citizens of the state; whether in their public or private relations; whether it relates to the rights of person or of property of the whole people of the state, or of any individual within it.

New York v. Miln, 36 U. S. 11 Pet. 139, 9 L. ed. 662.

It is the inherent and plenary power in the state, which enables it to prohibit all things harmful to the comfort and welfare of society.

Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190.

It is co-extensive with self protection, equal to every emergency and has been well termed, "the law of overruling necessity."

Lake View v. Rose Hill Cemetery Co. 70 Ill. 22 L. R. A.

192, 22 Am. Rep. 71; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625.

Among the numerous objects to which that power extends, is unquestionably the public market.

Cooley, Const. Lim. 6th ed. 743; *Wartman v. Philadelphia*, 38 Pa. 209.

The act of the legislature in question does not provide for an internal improvement within the meaning of section 5, article 9, of the State Constitution.

The terms as there used must be restricted to the establishment of highways as agencies of travel and commerce, like railroads and canals, to the improvement of rivers and waterways, the erection of bridges, and whatever else tends to facilitate commercial intercourse.

The constitutional provision involved in this proceeding is to be construed according to the sense of the terms and the intention of the parties.

Potter's Dwarrr. Stat. 655; *Sedgw. Stat. & Const. L.* 412; *Endlich*, Interpretation of Statutes, § 507.

History may be expressly invoked, in aid of construction of constitutions.

Cooley, Const. Lim. 70; *Opinion of Justices*, 15 L. R. A. 809, 155 Mass. 598.

The terms were almost if not quite unknown in Jefferson's day. While he for a time advocated a policy of improvement of the great avenue of trade between the different sections of the country, he never referred to them as works of internal improvement. The subject first came into public prominence when in 1806 congress authorized "the laying out and making of a road from Cumberland in the state of Maryland, to the state of Ohio."

Lossing, Cycl. of U. S. Hist. 686.

In 1817 an act was passed entitled, "An Act to Set Apart and Pledge Certain Funds for Internal Improvements." The pledge of funds was for constructing roads and canals and improving navigation of watercourses, in order to facilitate, promote, and give security to internal commerce among the several states and to render more easy and less expensive the means and provisions for the common defense.

See also Webster's Great Speeches, 80.

During the first half of the century, the fixed and well-defined meaning of the term "internal improvements" was restricted to the objects above named. Is it not then fair to assume that when the framers of our constitution framed the prohibition against the state's contracting any debts for works of internal improvements, they sought to protect the young state from experiences similar to those so recently had by other states.

See Minnesota Constitutional Debates, 478.

Where internal improvements under state authority are spoken of it is universally understood that works within the state by which the public are to be benefited are intended such as the improvement of highways and of travel and commerce.

Wetumpka v. Winter, 29 Ala. 660; *Union Pac. R. Co. v. Colfax County Comrs.* 4 Neb. 456; *Bushnell v. Beloit*, 10 Wis. 167; *Sloan v. State*, 51 Wis. 630. See also *Ryerson v.*

Utley, 16 Mich. 269; *People v. Springwells Twp. Board*, 25 Mich. 153; *Anderson v. Hill*, 54 Mich. 477; *People v. State Treasurer*, 23 Mich. 499; *Gillincater v. Mississippi & A. R. Co.* 13 Ill. 1.

As the authority of the state to supervise the inspection and weighing of grain, the regulation of charges by elevator companies and the rates and tariffs of railroad companies, is no longer denied (*Budd v. New York*, 143 U. S. 517, 36 L. ed. 247), it would seem to follow that the state may properly erect at its own expense suitable buildings in which it may the more effectually regulate the weighing and inspection of grain.

Mitchell, J., delivered the opinion of the court:

The object of this action, briefly stated, was to restrain the board of railway and warehouse commissioners from building a state elevator at Duluth pursuant to the provision of chapter 30, Laws 1893. The plaintiff assails the constitutionality of this act on several grounds; but the only one we find necessary to consider is that it is in violation of section 5, article 9, of the Constitution of the state, which provides that "the state shall never contract any debts for works of internal improvement or be a party in carrying on such works." On the other hand, the contentions of the defendant are: First. That the works contemplated by the act are merely ancillary to the more effectual exercise by the state of its police power to regulate the weighing and inspection of grain stored in bulk, and to regulate the charges for handling and storing the same in elevators or warehouses. Second. That the elevator and other works provided for in the act are not "works of internal improvement," within the meaning of the constitution; that this term refers only to channels of travel and commerce, such as roads, bridges, railways, canals, rivers, and the like. We shall consider these two propositions in the order named.

The right of the state, in the exercise of its police power, to regulate the business of receiving, weighing, inspecting, and storing grain for others, in elevators or warehouses, as being a business affected with a public interest, is now settled beyond all controversy. This power extends even to fixing the charges for such services. *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247.

And where a business is a proper subject of police regulation, doubtless, the legislature may, in the exercise of that power, adopt any measures they see fit, provided only they adopt such as have some relation to, and have some tendency to accomplish, the desired end; and if the measures adopted have such relation or tendency the courts will never assume to determine whether they are wise, or the best that might have been adopted. *State v. Donaldson*, 41 Minn. 74. How the "grain elevator" business may be and has been regulated is illustrated by the statutes of this state enacted for that purpose, notably chapter 144, Laws 1885, and chapter 28, Laws 1893. The first of these statutes declares all elevators or warehouses at cer-

tain terminal points, in which grain is stored in bulk, public warehouses. Requires the proprietor or manager to obtain a license and give a bond; to receive for storage all grain in suitable condition when tendered. Prohibits him from mixing grain of different grades. Requires him to keep grain in separate bins when requested by the owner. Provides what kind and form of receipt he shall give for the grain. Prohibits him from inserting anything in the receipt limiting his liability as imposed by the laws of the state. Requires him to make statements under oath of the condition of his business whenever required by the board of railway and warehouse commissioners; also, to post weekly statements of the amount of each kind and grade of grain in store in his warehouse, and to furnish certain statements to the warehouse register; also, to publish a schedule of rates of charges for storage, etc. Provides minutely what he shall do when any of the grain in store becomes damaged or out of condition; also, that all persons interested, and all authorized inspectors, shall have the right at any time to examine the grain in store; that all scales shall be subject to examination and test. Requires the railroad and warehouse commission to appoint a weighmaster and necessary assistants; also, an inspector of grain (who may appoint deputies), who shall have the supervision and exclusive control of the weighing and inspection of grain, subject to such rules and regulations as the board may adopt. Requires the board to fix the fees for weighing and inspecting; also, to establish the grades of grain, and publish the same; and, generally, to exercise control and supervision over the handling, inspection, weighing, and storage of grain, and to establish all necessary rules and regulations for the same. In contrast with this, we turn to the Act of 1893, now under consideration. Its title is, "An Act to provide for the purchase of a site and for the erection of a state elevator or warehouse at Duluth in this state for public storage of grain, and the regulation thereof, to publish a market report, and to appropriate money for that purpose." It orders the establishment of a warehouse and elevator, of a total capacity of 1,500,000 bushels of grain, to be located on Duluth harbor, on St. Louis bay, where there is navigable water, or where docks can be established for the largest vessels in the carrying trade on Lake Superior, and on such point as shall offer terminal facilities with the various railroads centering at the head of Lake Superior; that "said institution" shall be under the control and management of the board of railway and warehouse commissioners, who are required to locate the same, procure the necessary site, and erect the necessary buildings thereon, with the proper equipments and facilities to carry the act into effect, and build or procure "all necessary spur tracks, terminal yards and other facilities to receive and ship grain." The elevator is to have facilities for "weighing, unloading, cleaning and safe keeping of grain in separate bins; also for placing grain of the same grade together." The act provides for the commissioners procuring plans and specifications for elevator,

advertising for bids, and letting the contract for its construction to the lowest and best bidder; and provides for the manner of payment for the site and the construction of the building; and appropriates \$200,000 for that purpose out of any moneys in the state treasury belonging to the "grain and warehouse fund," to and with which the grain inspection fund, under the Act of 1885, is transferred and consolidated. The elevator is to be under the management of the board of railway and warehouse commissioners, who are to appoint a suitable person as warehouseman "of said state elevator or warehouse," and such assistants as are necessary, and adopt such rules and regulations for the receiving, handling, storing, and delivering grain as they shall deem proper, with power, in case they think that any person or combination of persons is seeking "to monopolize said elevator," to adopt rules limiting the amount of grain which any one person, combination, or corporation may have in the elevator at any one time. They are also required to fix the charges for storing, inspecting, weighing, and handling grain, including the cost of receiving and delivering, which charges are to be a lien on the grain so received, and, when collected, to be paid into the state treasury to the credit of the grain and warehouse fund. The elevator is to be "cleaned and measured up" once each year, to ascertain whether there is any gain or loss by the system of dockage. In connection with their other duties in managing and operating this elevator, the commissioners are to keep on file, for public inspection, publications showing the market price of grain and farm products in certain specified leading markets of this country and Europe; also, the freight rates to such markets by the different means of transportation; also, to publish a weekly bulletin showing the prices paid in said markets for farm products, and the rates of freight between Duluth and Minneapolis and said markets, said bulletin to be kept on file "in said institution," and in the office of the commissioners in St. Paul, and also to be furnished by mail to all persons who may order the same, at a price to be fixed by the commissioners, not exceeding one dollar per annum. The commissioners are also to send samples of grain, being exported, to the various leading markets of the world, "for inspection and to secure prices as to their market value, that they may know whether the markets of Minnesota are within a reasonable difference in price of the markets of the world. Said commission shall have power to purchase and export a quantity of grain to any of said markets, if they deem such course advisable, in order to ascertain the facts in the case; it being the intention of this act to prevent monopolization and unjust control of the markets of the state for farm products."

It seems to us as plain as words can make it—too plain to admit of argument—that the provisions of this act have no relation or reference whatever to the exercise of the police power to regulate the "grain elevator" business. We cannot discover, and counsel have failed to point out, a single provision of the

act that has any relation to, or any tendency to accomplish, any such purpose. Aside from the provisions of sections 3 and 4, for what we may term a bureau of information as to the state of the markets and rates of transportation (which has no relation to the exercise of any police power, and the connection between which and an elevator of a capacity of 1,500,000 bushels, with "all necessary spur tracks, terminal yards and other facilities to receive and ship grain," is not apparent), the evident sole purpose of the act is to provide for the state erecting an elevator, and itself going into the "grain elevator" business. All the provisions of the act as to receiving, handling, storing, and delivering grain clearly have reference only to the management of the business conducted by the state in its own elevator. The keynote to the object of the law is, we apprehend, to be found in the last clause of section 4 above quoted as to the intention of the act; and so far as relates to the right of the state, under the police power, to regulate this business, the position of defendants' counsel really amounts to this: That whenever those who are engaged in any business which is affected with a public interest, and hence the subject of governmental regulation, do not furnish the public proper and reasonable service, the state may, as a means of regulating the business, itself engage in it, and furnish the public better service at reasonable rates, or by means of such state competition, compel others to do so. The very statement of the proposition is sufficient to show to what startling results it necessarily leads. It needs no argument to prove that if, in the exercise of the police power to regulate this business, the state itself has a right to erect and operate one elevator at Duluth, it has the power to erect and operate twenty, if necessary, at the same point, and also to erect and operate elevators at every point in the state where there is grain to be handled and stored. Railways are also, under this same police power, the subjects of state regulation; and if it should be deemed that they were not furnishing the public with proper service, or charging unreasonable rates, it could with equal propriety be claimed that it would be a proper means of exercising the police power of regulating the business for the state itself to construct and operate competing railways. The hack business, the pawnbrokers' business, the manufacture and sale of intoxicating liquors, and numerous other kinds of business that might be named, are also the subjects of state regulation; and, if counsel's contention is correct, we do not see why, as a means of "regulating" these kinds of business, the state itself might not engage in running hacks, pawnbrokers' shops, building and operating distilleries and breweries, or even running saloons. But further illustration cannot be necessary. The police power of the state to regulate a business does not include the power to engage in carrying it on. Police regulation is to be effected by restraints upon a business, and the adoption of rules and regulations as to the manner in which it shall be conducted. While the jurists of continental Europe sometimes in-

clude under the term "police power" all governmental institutions which are established with public funds for the promotion of the public good, yet, as understood in American constitutional law, the term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, "*Sic utere tuo ut alienum non ledas.*" The provisions of this act have no reference to the regulation, in any such sense, of the "grain elevator business," and the right of the state to embark in the construction and operation of these works cannot be predicated on the police power.

2. Irrespective of the police power, we may concede, without deciding, that the legislature has unlimited power to embark, at the expense and in behalf of the state, in any business or other enterprise it sees fit, which is not prohibited by the constitution. It remains, therefore, to consider whether the elevator and other works contemplated by this act are works of internal improvement, within the meaning of the constitution.

As already stated, defendants' contention is that the prohibition of the constitution must be restricted to channels of travel and commerce. There is certainly nothing in the etymology of the words that would thus limit their meaning. "Internal" means merely interior, or within any limit; and "improvement" means progress towards what is better, or melioration. But, of course, etymological definitions of words are not controlling, if a phrase has, by common usage and understanding, received a fixed and definite meaning. And, in support of his contention counsel appeals to what he claims has become the fixed historical meaning of "internal improvements" in the political dialect of this country. The history of the term, as well as of the causes which led to the adoption of provisions in the constitutions of many states prohibiting the state from engaging in works of internal improvements, has been gone into very exhaustively by counsel in their brief. It is unquestionably true that in the earlier history of this country the works of "internal improvement" or "public improvements" (the term seem to have been used interchangeably, as synonymous) in which the government, federal or state, embarked, were channels of travel and commerce, such as the construction of turnpikes and canals, and the improvement of rivers and harbors. There were two reasons for this: First, in the then undeveloped condition of our country, highways for travel and commerce were the great and urgent need of the people; second, in those days the tendency was, much more than now, to limit the functions of government to those things which were necessary to secure the enjoyment of life, liberty, and property. Channels of travel and commerce were of such public importance as to be deemed by many to come within that category; but beyond that it was not supposed that it was proper or competent for the state to embark in any public improvements, except such as strictly pertained to its proper governmental functions. Hence, in the controversy between

the two great national parties during the last 30 years of the first half of the present century, the phrase "internal improvements" was generally, if not always, used with reference to the building of turnpikes and canals (and latterly railroads), and the improvement of rivers and harbors, because those were the only works, public and internal in their nature, in which it was proposed that the federal government should embark. The same was true of the state governments. The construction of roads, canals, and the like, were the only works of internal or public improvement, outside those required in the performance of strictly governmental functions, in which they engaged. But, suffering as the people were for want of channels of travel and commerce, which seemed the great desideratum for the development of the country, many of the states, for a time, expended large sums of money, and incurred immense debts, in the construction of roads and canals, some of which were of much value, and others of very little value, the cost and management of which, in many cases, resulted in financial disaster, bankruptcy, and even state repudiation. This was notably true in the great financial crash of 1836-37. Experience demonstrated that such enterprises could not be economically constructed or profitably and prudently administered by the government; and hence many of the states not only made provision for disposing of their works of public improvement, but, in view of their bitter experience, inserted in their constitutional provisions prohibiting the state from ever again engaging in such undertakings. The purpose, clearly, was to remand all such words to private enterprise, and to protect the citizen from being taxed for them. These provisions were incorporated by the people in their constitutions as precautions against injudicious action by their legislatures or even themselves, if, in a time of inflation or popular excitement, they should be tempted to embark in public improvements in cases where they were not content to wait the result of private enterprise. This state had an experience of this kind at an early day, in the adoption of the \$5,000,000 loan bill, in the form of a constitutional amendment. The result of that experiment is a matter of familiar history. In the case of the states, as in the case of the federal government, it is no doubt true that what was prominently in mind in using the term "works of internal improvement," or "public improvement," were roads, canals, rivers, and other avenues of commerce, and that it was the evils resulting from the states embarking in that class of improvements which chiefly led to the adoption of these constitutional prohibitions. As already suggested, the reason was that this was the only class of public works in which the states, up to that time, had engaged. No case, we admit, can be found, in which it has been held that a grain elevator is a work of internal improvement; for, so far as we can discover, Minnesota is the pioneer state in attempting to embark in any such enterprise. But it is equally true that no case can be found in which it has been held that works of internal improvement

mean only channels or mediums of travel and commerce. Indeed, even if the term was to be given the restricted meaning contended for, it is not apparent why it would not still include the works contemplated by this act; for an elevator on the navigable waters of a great lake, with terminal connections with all the railways centering at that point, and equipped with "all necessary spur tracks, terminal yards and other facilities to receive and ship grain," is merely ancillary to the transportation of the property. In fact, the receipt and storage of the grain into, and its delivery out of, such an elevator, is but a part of its transportation.

But we reject any such narrow definition of the term "works of internal improvement," and we are not without authority for our position. An act of the legislature of Nebraska authorized the issue of bonds by any county to aid in the construction of any railroad or other work of internal improvement. There was some ground, here, to hold, upon the application of the doctrine of *ejusdem generis*, that the act applied only to works similar in kind to railroads. But in *Traver v. Merrick County Comrs.*, 14 Neb. 827, 45 Am. Rep. 111, it was held that a water gristmill erected for public use, the rates of toll to be regulated by the county commissioners, and being subject to regulation by the legislature, was a work of internal improvement, within the meaning of the act; the court saying that the test for determining the character of an improvement of this kind is the use for which it is designed. If it is for public use, subject to legislative control and regulation, it would seem to come within the meaning of the words "internal improvement." In *Blair v. Cumming County*, 111 U. S. 863, 28 L. ed. 457, the Supreme Court of the United States, in construing this same act, held that bonds issued to aid a company in improving a water power for the purpose of propelling public gristmills were issued to aid in constructing a "work of internal improvement," and indorsed the decision in *Traver v. Merrick County Comrs.* as a correct exposition of the statute. A statute of Kansas authorized towns and counties to issue bonds "for the purpose of building bridges or to aid in the construction of railroads, water powers or other works of internal improvement." Laws 1873, chap. 68, § 1. Another statute declared all custom gristmills to be public mills, and regulated their management. In *Burlington Twp. v. Beasley*, 94 U. S. 810, 24 L. ed. 161, it was held that bonds issued to aid in the construction of a steam custom mill were authorized by the statute,—in other words, that a steam custom mill was a work of internal improvement,—the court saying that the expression is usually applied to railroads and canals, but to confine it to those two subjects would be to give the statute a narrow construction; also, that railroads, turnpikes, buildings, bridges, ferries, reclaiming swamps, and the like, are no doubt improvements, and, if such improvements are within the limits of a town or county, they are internal to such town or county. In this case, as in others, the terms, "works of internal

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improvement," "public improvements," and "public works," seem to be used as synonymous. In *Sparrow v. State Land Office Comr.*, 56 Mich. 567, the court, speaking through Justice Campbell, commenting on a provision in the constitution of that state the same as in our own, says: "The phrase is as broad as language can make it. It can make no difference for what direct or indirect purpose of public utility an improvement is made, so long as it comes within such a definition. All works of convenience, whether for travel, drainage, or irrigation, are similar in their nature. Any such work that is deemed important enough for the state to construct is within the rule, and, if not built in the permitted way [by devoting thereto the avails of any grant to the state for that specific purpose], is within the prohibition." In *Leavenworth County Comrs. v. Miller*, 7 Kan. 493, 12 Am. Rep. 425, in commenting on a similar provision in the constitution of that state, the court says: "The state, as a state, is absolutely prohibited from engaging in any works of internal improvement. We will concede that this prohibition does not extend to the building of a statehouse, penitentiary, state university, and such other public improvements as are used exclusively by and for the state as a sovereign corporation; but it does extend to every other species of public improvement." And again, in the same case, in enumerating the kind of improvements which the state is prohibited from making, the court mentions, among others, drains, waterworks, gas works, and the like. These cases clearly indicate the general understanding of the judicial mind as to the meaning of the term "works of internal improvement," as used in statutes and constitutions, and demonstrate that the courts have never supposed that it was to be restricted to channels of travel and commerce, but, on the contrary, have always assumed that it included "any kind of work that is deemed important enough for the state to construct," except, of course, as indicated in *Leavenworth County Comrs. v. Miller*, *supra*, those which are used exclusively by and for the state, as a sovereign, in the performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like; for education, the prevention of crime, charity, and the preservation of public health are all recognized functions of state government. The distinction between buildings for such purposes, and an elevator in which to carry on the business of storing grain, is too palpable to require argument, and the attempt to liken the latter to the former is little less than absurd.

The far-reaching consequences of restricting this constitutional inhibition to highways for travel and commerce can readily be foreseen. It would leave the state, through its legislature, at liberty, in every period of inflation or excitement, to embark in any and every other sort of enterprise, outside of its legitimate governmental functions, which might be deemed of public benefit. It would admit, not only of building grain elevators, but also of engaging in schemes of drainage.

irrigation, developing water powers, building public gristmills, public creameries and cheese factories, establishing stock yards and packing houses, and other like enterprises, almost without limit. Certainly, to engage in such enterprises as these at the expense of the taxpayers of the state is quite as much within the mischiefs aimed at by the constitution as to engage in the construction of highways for commerce; and there is even less excuse for it, for public highways for traffic and travel are of more general public importance, and less capable of being furnished by unaided individual enterprise.

The time was when the policy was to confine the functions of government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present, the tendency is all the other way, and towards socialism and paternalism in government. This tendency is, perhaps, to some extent, natural, as well as inevitable, as population becomes more dense, and society older, and more complex in its rela-

tions. The wisdom of such a policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government, it is their right to do so. But in order to do it they must amend the constitution of the state. The present constitution was not framed on any such lines.

It is always a delicate as well as an ungracious task to declare invalid an act of a co-ordinate branch of the government, and should never be done, except in cases free from reasonable doubt. But the legislature is not the people, any more than are the executive and judiciary. Like them, it is a branch—doubtless the most important one—of the government, and, equally with them, subject to the limitations imposed by the constitution; and, whenever it has clearly transcended those limitations, it is the duty of the judiciary to so declare. The act now under consideration seems to us so clearly in violation of the constitution, that it is our bounden duty to so hold.

Order reversed.

MICHIGAN SUPREME COURT.

George W. JENKS, Survivor, etc.,

v.

Frank PAWLOWSKI *et al.*, *Appts.*

(.....Mich.....)

A vendor of village premises upon condition that no intoxicating liquors shall be sold thereon cannot maintain a suit to enjoin the sale of such liquor in violation of such condition where he has subsequently sold adjoining premises without restriction, and such adjoining premises have been and are used for the sale of liquor, since such restrictions are sustained upon the theory that a person has the right in disposing of his property to prevent such a use by the grantee as may diminish the value of remaining land or impair its eligibility for other uses, and the fact that the omission of a restriction in the subsequent deed was a mistake will not affect the result.

(December 8, 1893.)

A PPEAL by defendants from a decree of the Circuit Court for Huron County in favor of complainants in a suit to enjoin the sale of intoxicating liquors on certain premises in alleged violation of a restrictive covenant in the title deeds. *Reversed.*

The case sufficiently appears in the opinion.

Mr. William T. Mitchell, with Mr. John F. Murphy, for appellants:

Complainants have not only lost but have waived any right they may have had to insist upon the observance of these conditions.

To insist on enforcing the condition as to one in the same locality with another unrestrained works a hardship and is unjust.

NOTE.—For conditions against sale of intoxicating liquor on premises conveyed, see note to Post v. Well (N. Y.) 5 L. R. A. 422.

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The party in whose favor the condition is reserved may be held to waive it by any act of his own which would render insisting upon it unjust.

Smith v. Barrie, 56 Mich. 314, 56 Am Rep. 391.

If it was the intent or plan of complainants to shut off the business in that locality for the benefit or preservation of their other property in that vicinity or to protect their homes from the noxious business they have broken their plan by selling other property without similar conditions and so assenting to the business.

Duncan v. Central Pass. R. Co. 85 Ky. 525.

By the sale of part of the same lot without the restriction and permitting the business on the part so sold, defendants had the right to interpret complainant's act as an abandonment of any right to enforce the condition.

Chippewa Lumber Co. v. Tremper, 4 L. R. A. 373, 75 Mich. 36.

Mr. Elbridge F. Bacon for appellee.

McGrath, J., delivered the opinion of the court:

This is a bill to enjoin the sale of intoxicating liquors upon premises in the village of Sand Beach, conveyed by complainant and another to Frank Pawlowski's grantor by deed dated October 2, 1888, which contained the following provision: "This conveyance and estate in the said premises hereby created is subject to the express condition that if the party of the second part, their heirs or assigns, shall at any time sell or keep for sale, or knowingly permit any person under them so to sell or keep for sale, any spirituous or intoxicating liquors, whether distilled or fermented, the entire title and estate in and to said premises conveyed and created shall cease, and the title in and to said premises

shall thereupon at once revert to and vest in the parties of the first part, their heirs and assigns forever, and it shall then be lawful for the parties of the first part, their heirs or assigns, to re-enter upon said premises, and said party of the second part, their heirs or assigns, and every person claiming under him or them, wholly to remove, expel, or put out." Prior to the date of the deed in question, complainant had conveyed several parcels of land in the village to other parties without restriction. The last of these deeds was dated May 20, 1888. It also appears that on January 24, 1885, complainant conveyed a parcel of land adjoining the premises in question to one Lowry by deed without restriction, and that Lowry, from 1888 and down to the time of the hearing, has kept a liquor saloon upon the premises so conveyed. Defendant Frank Pawlowski operated a meat market on his premises until August, 1891, since which time his son has kept a saloon therein. Until years after the establishment of the Lowry saloon, defendant had observed the conditions of his deed. Restrictions of this class are sustained upon the theory that a party has the right, in disposing of his property, to prevent such a use by the grantee as might diminish the value of remaining land, or impair its eligibility for other uses.

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Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 368; *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391.

But is there no mutuality in such agreements? It certainly cannot be said that a grantor has the right afterwards to sell an adjoining lot without restrictions, and thereby diminish the value of his former grantee's property, and impair its eligibility for other uses, converting the locality into a saloon locality, and still be allowed to insist upon the restriction. The damage to defendant's property by the permission and existence of Lowry's saloon is quite as apparent as that to complainant by reason of his ownership of an hotel and his residence in the same block. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 4 L. R. A. 373. It is no answer to say that the omission of the restriction in the deed to Lowry was a mistake. The consequences are the same to defendants. No proceedings have been taken to correct such mistake.

The decrees below must be reversed, and the bill dismissed.

Hooker, Ch. J., concurred in the result; the other Justices concurred with McGrath, J.

END OF CASES IN BOOK XXII.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with Oct. 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

The constitutionality of a statute providing for the state ownership of an elevator or warehouse for grain is denied as not coming within the exercise of police power and as violating the constitutional prohibition against carrying on works of internal improvement. (Minn.) 857.

The relations of the different parts of the government to each other which have arisen in several important recent cases are again considered in a Rhode Island case, touching the power of the governor to adjourn the general assembly. (R. I.) 716.

Gerrymander.

An apportionment act in the nature of a gerrymander is held unconstitutional in New Jersey on the ground that a division of counties into election districts is not constitutional. (N. J.) 548.

Interstate commerce.

The question what constitutes interstate commerce is involved in a telegraph case in which a message between two points in the same state, though passing through another state, is held not to constitute such commerce. (N. C.) 570.

The question of original packages is discussed very vigorously in a Pennsylvania case, which holds that to be protected as interstate commerce such a package must be of the form and size usual in such commerce, and not put up with a view to retail trade. (Pa.) 155.

The attempt to discriminate against meat from other states is held unconstitutional, although the ordinances involved did not on their face purport to discriminate against interstate business. (O. C. S. D. Ga.) 775.

The claim made in a Nebraska case that a contract for interstate transportation is not subject to state law prohibiting contracts limiting liability is denied, as is also the claim that state courts have not jurisdiction in such case. (Neb.) 835.

Courts.

The jurisdiction of a court to compel town officers to call a new election for a member of assembly is upheld in a Rhode Island case, against a contention that it is interference

with the right of the legislature to judge of the election and qualification of members. (R. I.) 65.

The inherent power of a court to provide facilities for its business is illustrated in a case deciding that a court may order the sheriff to operate an elevator in a court-house, notwithstanding the orders of the county commissioners against its use. (Ind.) 898.

Another recent case on the conflict between courts and county officers respecting court rooms holds that the power of courts to make repairs to court rooms cannot be extended to practical reconstruction of the court-house. (Ind.) 402.

Jurisdiction of the supreme court of Wisconsin under the constitution being appellate only, with certain exceptions, a statute attempting to provide for a review of the evidence and for judgment upon questions of fact regardless of the decision below, is held unconstitutional. (Wis.) 609.

Officers.

The contest of the right to municipal offices presents several interesting questions in a Connecticut case in respect to the action of the mayor and of the aldermen in voting and in appointments to office. (Conn.) 653.

The inherent power of the common council of a city to remove a city counselor for whose removal no provision is made is denied in a Michigan case which suggests the interesting question as to implied powers of municipal councils. (Mich.) 842.

The power of a governor as to the appointment of officers to fill vacancies is discussed at length in a Wyoming case, in which an appointment to fill a vacancy until the legislature meets is held not to expire on the meeting of the legislature so as to create a vacancy. (Wyo.) 751.

The clerk of a district court in Kansas is held not liable for a lack of skill or honest errors of judgment in making a search and certifying to the result, as it is not his duty although he supposed it to be, and received twenty-five cents for his services. (Kan.) 99.

The distinction between judicial and discre-

tionary action of county commissioners is discussed in a case which holds that the allowance of additional salary to judges under Indiana statutes is discretionary and not subject to an appeal. (Ind.) 516.

Elections.

Legislative control over municipal elections is elaborately discussed in a Florida case in which, among other things, the use of official ballots and the qualifications of voters are involved. (Fla.) 124.

The question whether the provisions of the Australian ballot law against distinguishing marks are mandatory or directory is settled in an Indiana case to the effect that they are mandatory. (Ind.) 468.

Jurors.

A dentist is held not to be a practitioner of medicine exempt from jury duty, although he is registered as a dental surgeon according to law and has a diploma from a reputable dental college. (Mo.) 799.

Aliens.

The effect on a woman citizen of her marriage to an alien is considered in a federal case, which holds that she does not become expatriated, where the parties reside in this country. (C. C. E. D. La.) 148.

Highways.

The important question of the extent of municipal authorities to permit the use of streets for private purposes is unusually well presented in an Illinois case, in which an ordinance, attempting to vacate a portion of a street for the sole purpose of allowing its use by a private person, was held void. (Ill.) 893.

Taxes.

The question of exemption from taxation of the capital stock of a manufacturing company is presented in Pennsylvania cases, holding that the power of a corporation to engage in mining for the supply of its own raw material does not defeat its exemption. (Pa.) 228.

And this is held even in case such right of mining is actually exercised, but in that case there is required an apportionment of the capital, allowing the exemption of that part only which is used in manufacturing. (Pa.) 282.

The exemption of the property of charitable institutions is held to be limited under the Montana constitution to property used by them. (Mont.) 684.

Taxation of the stock in trade of a partnership is to be made at the place of business and may properly be made to the firm instead of to the members, under a constitutional provision that goods permanently located may be assessed at the place of location. (Md.) 477.

A striking departure from the ordinary course of tax proceedings initiated by a Mississippi statute is declared unconstitutional. (Miss.) 346.

License tax.

The constitutionality of a tax on the exercise by a lawyer of his profession is again affirmed. (Fla.) 699.

A license fee of \$1,000 on emigrant agents in certain counties only, who contract for laborers to work outside the state, is held to be unconstitutional as a police regulation, because

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of its prohibitory character and as a tax because of its want of uniformity. (N. C.) 472.

Common law.

The validity of an oral contract for lands, in the absence of any statute on the subject, is upheld in an Oklahoma case, which holds that the common law, unmodified by English or American statutes, was the law of Oklahoma on the entry of settlers. (Okla.) 501.

Retrospective laws.

The constitutionality of retrospective laws is denied in the case of a statute allowing parol evidence to identify land which is not sufficiently described in a writing. (N. C.) 379.

Judgments for the sale of lands or interests therein are held in a Kansas case to be unaffected by a subsequent statute extending the time for redemption from such sales, although the sales have not yet been made. (Kan.) 465.

Constitutional rights in property.

The right to the use of a street in front of abutting lots is held, on discussion of the conflicting decisions, to be property, which cannot be taken without compensation. (Md.) 668.

The rights of abutting owners, even when they do not own the fee of a street, are discussed at length in a North Carolina case, which holds that compensation is necessary on damaging their property by narrowing a street or making it unsafe or dangerous, by constructing a steam railroad therein. (N. C.) 627.

The power of the legislature to compel a railroad company to receive mileage tickets of other companies is denied as an unconstitutional taking of property without compensation, where no provision is made for the redemption of such tickets. (Mass.) 112.

The noise and vibration of a pumping station for city waterworks is held to constitute an actionable nuisance as to the owner of adjoining property, whose buildings, though subsequently erected, are made untenable thereby; and general authority to the city to construct necessary structures for the waterworks will not justify the nuisance, even if the legislative act authorized it, without compensation to the injured person. (N. Y.) 241.

The constitutional right to make contracts is expressly declared in an Illinois case to be a property right, and a statute compelling weekly payment of wages by certain corporations is held to infringe the rights of employes, as well as of the corporations. (Ill.) 840.

The power of the legislature to interfere with the use of one's own property is illustrated by a decision upholding a statute prohibiting the sale, offering for sale, or possession during the close season, of fish or of trout artificially propagated on one's own premises. (Mass.) 439.

The right of riparian owners to make wharves is held in an Oregon case to be property which cannot be destroyed by revocation of the license to build such wharves, without process of law and due compensation therefor. (Or.) 786.

Eminent domain.

An attempt to take tide lands for railroad purposes is defeated in a Washington case which holds that tide lands are not included in the term "state lands," under the con-

stitution and statutes of that state. (Wash.) 217.

The constitutionality of a statute authorizing a condemnation of land for a private road, on which the decisions have been in conflict, is denied in a Nebraska case. (Neb.) 496.

Public improvements.

The necessity of benefits to be sustained on an assessment for local improvements is clearly shown in an Oregon case which decides that an assessment without benefits is the taking of property without due process of law which the courts may enjoin. (Or.) 718.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

See also, as to Interstate Commerce, *supra*, I.

Joint or several.

The question whether a subscription contract is joint or several is decided in case of a somewhat peculiar contract by holding the contract to be several only in part. (Minn.) 80.

Unilateral.

The validity of a unilateral promise to pay for property is presented in a case as to a so-called "wheat ticket," which is held valid although no consideration was expressed thereunder when a good consideration existed. (Minn.) 617.

Consignment.

The title to goods consigned to an agent for sale is discussed in a West Virginia case, which holds that the goods belong to the principal until a bona fide sale is made. (W. Va.) 850.

Sale.

The question of the passing of title by delivery of property to a carrier, which is so frequently raised, is decided in a New Jersey case in favor of the passing of title when delivery is made to a carrier to be forwarded, under instructions of a purchaser. (N. J.) 415.

Warranty.

A liability for breach of warranty, disconnected from any sale of property, is upheld in case of false representations, though made in good faith, as to the safety of a horse for a lady to drive, by which she was induced to drive the horse on trial. (Wis.) 512.

The rule which denies any implied warranty of quality for fitness is applied to the sale by stock breeders of an animal that is bought for breeding purposes. (Wis.) 187.

Bills and notes.

The liability of the maker of negotiable paper which is fraudulently raised is considered in a federal case, holding him not liable for the raised amount. (U. S. C. C. App.) 686.

Checks.

The extinguishment of the liability of the indorser of a check by failure to present it in time is held to extinguish also his liability on an indebtedness for payment of which the check was indorsed. (Tenn.) 785.

Bonds.

The liability on an official bond for moneys prudently deposited in a bank is measured by 22 L. R. A.

Sunday.

The constitutionality of a Sunday law is vigorously attacked in a Maryland case, which unhesitatingly declares the validity of the law, although as the writ of error was quashed the question was not strictly open for decision. (Md.) 731.

So in Michigan prohibiting the business of barbers on Sunday under severer penalties than those imposed on other business, but excepting those who keep Saturday as the Sabbath, is held not to be unconstitutional. (Mich.) 696.

the law of bailment, and is not extended by a promise in the bond to pay over moneys received, unless constitutional or statutory provisions have changed the rule. (Colo.) 449.

Deed.

See also *infra*, VI.

Restrictions in a deed on the sale of intoxicating liquors are held waived by the grantor's failure to incorporate them in subsequent deeds of neighboring premises. (Mich.) 863.

A deed never delivered, although placed in escrow, is not a sufficient memorandum to satisfy the statute of frauds, if the terms of the contract are not recited. (Ill.) 278.

Leases.

See also *infra*, VI.

The right of a tenant in respect to rent on the destruction of a building is involved in a Washington case, allowing him to recover back rent paid in advance. (Wash.) 618.

Public policy.

The invalidity of a contract on grounds of public policy is illustrated in a case denying recovery on a mortgage assigned merely to evade taxation. (Kan.) 709.

Restraint of trade.

The doctrine of the invalidity of contracts in restraint of trade is somewhat strongly illustrated in a Massachusetts case, which denies the validity of a stipulation not to engage in manufacturing or selling fire alarm or police telegraph machines for a period of ten years. (Mass.) 678.

Contract of officer.

The question of the right of an officer to compensation for services rendered under a contract with the body of which he is a member is raised in respect to a physician performing services by direction of the board of health of which he is a member, and he was allowed reasonable compensation. (Ark.) 855.

As to libel.

Agreeing to indemnify a publisher against costs and damages on account of anything in the book does not show an intent to publish a libel, which will make the agreement unlawful. (Mass.) 253.

Drunkenness.

A contract by an intoxicated person for the sale of property at an inadequate price to one who knew of his incapacity, is held to be insufficient to relieve the possessor from liability for fraud or conversion. (Ohio) 846.

Base ball player.

The claim of the right to discharge a base ball player under a custom or usage on ten days' notice, if he is deficient in playing, is denied under a special contract of hiring for a particular time; but ordinary skill and efficiency of such players is held to be the measure required. (Md.) 690.

Offensive business.

The establishment of an undertaker, in which dead bodies are prepared for burial and sometimes embalmed and dissected, is held to be a business injurious or offensive to the neighboring inhabitants, within the terms of a restrictive agreement. (N. Y.) 182.

Carriers.

The right of a passenger to a seat is involved in a Mississippi case in which damages are given for a conductor's abuse of a passenger who asks for a seat and is compelled to stand, while a seat might have been furnished him. (Miss.) 259.

The validity of a condition in a free pass against any liability whatsoever for injuries to the bearer is upheld in a Washington case respecting a street railway injury. (Wash.) 794.

A strict construction of a carrier's contract with a passenger in favor of the carrier is made in a New Jersey case, which denies the passenger's right to take an ordinary train from a junction to complete his journey, instead of waiting for the so-called connecting train, to which he is held restricted by a round-trip ticket to a point on a branch road, excluding the right to stop off. (N. J.) 251.

Damage for detention of cars, on which there have been few decisions, is held lawful in a Virginia case. (Va.) 580.

A Pennsylvania case of great importance upholds the right of a carrier to give lower rates to a manufacturing establishment for the transportation of coal than to coal dealers for similar service, on the ground that the conditions are dissimilar, because the manufacturing company uses the coal in making products which in turn furnish a large amount of transportation to the carrier. (Pa.) 268.

Insurance.

The validity of an oral contract for insur-

ance is considered in an Ohio case, in which it is held that such contracts may be valid. (Ohio) 788.

The doctrine that a life insurance policy is a wagering contract, in the absence of any relationship by blood or marriage, or of some contractual relation between the parties by reason of which the death of the person whose life is insured may cause damage to the beneficiary, is applied to a case of insurance on the life of a church member for the benefit of a college owned and controlled by the church. (N. C.) 291.

Insurance taken by a carrier "to cover the liability . . . as carriers and warehousemen" is held not to cover the carrier's liability under a collateral contract with the shipper to procure insurance on the property. (Minn.) 890.

The effect upon the rule that warranties in an application for insurance must be literally true without regard to their materiality, of the fact that the answers were made by the company's agent, who is charged with that duty, after full statement of the facts to him, is discussed in an important federal case, in which the company is held bound by the agent's mistake or misconstruction of the terms of the application. (U. S. C. C. App.) 325.

The effect of an insurance agent's knowledge of the facts and his acceptance of the situation as equivalent to that required is held in a Michigan case to prevent a forfeiture for breach of warranty. (Mich.) 819.

The construction of an accident policy, as to the time within which notice of death must be given, is held to require notice only from the time when the fact of death is known, although the policy fixes the time with reference to the date of death. (N. Y.) 483.

The requirement of "sole and unconditional ownership" of the insured is held not to exist in a vendor in a contract of sale, distinguishing some similar cases in the same state. (Mich.) 527.

The interpretation of an accident insurance policy in respect to persons found dead in shallow water presents several interesting questions as to what constitutes disease and the cause of death. (U. S. C. C. App.) 620.

III. CORPORATIONS AND ASSOCIATIONS.

The presumption that a bank is a corporation instead of a partnership is to be made against one who asserts a partnership liability of a member or stockholder, at least where the proof shows that it was organized with a board of directors and declared dividends, which were paid by a cashier's check. (Pa.) 276.

Removal by a corporation of its property, place of business, and all its agencies from the state, is held ground for dissolution. (N. C.) 677.

The doctrine that a corporation cannot escape liability for negligence in the conduct of a business because the business is *ultra vires* is strongly illustrated and emphasized in a Massachusetts case. (Mass.) 364.

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The power of a corporation after insolvency to make a preference, in this case by mortgage, between its creditors, is discussed very elaborately in a Texas case, which denies the power. (Tex.) 802.

On the other hand preferences given by corporate officers to themselves are upheld by a federal court in Michigan, following the state decisions. (U. S. C. C. App.) 817.

The lawfulness of a change in a church constitution is considered by the supreme court of Pennsylvania in one of the cases arising out of the division of the Church of the United Brethren in Christ, which holds the new constitution valid and that the adherents thereto, and not the dissenters therefrom, constitute the church. (Pa.) 161.

IV. DOMESTIC RELATIONS.

The question of estoppel of a married woman by deed is discussed in a Texas case denying

the estoppel under a statute authorizing her to convey her separate estate. (Tex.) 778.
See also, as to injury to wife, *infra*, VI.

V. FIDUCIARIES AND REPRESENTATIVES.

See, as to public officers, *supra*, I.; as to offi-

cer's contract, *supra*, II.; as to negligence of village trustees, *infra*, VI.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

Arrest.

Although arrest without possession of a warrant therefor is illegal, it is held that the officer is not liable for false imprisonment if the accused is not damaged by the officer's failure to have possession of the warrant. (Tex.) 87.

Trespass of cattle.

The fact that a fence in Texas, where cattle are allowed to run at large, was sufficient when built to exclude all cattle in the neighborhood will not affect the question of its sufficiency as against an exceptionally small class of young cattle, such as calves and yearlings, which are afterwards brought in. (Tex.) 105.

The common-law rule as to the duty to restrain one's domestic animals is discussed at length in an Illinois case, which holds that under the Act of 1874 the common-law rule, though long held inapplicable to the conditions existing in that state, is now established. (Ill.) 55.

Negligence as to building.

The duty of an owner of a building to keep it safe for firemen, who enter it under implied license to extinguish a fire, is denied on the ground that such firemen are mere licensees. (Ind.) 198.

Obstruction to channel under bridge.

Obstructions in a navigable channel between piers of a lawful railroad bridge are held to create no liability on the part of the railroad company, if it had no agency in causing them, since it had no control over the channel. (Fla.) 868.

Libel and slander.

The exemption of a witness from liability for defamatory statements in testimony is sustained, unless it is shown that the words were impertinent and malicious. (Or.) 886.

In Louisiana the English rule of absolute protection of defamatory matter in pleadings is not followed, but the protection depends on the good faith of the allegation. (La.) 649.

Physician's liability.

The treatment of a patient by a physician is to be tested by the general doctrines of his school and not by those of other schools. (Conn.) 843.

Injury to wife.

An action by a husband and wife for personal injuries to her is held in New Jersey to be defeated by his contributory negligence on the ground that he has a power coupled with an interest in the suit. (N. J.) 460.

Carrier's negligence.

The presumption of negligence on the part of a carrier, when a passenger is injured in a collision, is held insufficient to create a liability on the part of the railroad company when the facts proved show that the criminal act of a third party was the cause of the accident. (Pa.) 806.

At railroad crossing.

The question of the duty to stop and listen before attempting to cross a railroad is presented in an unusual way in a Michigan case, in which, against the dissent of a minority of the court, it is held that the failure to stop and listen is not negligence as matter of law, although it is on a dark night, so as to prevent a recovery for injuries done by an engine running backwards, as the traveler might reasonably expect that a train in the night would have a headlight. (Mich.) 83.

The negligence of a street-car driver is held not to defeat the right of a passenger in such car to recover for negligence of a railroad company, where he is injured in a collision at a crossing. (Pa.) 606.

So the joint liability of a railroad company and a street railway company for negligence resulting in a collision producing injury to a street-car passenger is held to exist, with the right to uphold the action against one only, if the other is found not negligent. (N. J.) 261.

The question of an implied license of the public to cross a railroad at a certain place is considered in a case which denies that the use of the crossing by the public without objection constitutes a license as a matter of law. (Mass.) 575.

The duty as to signals of trains at a crossing of railroad and highway, where one passes under the other, is presented in a case which holds that the rules and provisions as to grade crossings do not apply. (Wis.) 680.

Crawling under cars across a highway is held contributory negligence notwithstanding a custom to do so. (Idaho) 725.

Master's liability.

The track owned by a manufacturing company, over which a railroad ran cars to deliver freight, is not a part of the railroad company's ways within the Massachusetts Employers' Liability Act. (Mass.) 233.

A very full discussion of the subject of superintendence, within the meaning of an Employer's Liability Act is found in an Alabama case, in which an engineer, although usually

aided by a helper, is held not to be in the exercise of superintendence while operating his engine. (Ala.) 861.

The question of the liability of a master for negligence of servants resulting in injury to a mere volunteer is clearly shown in a case which holds that like a trespasser he is entitled to recover for failure of servants to use reasonable care to avoid injuring him after knowledge of his danger. (Minn.) 668.

The liability of a railroad company for a collision caused by a misplaced switch, which resulted from the malicious act of a discharged employé, is discussed in a Georgia case, in which the company had failed to get back a switch key from such discharged employé. (Ga.) 815.

The improper loading of a flat car resulting in injury to a brakeman is held, in a Michigan case reversing a former decision on rehearing, not to make the company liable, where the car was not defective and a competent inspector had been furnished. (Mich.) 392.

The question of the liability of a railroad company for the wrongful act of a brakeman in putting a person off a train in rapid motion is upheld in a Kentucky case, which clearly distinguishes between an act of wanton injury, which is purely malicious, and one performed for the purpose of expelling an intruder. (Ky.) 72.

Injury on highway.

A child playing in a highway is held lawfully there and entitled to protection against negligence in leaving a dangerous embankment, which falls and injures the child. (W. Va.) 561.

Village trustees are held to act officially and not to be personally liable in ordering by vote that a stone crusher be set up and operated at a ledge of rock purchased by them. (Vt.) 824.

By electric car.

The question of lawful speed for electric street-cars is discussed in a New Jersey case which denies their right to run any faster than is compatible with the safety of persons making lawful and customary use of the street. (N. J.) 874.

By electric wires.

The duty of an electric railroad company to place wires where they will prevent dangerous contact of its uninsulated wires with the insulated wires of a telephone company is declared in a Wisconsin case, and enforced by mandamus. (Wis.) 759.

The liability for injury from an electric shock caused by accidental contact with a telephone wire is the question involved in a case in which negligence in leaving the wire near a sidewalk is held to be the proximate cause, although accidental contact of this wire with other heavily charged wires occasioned the injury. (Or.) 685.

Nuisance.

Nearly, if not quite, the most important decision concerning the sale of intoxicating liquors is that of the supreme court of Indiana, which holds that a saloon may constitute an actionable nuisance as to adjoining property owners, although it is occupied by a person who is duly licensed to sell intoxicating liquors, and although no disorderly conduct at the saloon is alleged. (Ind.) 577.

VII. PROPERTY RIGHTS; LIENS; GIFTS; WILLS.

The general language of a deed with covenants sufficient to pass the estate of the grantor is not limited by a clause which recites that it is intended to convey absolutely all the interest of his wife who is named therein as one of the grantors but who has only an inchoate dower interest therein. (Ind.) 244.

Contingent remainders.

The distinction between contingent and vested remainders is discussed at much length in a North Carolina case which holds that a remainder to a person in case he survives another is contingent and that unless he outlives the former life tenant the rule in *Shelley's Case* cannot apply to give him an indefeasible fee, although the fee is limited to his heirs. (N. C.) 598.

Record title.

The effect of permitting the record title of land to remain in another is held not to give the creditors of the latter any right to attack a conveyance by him to the owner where they rely in giving credit only on their debtor's representations and possession. (Cal.) 256.

Right of abutting owner.

See also *supra*, L.

A novel case in Minnesota holds that an abutting owner cannot maintain and operate a private railroad or switch in that part of a street of which he owns the fee, to the damage of the abutting owner on the opposite side, by 23 L. R. A.

polluting the air and depreciating the rental value of his premises. (Minn.) 565.

Easement of light.

Interference with the right to light for the windows of the leased building, although it depends on express covenant or agreement, is held in an Illinois case to constitute an eviction. (Ill.) 544.

An implied right to have unobstructed access of light and air to a well or open space for the use of the upper floors of a building is sustained in a Massachusetts case in favor of a tenant against the landlord, where it was necessary to the enjoyment of the premises. (Mass.) 536.

Gas.

The right of an owner of property to do what he will with his own is illustrated in a novel case in which the owner of a gas well is held to have the right to allow the gas to escape and go to waste, although the owner of adjoining wells complains that gas is thereby drawn from his well. The question of malice is discussed, but it is found that the well was dug with good motives, although the motive in allowing it to go to waste, while the other party was willing to pay the expense of plugging the well, is not discussed. (Pa.) 141.

Surface water.

The common-law rule as to surface water is held applicable in South Carolina, giving a

landowner the right to throw it back on his neighbor, when necessary to protect his own property. (S. C.) 246.

Watercourses.

The nature of a watercourse is discussed in a case which denies that riparian rights can exist in a sluiceway which has no water in it except when the tide flows through it. (Conn.) 45.

Accretions.

The claim that accretions will belong to the person with whose land the point of contact is first made cannot be upheld, where they extend along the front of different owners. (Mo.) 591.

Party wall.

The right to tear down a party wall and rebuild it is asserted in respect to a wall, each part of which is owned in severalty by the adjoining owners, providing the party removing it replaces it at his own expense and with the least inconvenience and there is a reimbursement of damages occasioned thereby to the adjoining owner. (Md.) 632.

Trademark.

The words "sarsaparilla and iron" are held not to constitute a valid trademark for a medicinal compound, but a descriptive imitation of the label on which they are used is held to be an infringement. (Cal.) 790.

Tenancy by entirety.

An instance of holding personal property by the entirety is furnished in a Pennsylvania case, where a mortgage was taken in the joint names of husband and wife, on the sale of lands held by such tenancy. (Pa.) 594.

While tenancy by the entirety is recognized, a conveyance to husband and wife in joint tenancy is held to make them joint tenants. (Ind.) 42.

Church pews.

The rights of pew holders in a church are

discussed in a Massachusetts case, in which the owner of a pew is held entitled to compensation for its destruction, except in case of necessity. (Mass.) 206.

Liens.

The conflict of lien between chattel mortgages and claims for keeping animals is decided in Alabama in favor of a prior mortgage. (Ala.) 78.

Charities.

The indefiniteness of charitable gifts is a question discussed in respect to a devise to trustees "for some charitable purpose." (Tenn.) 179.

Signature by proxy.

Signature by proxy to a sheriff's deed in the sheriff's presence and at his request, is held as efficacious as if made by the sheriff himself. (Ala.) 297.

Will.

Signature to a will by mark is held valid, under a statute requiring the name of the testator to be written near the mark, where the name was written only at the beginning of the will and the mark is at the end. (Cal.) 370.

A signature to a will is held unaffected by the fact that testator's name was not written in her presence, where words showing that it was written at her request are added in her presence. (S. C.) 802.

The person writing her name may also be a subscribing witness. *Id.*

The competency of attesting witnesses to a will is declared in a Minnesota case to be tested with reference to the time of execution and not of the probate of the will. (Minn.) 481.

A peculiar case of an alleged devise of land is shown where the will merely gave a chest and its contents, among which was a deed of the land. (Mass.) 153.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

The effect of service on a foreign corporation made in another state to give jurisdiction to render a personal judgment is expressly denied in a South Carolina case, although by the statutes of that state, as well as of others, provision is made for such substituted service against foreign corporations. (S. C.) 49.

The abuse of the process of a court by issuing attachment for account books is rebuked in a Michigan case by compelling the surrender, not only of such books, but of copies taken for the purpose of evidence. (Mich.) 698.

A summons naming the defendant only by his surname and the initial of his given name stating that his full name is unknown must be served on him personally under the Nebraska code, and cannot be left at his residence. (Neb.) 578.

Choice of remedy.

The remedy of a servant wrongfully discharged, who was paid up to the date of discharge, is held to be exhausted by the recovery of one week's wages, although he might have had a much larger recovery by pursuing the proper course. (Md.) 74.

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Attachment.

Attachment of property in the hands of a trustee is discussed in a case which holds that the comptroller of currency had the legal title to property of the Freedmen's Savings & Trust Company, which was subject to attachment in his hands. (Fla.) 453.

Partition.

An unusual application of the powers of a court of equity to do justice is presented in a case which requires a partition of land owned entirely by one person, where prior purchases of timber had been made from persons then owning an undivided interest in the land. (Mich.) 641.

Garnishment.

Payment by a garnishee into court in advance of adjudication without deduction of wages due a householder for personal labor which are exempt is held to be at his peril, under the Michigan statutes. (Mich.) 732.

Garnishment of a debt due to a nonresident is involved in a Washington case which upholds the garnishment of a foreign insurance

company for a loss payable in another state. (Wash.) 287.

Injunction.

The question of the right to an injunction against false publications, injurious to business, is presented in an Indiana case, in which the injunction is upheld. (Ind.) 332.

The subject of injunctions against trespass to cut timber is discussed at length in a Florida case. (Fla.) 283.

Damages.

With much discussion and against dissent, the supreme court of Florida overrules a prior case and holds that for breach of contract to deliver an unexplained cipher message, only nominal damages, or at least the price paid for transmission and delivery can be recovered. (Fla.) 434.

A canal across a farm is held not to divide it into two parcels for the purpose of computing damages for constructing a railroad across one of them. (Pa.) 443.

Evidence.

The admissibility of evidence of payment of a third person's claim as constituting an admission of liability is discussed at length in a New Hampshire case which holds it to be a preliminary question for the justice presiding whether it was intended as admission or as a purchase of peace. (N. H.) 763.

Burden of proof.

The burden of proof as to testamentary ca-

pacity is elaborately discussed in a case which holds that the burden is on the proponents of a will to establish sanity, but that when uncertain on the evidence there is a legal presumption of sanity. (Conn.) 90.

Presumption.

The presumption of negligence arising from injury to a passenger does not exist, where the accident was caused by a fall upon a train of a rock which became detached from a natural hillside several hundred feet from the railroad cut. (Pa.) 351.

Set-off.

The right of an administrator to retain a distributive share and apply it on the distributee's indebtedness to the estate is declared to exist without any statute, and to continue against an administrator of such distributee. (Me.) 177.

The relation of co-sureties is illustrated in a somewhat unusual case, where a legacy from one to the other is held subject to deduction of the amount which the latter ought to contribute for a default of their principal. (Pa.) 444.

Limitation of time.

Limitation of actions in favor of the drawer of a check is held to begin to run, at the latest, after the lapse of a reasonable time from the payment of the check. (Neb.) 110.

A statute limiting the time for appeal is held inapplicable to a decree previously entered. (Fla.) 48.

IX. CRIMINAL LAW AND PRACTICE.

The constitutionality of a statute authorizing the court to determine the degree of crime is upheld, where a plea of guilty of murder is made. (N. H.) 744.

Presumption.

The presumption of innocence is held inapplicable on application for a habeas corpus by one detained under a regular mittimus. (N. C.) 678.

Anti-trust law.

A very important case construing an anti-trust law is decided in Texas to the effect that illegal combinations restricting trade do not include all contracts restricting trade, and that a combination of insurance companies to make uniform rates is not prohibited. (Tex.) 488.

Seduction.

Seduction accomplished on promise of marriage, conditioned on pregnancy resulting, is not within a statute making seduction under promise of marriage a criminal offense. (Or.) 840.

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Profanity.

The doctrine that profane swearing is not a common nuisance, unless it is heard by citizens and the utterance is of an offensive and annoying character is applied in a case which holds that an indictment is insufficient, where it charges merely that the profanity was on the public streets "to the evil example and to the common nuisance of the good citizens of the state." (Pa.) 353.

Place of crime.

The offense of shooting at another is held committed in Georgia, where the shot is fired from South Carolina and strikes the water near a boat on the Savannah river within the limits of Georgia. (Ga.) 248.

The place of sale of intoxicating liquors sent by express C. O. D. on a postal card order is held to be the place where it was delivered to the carrier. (W. Va.) 430.

See, as to Sunday law, *supra*, I.

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GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ABSTRACTS.

1. A clerk is not liable for want of skill or honest errors of judgment in making an abstract of title and certifying to the result, although he received 25 cents therefor, where it is not his duty to make such search, but he erroneously supposed that it was, and he was neither a lawyer nor engaged in the business of making such abstracts. *Mallory v. Ferguson* (Kan.) 99

2. It is not part of the official duty of a clerk of the district court of Kansas to make and certify to searches of the records in his office for judgments, liens, or suits pending affecting the title to real property. *Id.*

3. It will not be presumed, in the absence of evidence, that a clerk whose duty it was not to make abstracts of title, and who was not a lawyer nor engaged in the business of making abstracts, agreed to make a careful search and correctly certify as to the condition of the title, merely because he signed a certificate to an abstract of the title and received 25 cents therefor. *Id.*

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ACCOUNTS. See **WILLS**, 11.

ACCRETIONS. See **WATERS**, 4, 5, **NOTES AND BRIEFS**.

ACTION OR SUIT.

1. No formal rescission of the contract is necessary before bringing an action for damages in obtaining property from an intoxicated person at an inadequate price. *Baird v. Howard* (Ohio) 846

2. An employé wrongfully dismissed from service in breach of the contract of hiring cannot maintain an action for unearned wages as such, although he holds himself in readiness to perform his part of the contract; but his action must be for breach of the contract. *Olmstead v. Bach* (Md.) 74

3. One dismissed from service in breach of a contract to employ him for one year at a certain sum per week, payable weekly, can maintain but one action for the breach, and will not be permitted to maintain a separate action for each weekly installment as it falls due. *Id.*

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4. Previous employment of a special judge to whom a case is sent on change of venue, as counsel for one of the parties in a similar proceeding, this not being a statutory cause for change of venue, does not make it necessary to grant a second change, where but one change is allowed by statute for any statutory cause. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 882

5. Other tenants who caused the damages are not necessary parties to an action by tenants against a landlord for interference with the enjoyment of the premises, where the time for enjoyment has passed and the only relief that can be granted is by way of damages. *Case v. Minot* (Mass.) 536

NOTES AND BRIEFS.

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ADJOURNMENT. See **COURTS**, 5; **LEGISLATURE**.

ADVERSE POSSESSION.

1. A conveyance of a pew, sufficient in every respect to convey real estate except in the want of seals or words calling for seals, is a basis of adverse possession, if the grantees occupied under it, believing their title good. *Aylward v. O'Brien* (Mass.) 206

2. The possession of real estate by one who enters under an agreement to purchase from the owner, but without paying the consideration price, cannot be adverse until he repudiates the seller's title and asserts his own title to the property. *Spratt v. Livingston* (Fla.) 458

AGISTMENT. See **LIENS**.

AIR. See **EASEMENTS**, 2, 6, **NOTES AND BRIEFS**.

ALIENS. See also **EXPATRIATION**.

1. The relation of husband and wife is not inconsistent with one being a citizen and the other an alien. *Comitis v. Parkerson* (O. C. E. D. La.) 148

2. A woman citizen of the United States who never intends to leave the country, and never in fact does leave it, does not become expatriated and an alien by marriage with a subject of Italy who previous to his marriage has settled in the United States without intent to return to Italy, but who has never taken any steps toward naturalization. *Id.*

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ALTERATION OF INSTRUMENTS.

See **BILLS AND NOTES, 1.**

ANIMALS. See also **FENCES; LIENS.**

1. The owners of domestic animals are liable at common law for damages committed by them in trespassing, without regard to the negligence of the owners in permitting them to escape, or to the fact of enclosure, or lack of enclosure, of premises on which they are trespassing. *Bulpit v. Matthews* (Ill.) 55

2. The common-law rule as to the duty of the owners of domestic animals to keep them from trespassing exists in Illinois, under the Act of 1874, except in districts where a vote taken under the statute has established the contrary rule, although for a long period of time the common-law rule was rejected in that state as inapplicable to its conditions. *Id.*

NOTES AND BRIEFS.

Animals; liability of owner for trespass of cattle:—general liability for trespassing stock; from highway; driving cattle on lands of another; lack of division fences; removal of division fence; defects in partition fence; liability for trespass of stock of third party; as between owner and keeper. 55

ANTI-TRUST LAW. See **CONSPIRACY, NOTES AND BRIEFS.****APPEAL AND ERROR.** See also **COUNTIES.**

1. Permitting witnesses to give an opinion as to the amount of damage inflicted on abutting property by the construction of a viaduct in a street is not reversible error, where the jury is instructed that the damage will be the difference in the value of the property before such construction and immediately afterwards. *Spencer v. Metropolitan Street R. Co.* (Mo.) 668

2. No writ of error lies to the Court of Appeals of Maryland from a decision of the circuit court on an appeal from the judgment of a justice of the peace. *Judgeford v. State* (Md.) 721

3. The jurisdiction of the Supreme Court of Wisconsin under the Constitution being appellate only, except in specified cases, a statute attempting to make it the duty of that court to examine and review the evidence preserved by bill of exceptions, and give judgment according to the right of the case, regardless of the decision by the court below, upon questions of fact as well as of law,—is unconstitutional. *Klein v. Valerius* (Wis.) 609

4. The provision of Fla. Act of May 11, 1898, chap. 4180, that all appeals in chancery, whether from final decrees or interlocutory orders, must be taken within six months after the entry of the decree or order appealed from, 23 L. R. A.

has no retroactive effect, but applies only to decrees and orders entered after the Act took effect, which was Aug. 1, 1893, or sixty days after the final adjournment of the Legislature. *Sammis v. Bennett* (Fla.) 48

5. An appeal from a decision in *quo warranto* will not be dismissed because the appellant pending the appeal has been removed from office for insubordination in taking the appeal. *State, Rylands, v. Pinkerman* (Conn.) 653

6. A motion to strike out plaintiff's testimony is waived if defendant proceeds to introduce evidence. *Manufacturers' Acci. Indemnity Co. v. Dorgan* (O. C. App. 6th C.) 620

7. Exceptions taken during the trial to the rulings of the trial court may be settled and saved in accordance with Id. Rev. Stat. § 4426, or they may be settled after the trial, in accordance with § 4480, or in the statement on motion for a new trial, and when so settled and saved will be reviewed by the supreme court on appeal. *Rumpel v. Oregon Short Line & U. N. R. Co.* (Id.) 725

8. A transcript of judicial proceedings, which is not made a part of the bill of exceptions, cannot be considered on appeal, although an offer of it in evidence is recited. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 332

9. The findings of the trial court should receive such construction as will uphold, rather than defeat, its judgment thereon. *Breeze v. Brooks* (Cal.) 254

10. The finding of a referee affirmed by the trial court is conclusive as to whether or not an attempted amendment of the confession of faith of a religious society was so radical as to destroy the identity of the church, unless clear error in the finding is pointed out. *Schlichter v. Keiter* (Pa.) 161

11. A verdict that facts do not sustain a charge of negligence cannot be disturbed on appeal. *Gibson v. Huntington* (W. Va.) 561

12. Error in sustaining exceptions to portions of an answer is immaterial, if the averments excluded could not have changed the result. *Smith v. McDowell* (Ill.) 393

13. Refusal to allow answers by witnesses is not prejudicial error, if no possible answers could have been substantially material. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

14. The exclusion of evidence of payment of a third person's claim as an admission of liability is not ground for reversal, where it does not appear that it was against the evidence to hold that it was a mere purchase of peace. *Colburn v. Groton* (N. H.) 763

15. It is reversible error to instruct the jury in a proceeding to establish a will, that if from the whole evidence "it is left uncertain whether or not the testator was of sound mind, then it is left uncertain whether a person of sound mind, within the meaning of our statute, has made the will, and the will should not be sustained," although preceded by an intimation that the proponent has the burden of establishing the will by only a fair preponderance of evidence, and followed by a statement that to defeat the will because of insane delusions they should be established by "a fair prepon-

derance of evidence." *Re Barber's Estate* (Conn.) 90

16. To instruct the jury that the burden is on the proponents of a will to establish the testator's sanity, and that they must fail if at the close of the evidence "the scales stand evenly balanced," without instructing as to the legal presumption of sanity, is reversible error. *Id.*

APPORTIONMENT. See COURTS, 7; ELECTION DISTRICTS, NOTES AND BRIEFS.

ARCHBISHOP. See PEW, 2.

ARREST.

1. A warrant in the hands of a marshal or sheriff will not justify a deputy who does not have possession of it, in making an arrest, where the statutes require the warrant to be exhibited on request to the person arrested. *Cabell v. Arnold* (Tex.) 87

2. A misrecital of the hour of meeting, in a warrant of arrest of absent members of a board of commissioners, which could mislead no one, will not impair the validity of the warrant. *State, Rylands, v. Pinkerman* (Conn.) 658

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ASSEMBLY. See ELECTION DISTRICTS.

ASSESSMENT. See INJUNCTION, 15.

ATTACHMENT. See ATTORNEYS, 1; LEVY AND SEIZURE, 8, NOTES AND BRIEFS.

ATTORNEY-GENERAL.

The attorney-general can properly institute proceedings, under Mass. Stat. 1892, chap. 889, to require a railroad company to issue mileage tickets and receive those of other companies, since it is not a proceeding in equity, but rather a petition for a writ of mandamus in a matter concerning the public. *Attorney-General v. Old Colony R. Co.* (Mass.) 112

ATTORNEYS.

1. Attorneys who have abused the process of the court by causing a writ of attachment known to them to be utterly void to issue for the purpose of obtaining custody of the books and private papers of the defendant, for the purpose of founding subsequent proceedings upon them and for inquisitorial purposes, will be compelled to surrender such books and any copies containing evidence taken from such books and papers, and to make proof that they have surrendered the whole so that it may not be used by them or any one else. *Rosenthal v. Muskegon Circuit Judge* (Mich.) 698

2. A tax upon the exercise of the profession of a lawyer is not unconstitutional as impairing the obligation of a contract. *Odlén v. Woodruff* (Fla.) 699

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BAILMENT. See FACTORS, NOTES AND BRIEFS.

BALLOTS. See VOTERS AND ELECTIONS.

BALL PLAYER. See also CUSTOM, 8.

The ordinary skill, knowledge, and efficiency of base-ball players is all that is required of a player under a contract of hiring for a definite time, which is silent as to the degree of skill to be possessed. *Baltimore Base Ball & E. Co. v. Pickett* (Md.) 690

BANKS. See also BILLS AND NOTES, 1.

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Banks; liability on official bond for loss by bank failure. 449

BARBERS. See CONSTITUTIONAL LAW, 8, 15.

BILLS AND NOTES. See also CHECKS.

1. A bank which issues to a confidential clerk and employé a draft upon another bank, upon such clerk's representation that he desires it for the purpose of making a remittance, is not liable to a bona fide holder of such draft who takes it after it has been raised by such clerk to a larger amount, for the increased amount, since such clerk does not in raising it act for the bank or in his capacity as clerk. *Exchange Nat. Bank v. Bank of Little Rock* (C. C. App. 8th C.) 686

2. A drawer of a draft or note complete in itself, but in such form as to be easily altered without attracting attention, is not liable for the amount to which it is afterwards fraudulently raised by a third person without his knowledge or authority, even to an innocent purchaser, since it is not his negligence, but the crime of the forger, that is the proximate cause of the loss. *Id.*

NOTES AND BRIEFS.

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BOARDS. See also PARLIAMENTARY LAW, 4.

1. The specification of certain objects in a notice of a meeting of a board of aldermen does not exclude action upon any others which are within the range of its general powers. *State, Rylands, v. Pinkerman* (Conn.) 658

2. Want of notice to rightful commissioners, of the meeting of a pretended board, is fatal to action by the latter without a quorum of legal members. *Id.*

BONDS.

1. The loss of money deposited by a clerk of court in a bank of reputed solvency, acting as a prudent man would, will not make him liable on his bond to pay over moneys that come into his hands. *Wilson v. People, Pueblo & A. V. R. Co.* (Colo.) 449

2. A bond given by an officer does not extend the obligation imposed on him by law, unless by force of constitutional or legislative provisions; but his duty and liability as to moneys coming into his hands are measured by the law of bailment. *Id.*

NOTES AND BRIEFS.

Bond; liability on official bond for loss of money by theft or bank failure. 449

BOUNDARY. See also **COURTS**, 8.

A person in a boat on the Savannah River, within 80 yards of the Georgia side, at a point where the river is at least 175 yards wide, is prima facie in the state of Georgia. *Simpson v. State* (Ga.) 248

BRIDGE. See also **WATERS**, **NOTES AND BRIEFS**.

A railroad company is not liable for obstructions in the channel or open space under a drawbridge over a navigable stream, which the company has constructed properly and under lawful authority, if the obstructions are not caused by any instrumentality or fault of the company. *Pensacola & A. R. Co. v. Hyer* (Fla.) 868

BUILDINGS. See also **EASEMENTS**, 4, 5.

1. An ordinance requiring the owner of a dangerous or insecure wall or building to make it safe within twelve hours after notice does not apply to a building which is safe for the purpose of commerce and trade, but falls by reason of the large quantities of water thrown into and upon it in extinguishing a fire, while it is stored with stationery by a tenant, thus putting it to an extraordinary strain. *Woodruff v. Bowen* (Ind.) 198

2. Keeping a building in a populous city safe for firemen is not a duty of the owner at common law, independent of any statute or ordinance. *Id.*

CARRIERS. See also **ATTORNEY-GENERAL**; **COMMERCE**, 1; **DAMAGES**, 8; **INSURANCE**, 1; **JOINT DEBTORS**; **MASTER AND SERVANT**, 8.

1. The wrongful act of a brakeman in kicking a boy off from a train in rapid motion for failure to pay his fare is within the scope of his employment, so as to render the railroad company liable for the act, where the brakeman's duties included the assistance of the conductor in collecting fares and ejecting persons who had no right to ride; but if he kicked the boy merely for the purpose of injuring him, and not with the purpose of ejecting him from the train, the employer is not liable. *Smith v. Louisville & N. R. Co.* (Ky.) 73

2. A railroad company is not liable for an

injury to a passenger caused by the grossly criminal act of a stranger in letting off the brakes on loaded cars standing on a switch and closing the switch, which had been left open to derail the cars if they got loose, on account of the cars running down grade and out on the main track causing a collision, where there was no negligence in failing to discover the mischief or prevent its effect. *Fredericks v. Northern C. R. Co.* (Pa.) 806
See also **MASTER AND SERVANT**, 8.

3. A railroad passenger holding a first-class ticket may recover damages from the company if his request to the conductor for a seat in a first-class coach is met by an explosion of profane and contemptuous wrath, and he is compelled to stand although passengers in the car are occupying more seats than they are entitled to. *Louisville, N. O. & T. R. Co. v. Patterson* (Miss.) 259

4. One who accepts a free pass on a street railway, with a printed condition that the company shall not be liable under any circumstances, whether by negligence of agents or otherwise, for injuries, is bound by that condition. *Muldoon v. Seattle City R. Co.* (Wash.) 794

5. A round-trip ticket "via Burlington branch" from a point on the main line of a railroad to a point on the branch line, with the provision that it is "not good to stop off en route," is subject to a regulation of the company making it good on the main line upon those trains only which connect with trains on the branch, and does not entitle a passenger, on reaching the junction upon his return trip, to take an accommodation on the main line which stops at his destination, but which he is enabled to catch only because it is late and by leaving the branch train while it stands on a Y track and walking to the depot, although he might have ridden on the accommodation train without paying any more for his ticket if he had bought separate tickets for the round trip on each line, and although by taking the accommodation he could avoid waiting a half hour or more for the so-called connecting train. *Pennsylvania R. Co. v. Parry* (N. J. Err. & App.) 251

6. A statute requiring railroad companies to issue mileage tickets and to receive those of other roads in payment of fare, without providing any fund for their redemption, or making them a lien on any tangible property, or putting any limit on the number of them which may be issued, or the time within which they must be used, is unconstitutional as an appropriation of individual property to public use without the owner's consent and without legal provision for a reasonable compensation therefor. *Attorney-General v. Old Colony R. Co.* (Mass.) 113

7. A passenger's standing on the platform of the trail car in a moving cable train, in accordance with custom, is not negligence as matter of law, in the absence of any rule of the company against it. *Muldoon v. Seattle City R. Co.* (Wash.) 794

8. A passenger upon a street car approaching a railroad crossing, which has stopped 75 feet away from the crossing and again started,

is under no duty to be on the lookout to learn if the railroad track can be safely crossed and if by so doing he can see an approaching locomotive, to jump off,—especially where he is crippled. *O'Toole v. Pittsburgh & L. E. R. Co.* (Pa.) 606

Of goods.

9. A railroad company in the carriage of goods is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in Nebraska, by special contract, limit or relieve itself from this liability. *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 835

10. Giving lower rates for transportation of coal to a manufacturing company than to a coal-dealer is not undue or unreasonable discrimination, in violation of Pa. Const. 1874, art. 17, § 8, or of the Act of 1888, which further specifies that the equality of rates required shall be for "a like service for the same place, upon like conditions, and under similar circumstances," where the manufacturing company consumes the coal in creating products which furnish a large amount of additional transportation to the carrier,—and especially where the carrier was bound to give such company the lower rate by a contract made years before the coal-dealer began business. *Hoover v. Pennsylvania R. Co.* (Pa.) 268

11. A manufacturing company violates its right to accept lower rates for the transportation of coal than are given to a coal-dealer, if it sells coal, even to its own employés; and the carrier on notice of such sales must charge such company the same rates that are charged to coal-dealers. *Id.*

12. Notice by a carrier of special rates to other shippers entitled thereto by difference of conditions need not be given to regular shippers in order to protect the carrier from the charge of unreasonable discrimination. *Id.*

13. A reasonable charge for improper delay in unloading cars is not one for transportation, storage, or delivery of freight within Va. Code 1887, §§ 1202, 1208, which provide that no charge other than that provided by law shall be made. *Norfolk & W. R. Co. v. Adams* (Va.) 580

14. A charge to a consignee of \$1 per day after three days, for every car remaining unloaded after notice of arrival, is not unreasonable. *Id.*

NOTES AND BRIEFS.

See also EVIDENCE.

Carriers; limitation in ticket to connecting train. 251

Limitation of liability by contract. 385

Discrimination in rates between dealers and manufacturing company. 264

Legislative power to regulate business of. 112

Right of railroad company to make a charge for detention of its cars by consignees. 530

Rights of passenger to seat; when seat is refused. 259

Rights of a person riding on pass or contract for free passage:—stockbroker; drovers' pass; 22 L. R. A.

assuming risk; express agents, newsboys, and the like; complimentary or gratuitous pass. 794

CHARITIES. See also TAXES, 6, 7; WILLS, 10.

A devise to trustees "for some charitable purpose, preference always to be given to something of an educational nature, although permissible to appropriate the income in any way it may seem to the trustees to be necessary and most desirable, as they may elect,"—is too indefinite to be enforced in equity. *Johnson v. Johnson* (Tenn.) 179

CHATTEL MORTGAGE. See MORTGAGE.

CHECKS. See also EVIDENCE, 11; LIMITATION OF ACTIONS; PAYMENT.

The indorser of a check is released by failure to present it for several days, during which the bank fails and the collection of the check is rendered impossible, when there was a deposit out of which it would have been paid if promptly presented. *Kirkpatrick v. Puryear* (Tenn.) 785

NOTES AND BRIEFS.

See also LIMITATION OF ACTIONS.

Check; release of indorser of, by delay in presenting it:—unreasonable delay; reasonable delay. 785

CITIZENS. See ALIENS, NOTES AND BRIEFS.

CITY COUNSELOR. See MUNICIPAL CORPORATIONS, 3.

CLERK. See ABSTRACTS; BONDS, 1.

COLLEGE. See INSURANCE, 7.

COMMERCE.

1. The fact that a contract was for the carriage of goods from one state to another does not relieve a corporation of the state in which the contract was made from the rule of law existing in that state, which prohibits special contracts limiting liability. *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 835

2. Telegraph messages between points in the same state do not constitute interstate commerce, because of the fact that they traverse another state on the route. *State, Railroad Commission, v. Western U. Teleg. Co.* (N. C.) 570

3. The sale of a package of goods entire and unbroken, as imported from another state, will be protected as interstate commerce only when the form and size of the package is that usually adopted in the trade for purpose of transportation, and not when adopted with a view to unlawful intrastate retail trade. *Com. Philadelphia County, v. Schollenberger* (Pa.) 155

4. Showing that a package of material to be used as food was made, stamped, and branded in another state, is not sufficient to show that it is an original package, trade in

which is protected by the Federal Constitution, without showing further that it was in the form usually adopted in the trade for purposes of transportation. *Com. Philadelphia County, v. Schollenberger* (Pa.) 155

5. An original package, trade in which is protected by the Federal Constitution, is such form and size of package as is used by producers or shippers for the purpose of securing both convenience in handling and security in transportation of merchandise between dealers in the ordinary course of actual commerce. *Id.*

6. That one having goods for sale is a non-resident manufacturer, and sells his goods within the state through an agent, does not, under the Federal Constitution, relieve him from the operation of the local police laws, if he keeps in the state a store containing a stock of goods for the inspection of customers, from which he makes sales to actual customers. *Id.*

7. A license tax of \$500 per annum, imposed on every person selling in a city any meat which is not from animals of his own raising, unless he rents a stall in a public market, while the rent of such stall is \$150 per year and the market regulations are so restricted and burdensome as to preclude the reasonable conduct of a wholesale business there, is unconstitutional in respect to wholesale dealers in meat brought from other states, by reason of the necessarily resulting discrimination against them, although the ordinances on the subject on their face purport to apply to vendors irrespective of the places from which it comes,—especially where neither sales nor inspection of meat are restricted to the market, and the regulations are clearly made for the purpose of revenue, and not merely to prevent the sale of uninspected meat. *Georgia Packing Co. v. Macon* (C. C. S. D. Ga.) 775

NOTES AND BRIEFS.

Commerce; original packages from other state. 156

COMMON LAW. See also CONTRACTS, 2.

The common law was brought into Oklahoma by the settlers on April 23, 1889, unless it had already been established there by the Act of Congress of March 1, 1889, establishing a district court of the United States in the Indian Territory. *McKennon v. Winn* (Okla.) 501

NOTES AND BRIEFS.

Common law; adoption of, in the United States; general rules; effect of English decisions; constitutional and statutory adoption; what constitutes the common law adopted; adoption in particular matters; as to remedies; limitation of the adoption; in the United States courts and territories; in criminal matters; adoption of British statutes; repeal of English statutes. 501

CONDITION. See INJUNCTION, 9.

CONFLICT OF LAWS. See also COMMERCE, 1.

1. The place of making the contract is presumably that of its performance, in the absence of anything indicating the contrary. 22 L.R. A

Tillinghast v. Boston & P. R. Lumber Co. (S. C.) 49

2. The place from which a telegram is sent to another state is the place of the contract made by the message, in the absence of anything therein to the contrary. *Id.*

CONSPIRACY.

1. A combination of insurance companies to establish uniform rates of insurance and of agents' commissions is not illegal under the Texas Anti-Trust Law of March 30, 1889, prohibiting trusts for restrictions in trade or the production price, or rates of transportation for commodities or articles of commerce, since a contract of insurance is not "trade," nor is it an "article of commerce" or a "commodity." *Queen Ins. Co. v. State* (Tex.) 488

2. The words "restrictions in trade," in an anti-trust law making such restrictions a felony punishable with heavy penalties, by fine or imprisonment, cannot be construed to include all contracts which in any sense restrict trade, but are limited to combinations such as those between producers or dealers to limit production or supply of an article and thus acquire a monopoly of it, and then unreasonably to enhance prices, or those of quasi public corporations which might be disabled by the combination from performing duty to the public. *Id.*

NOTES AND BRIEFS.

Conspiracy; in restraint of trade. 484

CONSTITUTIONAL LAW. See also CARRIERS, 6; COMMERCE; INTOXICATING LIQUORS, 5; OFFICERS, 1; SUNDAY, 1, 2; TAXES, 1, 2, 5; WHARFAGE.

1. Long usage and practical interpretation cannot control in the interpretation of the Constitution unless the language is obscure and doubtful. *State, Morris, v. Wrightson* (N. J. Sup.) 548

2. The power of the executive and judicial departments in a state government is a grant, not a limitation, while the powers of the legislative department are absolute except as restricted and limited by the Constitution. *People, Richardson, v. Henderson* (Wyo.) 751

3. The constitutional separation of the departments of government is not violated by a statute authorizing circuit courts to repair their court-rooms. *White County Comrs. v. Guin* (Ind.) 408

4. The constitutional provision that "the state shall never contract any debts for works of internal improvement or be a party in carrying on such works," prevents a state from owning and operating an elevator or warehouse for the public storage of grain, or any other kind of public works excepting those used by and for the state in the performance of its governmental functions. *Rippe v. Becker* (Minn.) 857

Vested rights.

5. Judgments rendered before the passage of the Act, directing the sale of lands or interests therein, cannot be affected by a statute extending the time for redemption from such

sale, although the sale has not yet taken place. *Greenwood v. Butler* (Kan.) 465

6. The reopening of the decision of tax officers, by which the valuation of taxable property has been fixed and taxes thereon collected, under a subsequent statute authorizing a state revenue agent to assess and collect additional taxes, where, in his opinion, the tax assessment had been too small,—is an unconstitutional interference with vested rights. *Adams v. Tonella* (Miss.) 346

7. A receipt which was void for uncertainty as a contract for land cannot be made valid by a subsequent statute allowing parol testimony to identify the land. *Lowe v. Harris* (N. C.) 379

Equal rights.

8. The equal privileges or immunities of citizens are not violated by prohibiting the business of a barber on Sunday under greater penalties than those imposed upon other business, or because an exception is made as to those who conscientiously observe the seventh day of the week as the Sabbath, nor is such a statute invalid as class legislation. *People v. Bellet* (Mich.) 696

9. A statute requiring weekly payment of wages "by every manufacturing, mining, quarrying, lumbering, mercantile, street, electric, and elevated railway, steamboat, telegraph, telephone, and municipal corporation, and every incorporated express company and water company,"—makes an unconstitutional discrimination between those corporations and others which are organized for pecuniary profit and employ labor. *Braceville Coal Co. v. People* (Ill.) 840

Due process of law.

10. The enforcement of an assessment for local improvements upon property not at all benefited thereby is the taking of property without due process of law. *Oregon & C. R. Co. v. Portland* (Or.) 718

11. The liberty to enter into contracts by which labor may be employed in such way as the laborer may deem most beneficial, and to others to employ such labor, is necessarily included in the constitutional guaranty of the right to property. *Braceville Coal Co. v. People* (Ill.) 840

12. A restriction of the right of corporations to contract with employes as to payment of wages requiring weekly payments denies the constitutional rights of the employes, and does not affect the corporation merely. *Id.*

Police power.

13. The police power of the state to regulate a business is to be exercised by the adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it. *Rippe v. Becker* (Minn.) 857

14. The purchase by a state of a site for state elevators or warehouses, and the erection of such structures for the public storage of grain, is not within the exercise of the police power of the state to regulate the business of such elevators. *Id.*

15. Prohibiting the opening of barber shops on Sunday is within the police power of the state. *People v. Bellet* (Mich.) 696

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16. The Legislature may forbid the sale, offering for sale, or possession during the close season, of trout which are not alive, although they were artificially propagated on one's own premises, if such close season is not unreasonable. *Com. v. Gilbert* (Mass.) 439

17. The occupation of an "emigrant agent" does not belong to that class which is so inherently harmful or dangerous to the public that it may be either directly or indirectly restricted or prohibited, where the occupation consists merely in hiring laborers in the state to be employed beyond the limits of the state. *State v. Moore* (N. C.) 472

NOTES AND BRIEFS.

See also SUNDAY.

Constitutional law; as to restriction of use of private property. 440

Constitutionality of statute legalizing an invalid private contract; under federal constitution; retroactive laws and vested rights; due process of law; application of the rules to acknowledgments; application of the rules to contracts unenforceable because usurious; conflict with judicial power; rights of third persons cannot be impaired. 379

Extent of police power of state. 858

CONTRACTS. See also ACTION OR SUIT. 1; ATTORNEYS, 2; BALL PLAYERS; CONSTITUTIONAL LAW, 7; CUSTOM, 2, 8; WILLS, 12.

1. A valid oral contract for the sale of real estate, or an interest therein, can be made in the absence of statutory restrictions. *McKennon v. Winn* (Okla.) 501

2. The Statute of Frauds is in force in the United States only where it has been adopted by legislative enactment; and at common law an oral contract for real estate is valid. *Id.*

3. A deed placed in escrow, but not delivered, cannot be regarded as a sufficient memorandum of a parol agreement for the land to satisfy the Statute of Frauds, where it does not recite the terms of the contract. *Kopp v. Reiter* (Ill.) 273

4. A contract between a creamery supply firm and those agreeing to subscribe for the erection of a butter factory, by which the former was to erect and complete the factory and the latter to pay the contract price, creates a several liability on the part of each subscriber to the amount of his subscription only; but the interests of the subscribers are joint in so far that all must unite in order to repudiate and renounce the contract. *Gibbons v. Bents* (Minn.) 80

5. No cause of action on contract can arise before the contract is broken. *Tillinghast v. Boston & P. R. Lumber Co.* (S. C.) 49

6. A contract to hire a person for a year for a certain sum per week, payable weekly, is entire and indivisible. *Olmsstead v. Bach* (Md.) 74

7. A unilateral promise or agreement in writing to pay for specified personal property is binding if upon sufficient consideration; and the consideration need not be expressed if the case is not within the Statute of Frauds. *Horn v. Hansen* (Minn.) 617

8. A physician who is a member of a board of health may recover reasonable compensation for purely professional services which any other physician might render, rendered by him under direction of the board of health without any express agreement for compensation. *Spearman v. Texarkana* (Ark.) 855

9. An agreement by an author to indemnify his publisher for any costs and damages by reason of the publication is not invalid, on the ground that an unlawful publication is intended, where it does not appear that there was any intention on the part of either to write or publish anything libelous. *O. F. Jewett Pub. Co. v. Butler* (Mass.) 268

10. It is not illegal at common law for insurance companies to make a combination to establish uniform rates of insurance and of commissions to agents. *Queen Ins. Co. v. State* (Tex.) 483

11. A stipulation not to engage in manufacturing or selling fire alarm or police telegraph machines and apparatus, and not to enter into competition with the purchaser of the business for the period of ten years, with no restriction as to place stipulated, which is entered into by a manufacturer on the sale of his business and a transfer of his patents used therein, is void on the ground of public policy as a contract in restraint of trade, and cannot be upheld on the ground that it concerns property and business protected by patents, or because the restriction is necessary to enable the purchaser to enjoy what is purchased,—even if that could be regarded as a test,—or because it relates to a single commodity which is not of prime necessity and not a staple of commerce. *Garnett v. Fire Alarm & Teleg. Co. v. Crane* (Mass.) 678

12. A change of decision as to the validity of a certain kind of mortgage, made after some instruments of the kind were made, whereby they are upheld, does not impair the obligation of a contract between the mortgagor and a creditor who gave him credit, when under the existing decisions such mortgages would be held void. *Brown v. Grand Rapids Parlor Furniture Co.* (C. C. App. 6th C.) 817

13. Either party to a contract, while it is executory, may by explicit direction stop performance on the other side, thereby becoming liable for the damages to which the other is subjected; and thereafter the other cannot proceed with the performance of the contract and increase the amount of damages. *Gibbons v. Bente* (Minn.) 80

14. Doubts as to the solvency of a publishing corporation will not justify the breach of a contract to furnish it a book for publication. *O. F. Jewett Pub. Co. v. Butler* (Mass.) 258

15. The disgrace attaching to the name of a corporation on account of the conduct of its former president and manager, whose name it bears, is not sufficient ground for breaking a contract to furnish it a book for publication. *Id.*

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See also CONSTITUTIONAL LAW.

Contracts; impairment of obligation of. 465
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Legality of combinations or trusts. 484

Is a subscription contract joint or several—in general; in which there is a promisee; effect of agreements among subscribers and their relation to each other. 80

Of indemnity against liability for libel. 254

Illegality of contract to evade taxes. 709

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Validity of contracts of sale in restraint of trade without limitation of place;—restraint, unlimited as to time and place; divisibility of contract in general restraint of trade; restriction as to time but not as to place; as to publications; secrets of trade, compounds, and medicine; patented articles; contracts of purchase. 673

CORPORATIONS. See also EVIDENCE, 12; TAXES, 8, 9.

1. A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to or become holders of shares in the property entrusted to it for a common purpose. *Gibbs's Estate* (Pa.) 276

2. A corporation *de facto* is an apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative fiat of the law. *Id.*

3. An amendment to the charter of certain corporations by providing for weekly payments of wages, but not applying to all corporations created under the general law, is in violation of a constitutional provision that the charter of no corporation shall be changed by special law. *Bruceville Coal Co. v. People* (Ill.) 840

4. An educational corporation engaged in operating a public ferry carrying passengers for hire cannot escape liability for negligence in the management of the ferry, on the ground that the business was *ultra vires*. *Nims v. Mt. Hermon Boys' School* (Mass.) 364

5. A corporation must be held to have adopted the acts of its agents in conducting a business *ultra vires*, where its managing officers, knowing the business has been done and that the income of the business has been received and the expenses of it paid by the treasurer, have adopted the action of the treasurer and elected to keep the money. *Id.*

6. The "business" of a corporation, within a statutory authority to contract in "its authorized business," cannot be construed to include the making of a preferential deed of trust after the corporation has become insolvent and ceased to carry on its operations without any intention of resuming. *Lyons-Thomas Hardware Co. v. Perry Stone Mfg. Co.* (Tex.) 803

7. Statutory authority of a corporation to hold, purchase, and sell property as the "purposes" of the corporation shall require, applies only to powers to be used while the corporation is carrying on business, and does not give power to execute a preferential deed of assignment after insolvency and permanent cessation of business. *Id.*

8. A preferential deed of trust executed by a private trading corporation after its insolvency and ceasing to carry on business, without any intention of resuming, is void as against unsecured creditors of the corporation. *Id.* But see next case.

9. The fact that directors and stockholders of a corporation vote to give a mortgage preferring themselves as creditors does not render it invalid. *Brown v. Grand Rapids Parlor Furniture Co.* (C. C. App. 6th C.) 817

10. A director who is a bona fide creditor of a corporation may be made a preferred creditor, where preferences to any creditors are lawful. *Id.*

11. A resolution authorizing officers of a corporation "to secure any and all other creditors" after a person named does not require that a mortgage executed in pursuance thereof should secure all other creditors, but the word "and" has the meaning of "or." *Id.*

12. It is sufficient ground for the dissolution of a corporation that it has removed its principal place of business and all of its agencies from the state of its creation, in contravention of the policy of the state as evinced by its general system of legislation. *Simmons v. Norfolk & B. Steamboat Co.* (N. C.) 677

13. An attachment and sale of the corporate property in a suit against the comptroller of the currency as commissioner and statutory successor of the Freedman's Savings & Trust Company is lawful, where the corporation would have been subject to attachment. *Spratt v. Livingston* (Fla.) 458

14. The purpose, as well as the effect, of the amendatory Act of Congress making the comptroller of the currency a commissioner of the Freedman's Savings & Trust Company, was to invest him, as such commissioner, with the property, management, and disposition of the affairs of said company for the purposes of liquidation; and he thereby became the statutory substitute and successor of the corporation itself, and not a mere trustee of the bare legal title of its property. *Id.*

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Corporations; doctrine of *ultra vires* as affecting liability for negligence. 865

Presumption as to incorporation:—in civil cases; in criminal cases. 276

Power to prefer creditors when insolvent. 818

Preferences among creditors given by insolvent corporations:—in general; preferences prohibited; stockholders as preferred creditors; directors and officers as preferred creditors; preferences by legal proceedings; remedies; English decisions. 802

COSTS.

1. Costs out of the estate will not be allowed to one who unsuccessfully contests the right of the administrator to retain a distributive share, and apply it on the distributee's indebtedness to the estate. *Webb v. Fuller* (Me.) 177

2. Costs in favor of plaintiff on a note and mortgage which are invalid cannot be ordered 22 L. R. A.

paid from the proceeds on foreclosure of another mortgage on the same property, in the same case. *Sheldon v. Pruessner* (Kan.) 709

COTENANCY. See also HUSBAND AND WIFE, 1; LEVY AND SEIZURE, 1.

A joint tenancy is an estate held by two or more persons jointly, so that during the lives of all they are equally entitled to the enjoyment of the land, or its equivalent in rents and profits; but upon the death of one his share vests in the survivor or survivors until there be but one survivor, when the estate becomes one in severalty in him and descends to his heirs upon his death. *Thornburg v. Wiggins* (Ind.) 42

NOTES AND BRIEFS.

Cotenancy; as to timber. 641

COUNTIES. See also COURTS, 4.

The action of county commissioners on petition under Ind. Acts 1893, p. 741, which says the board "may fix and allow a certain sum" within prescribed limits and that any such allowance and the proceedings of the board in relation thereto, "if in conformity with the provisions of this Act, shall be final and conclusive" is an exercise of the discretion of the board, and is not a judicial act from which an appeal can be taken. *Vigo County Comrs. v. Davis* (Ind.) 515

COUNTY-SEATS. See COURTS, 1.

COURT-HOUSE. See COURTS, 2-4; INFUNCTION, 17.

COURTS. See also APPEAL AND ERROR, 8; CONSTITUTIONAL LAW, 8; WITNESSES.

1. Long acquiescence in the universal custom of courts to sit at county-seats is equal to positive law requiring the courts to be held at those places. *White County Comrs. v. Gwin* (Ind.) 402

2. The power of courts to order necessary repairs to the court-room is inherent and incidental to jurisdiction, like the power to punish for contempt. *Id.*

3. The power of circuit courts to authorize repairs to the court-room cannot extend to the practical reconstruction of the court-house, or to the construction of lasting and permanent improvements,—such as extensions, additions, and enlargements. *Id.*

4. A court has inherent power to order an elevator in the court-house to be operated by the sheriff during sessions of court, when the use of the elevator is necessary to furnish fit and convenient means of access to the court-room, although the county commissioners direct, on the contrary, that the use of the elevator shall be discontinued. *Vigo County Comrs. v. Stout* (Ind.) 898

5. The question whether or not a "disagreement" exists which authorizes the governor to adjourn the General Assembly, under R. I. Const. art. 7, § 6, is one on which the decision of the governor is conclusive, and is not reviewable by the courts. *Re Legislation Adjournment* (R. I.) 716

6. The courts cannot overturn a law passed within constitutional limitations, on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corrupt means. *State, Morris, v. Wrightson* (N. J. Sup.) 548

7. The constitutionality of an apportionment Act is a subject of judicial inquiry, and not a mere political question. *Id.*

8. The offense of shooting at another is committed in Georgia when one in the state of South Carolina, without malice aforethought, but not in his own defense or under other circumstances of justification, aims and fires a pistol at another who at the time is in Georgia, although the ball misses him, and strikes the water in Georgia near the boat which he occupies. *Simpson v. State* (Ga.) 248

9. The jurisdiction of a court to compel town officers to call a new election for a member of the General Assembly, as required by statute, is not defeated by the fact that each House is the judge of the elections and qualifications of its members, and that the ordering of a new election may involve the question of the validity of a prior election. *State v. South Kingtown* (R. I.) 65

10. Whether chattel mortgages are void as common-law assignments giving preferences to creditors is a question of local law, upon which a federal court will follow the state decisions. *Brown v. Grand Rapids Parlor Furniture Co.* (C. C. App. 6th C.) 817

11. A federal court will follow the latest decisions of the supreme court of the state as to the validity of mortgages, although a different decision by that court was regarded as the law when the mortgages were made. *Id.*

12. The title to letters patent does not necessarily involve the validity or infringement of the patent, so as to defeat the jurisdiction of a state court. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 832

13. State courts have not lost jurisdiction of the subject-matter of actions against carriers in respect to interstate shipments, by reason of the fact that Congress has legislated upon the subject. *St. Joseph & G. I. R. Co. v. Palmer* (Neb.) 885

14. An injunction against carrying out an order of court cannot be granted by another court of similar jurisdiction, but can be granted, if at all, only by the court which made the order. *Vigo County Comrs. v. Stout* (Ind.) 898

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Courts; jurisdiction of crime on state boundary. 249

Power of, to provide the necessary places and equipments for their business. 898, 899

Power in respect to court-room. 402

COVENANT.

An undertaking establishment in which human dead bodies are prepared for burial or other sepulture, and sometimes subject to embalming and post mortem examination, is a business "injurious or offensive to the neighboring inhabitants," within the terms of a re-
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strictive agreement, although it may not constitute a legal nuisance. *Rowland v. Miller* (N. Y.) 182

NOTES AND BRIEFS.

Covenants; of married women, see ESTOPPEL.

CRIMINAL LAW. As to Jury Trial, see TRIAL, 1, NOTES AND BRIEFS.

See also BLASPHEMY.

CURSING. See NUISANCES, 1.

CUSTOM. See also EVIDENCE, 42, 43.

1. The custom of people to crawl under a train blockading a highway crossing cannot affect the question of negligence in so doing. *Rumpel v. Oregon Short Lines & U. N. R. Co.* (Id.) 726

2. A usage to affect a contract must be so general and well established that knowledge and adoption of it may be presumed; and it must be certain and uniform. *Baltimore Base Ball & H. Co. v. Pickett* (Md.) 690

3. A usage or custom of base ball clubs to discharge a player on ten days' notice, if he is deficient in playing, cannot modify a special contract for a definite time,—especially when the player has no reciprocal right to cancel the contract. *Id.*

NOTES AND BRIEFS.

Custom; as affecting contract. 690

DAMAGES.

1. Compensatory damages cannot include an allowance for "inconvenience" as well as injuries. *Jenson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 680

2. The amount to be recovered for unlawful discharge of an employé is the contract price less what may have been paid him, and also what he has earned or by due diligence might have earned during the time covered by the contract. *Baltimore Base Ball & H. Co. v. Pickett* (Md.) 690

3. The amount of injury suffered by a shipper on account of lower rates given to another shipper, for which he may recover from the carrier, under Pa. Act 1883, cannot be taken, without proof, to be the difference in the rates charged. *Hoover v. Pennsylvania R. Co.* (Pa.) 263

4. For breach of a contract to transmit or deliver an unexplained cypher, or otherwise unintelligible message, a telegraph company is liable only for nominal damages, or, at most, for the sum paid it for transmission and delivery. *Western U. Telog. Co. v. Wilson* (Fla.) 484

5. It is proper for a railroad desiring to cross another to pay the expense of necessary frogs and crossing apparatus. *Seattle & M. R. Co. v. State* (Wash.) 217

6. Condemnation of a strip of land across a farm for canal purposes does not divide the farm into two parcels for the purpose of estimating damages for the construction of a railroad across one of them, although such

strip is taken in fee, and the canal is abandoned, and the fee to such strip acquired by third persons. *Cameron v. Pittsburgh & L. E. R. Co. (Pa.)* 448

7. In estimating the benefits which may be set off against a claim by the owner of lots abutting on a highway for damages resulting from the construction of a viaduct in the street, only those can be considered which particularly affect the lots damaged, and not such as are shared in common with other lots not damaged. *Spencer v. Metropolitan Street R. Co. (Mo.)* 668

NOTES AND BRIEFS.

Damages; in eminent domain case. 668

What parcels considered in estimating damages for lands condemned. 448

Measure of, for default of telegraph company. 435

DEDICATION.

1. A reference in deeds to a map of an addition to a city cannot be taken as constituting a dedication of a street marked on a map of the city which is not shown to have been known to the grantor, where the latter had made maps of the addition without showing such streets. *Lewis v. Portland (Or.)* 736

2. A street shown on that portion of a map representing the oldest part of the city, leaving lots and blocks blank, is not dedicated by the map, which is intended merely to show a new portion or addition not touched by such street, in which the lots and blocks are marked, —especially where the maker has prior maps of the portion including such street, which do not show any street at that place. *Id.*

DEED. See also EVIDENCE, 23.

1. The general language of a deed with covenants sufficient to pass the estate of the grantor is not limited by a clause which recites that it is intended to convey absolutely all the interest of his wife, who is named therein as one of the grantors, but who has only an inchoate dower interest therein. *Davenport v. Williams (Ind.)* 244

2. There is a sufficient delivery of a deed, in the absence of evidence to weaken the force of the facts, if the judge of probate before whom it is acknowledged takes it for the purpose of recording it in his office. *Lewis v. Watson (Ala.)* 297

3. The bare fact that a deed was executed in the presence of a witness is not sufficient to show that it was delivered during the grantor's lifetime. *Parrot v. Avery (Mass.)* 153

4. A sheriff's deed to which his name is affixed by another person in his presence and at his request, and which the sheriff then duly acknowledges, is as efficacious as though signed by the sheriff himself. *Lewis v. Watson (Ala.)* 297

NOTES AND BRIEFS.

Deed; estoppel of married women by, see ESTOPPEL.

See also CONTRACTS.

23 I. R. A.

Delivery of. 153

What interest conveyed by. 244

Waiver of condition in. 863

DE FACTO. See OFFICERS, 6.

DEFINITION. See CORPORATIONS, 1, 2; EMINENT DOMAIN, 8; NEGLIGENCE, 1.

DEMURRAGE. See CARRIERS, 13, 14, NOTES AND BRIEFS.

DENTISTS.

A dentist, though having a diploma from a reputable dental college, and on the roll of dental surgeons, and registered according to law, is not exempt from jury duty, under Mo. Rev. Stat. 1889, § 6062, as a "practitioner of medicine." *State, Flickinger, v. Fisher (Mo.)* 799

DEPOSITIONS.

1. Answers to interrogatories by a nonresident witness cannot be read if he is actually present in court, although he has come at the request of the opposite party. *East Tennessee, V. & G. R. Co. v. Kane (Ga.)* 815

2. A witness "lives" where he is sojourning for his health for an uncertain time, within the meaning of U. S. Rev. Stat. § 863, in respect to the taking of depositions of a witness who lives more than 100 miles from the place of trial. *Mutual Ben. L. Ins. Co. v. Robison (C. C. App. 8th C.)* 825

DEPUTY SHERIFF. See ARREST, 1.

DRUNKENNESS. See ACTION OR SUIT, 1; FRAUD AND FRAUDULENT CONVEYANCES, 1; TROVER.

NOTES AND BRIEFS.

Drunkenness; as affecting contracts, see CONTRACTS.

DUE PROCESS. See CONSTITUTIONAL LAW, 10, NOTES AND BRIEFS.

EASEMENTS.

1. The use of the private way to a wharf and warehouse by the public cannot give a prescriptive right of user to the public, as it is not inconsistent with private ownership. *Lewis v. Portland (Or.)* 736

2. The right to have the light and air enter the windows of a building from an adjoining lot may exist by express grant, or by virtue of express covenant or agreement. *Keating v. Springer (Ill.)* 544

3. A landlord will not be liable for obstructing his tenant's windows by building on the adjoining close, in the absence of any covenant or agreement in the lease forbidding him to do so. *Id.*

4. A provision in a lease, that the lessee shall not build at the rear of the premises nearer than 25 feet, is not violated by building on one side of the premises, extending beyond the rear wall of the old building but not extending in the rear of the leased premises. *Id.*

5. A lease providing that the lessee "shall not build at the rear of said premises nearer than 25 feet, and no obstruction higher than 6 feet shall be placed in such manner as to obstruct light to said premises," prohibits any obstruction higher than 6 feet in any direction from said premises, which would obstruct light to them. *Keating v. Springer* (Ill.) 544

6. The right of a tenant of upper floors to light and air from a well or open space which is not accessible to the street cannot be obstructed, where it is necessary to the enjoyment of the demised premises. *Case v. Minot* (Mass.) 536

7. A landlord is liable to a tenant of upper floors for wrongful obstruction of light and air from a well or open space in a building, by a chimney constructed by another tenant under the landlord's express authority to erect such chimney for the use of boilers in the basement. *Id.*

NOTES AND BRIEFS.

Easements; American law as to easements of light, air, and prospect:—general doctrine; right of prospect; implied grants; implied easement of tenant; express grant or reservation of such easements; enforcement of right; right to light and air for public highway. 536

ELECTION DISTRICTS. See also COURTS, 7.

The election of members of assembly in assembly districts allowing each voter to vote for but one member, instead of voting for all the members elected in that county, is not in accordance with the Constitution of New Jersey, which provides that the members of assembly shall be elected "by the legal voters of the county respectively," and that each shall be an inhabitant of "the county for which he shall be chosen." *State, Morris, v. Wrightson* (N. J. Sup.) 548

NOTES AND BRIEFS.

Election districts; constitutionality of division of counties. 548

ELECTRICAL USES AND APPLICATIONS. See also MANDAMUS, 2.

1. Negligence in leaving a telephone wire where it is touched accidentally by a traveler on a sidewalk is the proximate cause of an injury to him from an electric shock, although this was occasioned by accidental contact of the wire with wires of an electric-light company or a street-railway company,—at least, where it does not appear that these were out of their proper position. *Ahern v. Oregon Teleph. & Teleg. Co.* (Or.) 685

2. A telephone company which, instead of removing its wire on taking it out of a residence, leaves it hanging upon an electric-light company's pole, is bound to look after it, and is liable for an injury to a traveler who comes in contact with it after it has been removed by employes of the electric-light company and hung upon a telephone pole, where he accidentally touches it while it is charged by contact with an electric-light wire or a street-railway company's wire. *Id.*

22 L. R. A.

3. It is negligence to allow a wire which from its environment is liable to become charged with electricity, to hang over a street or sidewalk at such a height as to obstruct and endanger ordinary travel. *Id.*

4. An ordinance requiring guard wires for electric wires "whenever it shall be necessary to cross" other electric wires, applies to crossing wires already erected, since it provides a remedy for an existing evil. *State, Wisconsin Teleph. Co. v. Janesville Street R. Co.* (Wis.) 759

5. An electric-railroad company using strong currents of electricity on wires which are not insulated, which directly cross telephone wires which are insulated, may be compelled to place guard wires where they will prevent the contact of the telephone and railway wires in case of the breaking of poles or the falling of wires on account of storms or otherwise,—especially where there is an ordinance requiring such guard wires, which the telephone company has complied with. *Id.*

NOTES AND BRIEFS.

Electrical uses; negligence as to dangerous wire. 685

Regulation of dangerous wires. 759

ELECTRIC RAILWAYS. See STREET RAILWAYS, 1.

ELEVATORS. See CONSTITUTIONAL LAW, 14; COURTS, 4.

EMIGRANT AGENT. See CONSTITUTIONAL LAW, 17; LICENSE, 2.

EMINENT DOMAIN. See also CARRIERS, 6; DAMAGES, 5-7.

1. A statute authorizing the condemnation of land for a private road from lands which are shut out and cut off from a public highway, giving an easement to the owner of such lands, who is required to pay damages, is unconstitutional as authorizing the taking of private property for private use. *Walton v. Dickson* (Neb.) 496

2. The taking of private property only is authorized by statutes providing for the exercise of the power of eminent domain, unless there is either express or clearly implied authority to extend them to public property. *Seattle & M. R. Co. v. State* (Wash.) 217

3. Tidelands cannot be condemned for railroad uses, by reason of a statutory provision for the appropriation of "state, school, or county land," under the Washington Constitution and statutes, in the nomenclature of which "state" lands did not include tidelands. *Id.*

4. The state, as owner of the fee of tidelands over which a street runs, and of lands abutting on both sides of the street, is entitled to damages for the occupation of the street for ordinary railroad purposes. *Id.*

5. The length of a railroad, or the amount of its business, does not affect its right to retain its right of way as against a railroad which subsequently desires to appropriate a portion

of it, although the amount of damages may be thereby affected. *Id.*

6. The statutory right of one railroad to cross another does not apply to a commingling of tracks for 400 feet or more along a 80-foot right of way, making it impracticable to operate either track or set of tracks when any one of the other tracks is in actual use. *Id.*

7. A claim of the right to lay four tracks on another railroad's right of way may be denied by the court, where the place is practically a street, and the whole room applicable to railroad purposes is extremely limited, and allowing two tracks will give better facilities than the other road enjoys. *Id.*

8. The convenience of the railroad to be crossed, and the probability of some other means of accomplishing the same purpose, may be considered in determining the necessity of appropriating any part of the right of way by another company, where the statute requires the judge to be satisfied by competent proof of such necessity. *Id.*

9. An attempt to agree as to the points and manner of crossing must be made by a railroad which desires to cross another before it can seek the aid of a court, under Wash. Gen. Stat. § 1571. *Id.*

10. It is not error for a judge who heard a case on the question of the necessity of the condemnation of land, under Wash. Code Prac. § 651, to send the jury trial to another judge. *Id.*

11. The points and manner of crossing, the place where, and whether under, over, or at grade, are to be decided by the court, on an application by one railroad for the right to cross another, under Wash. Gen. Stat. § 1571. *Id.*

Abutting owners.

12. The right to the use of the street in front of abutting lots is property within the protection of a constitutional provision against taking property without compensation. *Spencer v. Metropolitan Street R. Co. (Mo.)* 668

13. An abutting owner, whether owning the fee in the highway or not, has certain proprietary rights which cannot be taken away without compensation, even under the authority of the legislature. *White v. Northwestern N. O. R. Co. (N. C.)* 627

14. The use of a street for a steam railroad is a perversion of the street from its original and proper public purpose. *Id.*

15. An abutting owner is entitled to damages for the diminution of the value of the property caused by reducing the width of the street, or by excavations rendering it unsafe and dangerous, in constructing a steam railroad thereon. *Id.*

16. A street dedicated to the public for ordinary purposes cannot be appropriated for the construction of a viaduct which completely destroys its use for street purposes, without liability for damages to abutting owners. *Spencer v. Metropolitan Street R. Co. (Mo.)* 668

NOTES AND BRIEFS.

Eminent domain; taking lands for private purposes. 497

22 L. R. A.

Protection of private property. 628
Injury to abutting property by obstruction of street. 668

ENGLISH STATUTES. See COMMON LAW, NOTES AND BRIEFS.

ENTIRETIES. See HUSBAND AND WIFE, NOTES AND BRIEFS.

EQUITY.

That the tenant's right to an injunction against the landlord's interference with his employment of the premises terminates pending suit by the expiration of the term will not prevent equity from retaining the suit to assess damages. *Case v. Minot (Mass.)* 586

ESTOPPEL.

1. Statutory authority to a married woman to convey her separate property by joining with her husband will not extend to an implied covenant of warranty, so as to make such deed—at least in the absence of an express covenant—operate on an after-acquired interest in the property, when she owned only an undivided portion at the time of the conveyance. *Wadkins v. Watson (Tex.)* 779

2. Permitting the record title of land to remain in another will not make a subsequent conveyance to the real owner fraudulent as to the creditors of the former, where they gave the debtor credit merely on his own representations of ownership and his possession, and did not rely on the records or any act of the owner. *Breeze v. Brooks (Cal.)* 256

3. A purchaser of land at sheriff's sale cannot, while relying on the title so acquired, impeach the title of the judgment debtor, to prevent his recovering the land in ejectment. *Lewis v. Watson (Ala.)* 297

NOTES AND BRIEFS.

Estoppel; of land owner by allowing record title to remain in another:—sale by record owner; giving credit to one having record title; notice to one dealing with the land. 256

Effect of covenants of married women and their estoppel by deed or mortgage:—liability on covenant; estoppel by recitals; estoppel by covenant against acquiring superior title; conveyance without covenant by wife; operation and effect of conveyance. 779

EVIDENCE. See also ABSTRACTS, 3; CONSTITUTIONAL LAW, 7.

Judicial notice.

1. Judicial notice of the laws of another state cannot be taken. *Scroggin v. McClelland (Neb.)* 110

2. The Supreme Court of Rhode Island holds it a matter of common knowledge that there are many Seventh Day Baptists, so called, living in Hopkinton, who observe Saturday as their Sabbath. *State v. South Kingstown (R. I.)* 65

3. It is a matter of common knowledge that in 1874, and long prior to that date, there was comparatively little vacant land in Illinois, and to be found, not upon the prairies as a

rule, but in the poorer and timber portions of the state. *Bulpit v. Matthews* (Ill.) 55

4. Judicial notice will be taken by a federal court that the distance between Dubuque, Iowa, and Asheville, North Carolina, is more than 100 miles. *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 825

5. Courts can take judicial notice of the offensive character of an undertaking establishment in a locality used for residences. *Rowland v. Miller* (N. Y.) 182

6. It is a matter of common knowledge that during the year 1893 a large number of manufactories were shut down because of the stringency in the money market. *Braceville Coal Co. v. People* (Ill.) 340

7. It is a matter of public history that along the valleys of the Lehigh and Schuylkill rivers there are great numbers of blast furnaces, rolling-mills, rail-mills, founderies, machine shops, and numerous other manufacturing establishments which consume enormous quantities of the coal output of the state, and at the same time an immensely large industry in buying and selling coal for domestic consumption is prosecuted in every village, town, and city in this region. *Hoover v. Pennsylvania R. Co.* (Pa.) 263

8. Judicial notice is taken of the fact that many corporations are organized and doing business in the state outside of certain classes of corporations enumerated in a statute. *Braceville Coal Co. v. People* (Ill.) 340

9. It is held by the courts of Oregon to be common knowledge that before and after the admission of the state into the Union the right to wharfage was regarded as incident to riparian ownership on a navigable fresh-water stream. *Lewis v. Portland* (Or.) 736

Burden of proof; presumptions.

10. The insurer has the burden of showing breach of warranty in the application. *Manufacturers' Acci. Indem. Co. v. Dorgan* (C. C. App. 6th C.) 620

11. The holder of a check has the burden of proving that the indorser was not injured by delay in presenting it until after the bank had failed, where the indorser has proved that it was not duly presented for payment; and this is the rule whether the suit is brought on the check or on an indebtedness to pay which the check was transferred and indorsed. *Kirkpatrick v. Puryear* (Tenn.) 785

12. The burden of proving that a bank was a partnership is on the one who asserts it, especially where the proof shows its organization under the name of the Home Savings Bank, with a president, cashier, and board of directors. *Gibbs's Estate* (Pa.) 276

13. The burden is on those who seek to dispossess of church property trustees who, with their predecessors, have been in continuous possession of it for more than sixty years, to show affirmatively how and when their title accrued and that it is good and valid. *Schlichter v. Keiter* (Pa.) 161

14. The presumption, in the absence of evidence, is that the fee of a street remains in the abutting proprietor. *White v. Northwestern N. O. R. Co.* (N. C.) 627
22 L. R. A.

15. Presumption of the delivery of a deed arises if it is found in the possession of the personal representative of the grantee. *Lewis v. Watson* (Ala.) 297

16. A passenger injured in a collision of cars on the railroad is entitled to the benefit of a presumption of negligence on the part of the carrier. *Fredericks v. Northern C. R. Co.* (Pa.) 306

17. No presumption of negligence on the part of a railroad company arises from injury to a passenger by the fall, upon a train, of a rock which became detached from the natural hillside more than 800 feet from the top of the cut through which the railroad ran. *Fleming v. Pittsburgh, C. O. & St. L. R. Co.* (Pa.) 351

18. The burden of proof as to the manner and cause of death is upon the plaintiff in a suit upon an accident policy. *Manufacturers' Acci. Indem. Co. v. Dorgan* (C. C. App. 6th C.) 620

19. Although the burden is on the proponents of a will to establish the sanity of a testator, yet after favorable testimony by the attesting witnesses, to defeat the will the testimony of contestants must so far overcome that of proponents as to neutralize the effect of the legal presumption of sanity. *Re Barber's Estate* (Conn.) 90

20. The presumption of innocence does not apply on an application for a writ of habeas corpus by one held under a commitment. *State v. Jones* (N. C.) 678

21. No unfavorable inference can properly be drawn against a corporation because of a failure to call its employes as witnesses to prove facts admitted by the pleadings of the opposite party. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 315

22. The laws of another state will be presumed by a court to be the same as those of the forum. *Scroggin v. McOlelland* (Neb.) 110

Documentary.

23. A deed, the effect of which has been adjudicated in a prior suit, is not admissible for the purpose of collaterally attacking the prior decision. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 333

24. An appeal from a probate decree approving or disapproving an alleged will is not an "action by or against the representatives of a deceased person," within the meaning of Conn. Gen. Stat. § 1094, making memoranda in his books evidence of the facts therein stated in such actions. *Re Barber's Estate* (Conn.) 90

25. A large number of letters alleged to have called forth letters copies of which in a testator's letter book have been admitted on the question of his mental capacity should not be laid in a mass before the jury unread, for them to examine or not as they should feel inclined; but absence of proof of authenticity, that they were received in due course of mail, or of any offer to produce their authors for examination, is not ground for rejecting them if they were found among testator's papers with his memoranda on them. *Re Barber's Estate* (Conn.) 90

26. A ruling of the postmaster general or-

dering a postmaster to deliver to one party mail addressed to another is not admissible on the question of malice in publishing circulars which are injurious to the business of the other party. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 332

To vary writing.

27. Oral evidence is not admissible to contradict an unilateral agreement so far as it is in writing, although it is admissible to show the consideration or conditions. *Horn v. Hansen* (Minn.) 617

Opinions.

28. A physician who made an autopsy may state that there was no need of what was called an air or water test with the heart, when the sufficiency of the autopsy is questioned. *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C. C. App. 6th C.) 620

29. A physician may give an opinion that the condition of the lungs of a person found dead in shallow water was what it would have been if he had fallen and been stunned in the water. *Id.*

30. A physician cannot be asked whether or not in his judgment, from testimony that he has heard, an autopsy was such as to enable a physician to state the cause of death with any degree of certainty, but the question should recite the scope and character of the autopsy. *Id.*

31. A hypothetical question to an expert witness testifying to a person's mental condition, about which he has no personal knowledge, is improper if it fails to present facts which it includes, in their just and true relation, and causes them to appear in one that is untrue and unjust. *Re Barber's Estate* (Conn.) 90

32. After enumerating a great number of facts as the basis for a hypothetical question to an expert, it is improper to incorporate the entire testimony of a witness, without stating it to be considered "in connection with" the other facts and propositions named. *Id.*

33. The fact that many persons after conversing with a testator and observing his conduct believed him to be insane is not a proper one upon which to base a hypothetical question to an expert as to his capacity to form an opinion regarding testator's sanity,—at least if the conversations and descriptions of conduct are not stated; nor is the fact that persons who observed his conduct advised his wife that it was unsafe for her to remain alone with him. *Id.*

34. In a hypothetical question to an expert as to his capacity to form an opinion regarding the sanity of a testator attacked because of an insane delusion as to the illegitimacy of his children, which is based on their being disinherited, the true value of the estate and the amount given the children should be stated, and not the inventory value and the counsel's statement that the children's share was "inconsiderable" and amounted to "practical disinheritance." *Id.*

35. The opinion of a witness on the question whether or not it was possible for a person, if standing, to have fallen in the position in which he was found, is not admissible. 23 L. R. A.

Manufacturers' Acci. Indemnity Co. v. Dorgan (C. C. App. 6th C.) 620

36. The question whether or not a person could have rolled from a certain place where he was sitting to that where he was found in a stream is not one on which an opinion of a witness can be given. *Id.*

37. A conductor whose knowledge has extended to only two or three instances cannot testify that an engineer was habitually reckless in running at excessive speed. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

Admissions and declarations.

38. Whether or not the payment by defendant of the claim of a third person was an admission of liability, so as to be provable in the case, or was a mere purchase of peace which cannot be proved, is a preliminary question of fact for the presiding justice. *Colburn v. Groton* (N. H.) 768

39. Admissions in plaintiff's declaration may be used by defendant as evidence, without offering the declaration itself in evidence, or otherwise proving its admissions. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

40. Evidence of admissions or statements made during the limitation period, by a plaintiff claiming land by adverse possession, that the land belonged to a third person, is admissible in ejectment as tending to show that when they were made plaintiff did not claim ownership. *Lewis v. Watson* (Ala.) 297

41. Evidence of declarations made by a person when sober, as to the value of his property, is admissible on the question of fraud in obtaining it from him shortly after, at an inadequate price, while he was intoxicated. *Boird v. Howard* (Ohio) 846

Relevancy.

42. The custom of people to crawl under cars blockading a street cannot be proved on the question of negligence in thus passing under them. *Rumpel v. Oregon Short Line & U. N. R. Co.* (Id.) 725

43. Evidence that travelers were accustomed to warn each other to avoid meeting others at a spot in a highway where an accident occurred is not admissible in an action against the town to recover for injuries caused by the accident. *Colburn v. Groton* (N. H.) 768

44. Evidence of the blockading of streets by trains at other times than that at which an accident for which suit is brought occurred is inadmissible on the question of negligence. *Rumpel v. Oregon Short Line & U. N. R. Co.* (Id.) 725

45. Evidence of the common experience of railroads in getting back switch keys from employes is inadmissible on the question of negligence of a railroad company in failing to recover such key from a discharged employe. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

46. In ejectment for land which plaintiff claims by adverse possession, evidence is admissible for the purpose of showing that the possession has not been continuous, that within the limitation period defendant recovered it in ejectment against plaintiff and was placed in possession. *Lewis v. Watson* (Ala.) 297

47. On the issue whether or not a physician making an autopsy cut open the stomach, he may state that he had been told that the deceased had been drinking on the day of his death, as bearing on the scope of his investigations. *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C. C. App. 6th C.) 620

48. Evidence is inadmissible, in an action for libel in charging the plaintiff with unchastity, of her general reputation for virtue and chastity, where no attack is made upon it. *Cooper v. Plipps* (Or.) 836

Sufficiency.

49. A variance between an allegation that a person came in contact with a wire in the dark while walking on the sidewalk, and received a shock while attempting to remove it from his pathway, and evidence that he touched it in groping to find packages which he had dropped when he slipped and fell on the sidewalk, is not a failure of proof which is fatal, under Hill's (Or.) Code, § 98. *Ahern v. Oregon Teleph. & Teleg. Co.* (Or.) 635

50. Proof that a person purchased shares in a bank which was then organized and doing business, and received dividends declared by the directors and paid to him in a cashier's check, does not show any liability as a partner. *Gibbs's Estate* (Pa.) 276

51. That the unconsciousness of a person during which drowning ensues was caused by a mere temporary affliction may be found by a jury, where there is evidence that he was not suffering from disease, but he was found drowned in shallow water. *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C. C. App. 6th C.) 620

NOTES AND BRIEFS.

Evidence; to vary or contradict writing. 618
Presumption as to incorporation:—in civil cases; in criminal cases. 276

Presumption of innocence in habeas corpus proceeding. 678

Presumption of negligence of carrier from injury to passenger. 351

Burden of proof and opinions as to testamentary capacity. 90

Oral evidence as to contract with carrier. 391

EXCEPTIONS. See **APPEAL AND ERROR, 7.**

EXECUTORS AND ADMINISTRATORS. See **COSTS, 1.**

1. The fact that a debt due by legatees to testator's estate is joint will not prevent the amount of their debt being retained from their claims to legacies. *Webb v. Fuller* (Me.) 177

2. The administrator of a deceased legatee of an estate is subject to the same right of retainer or deduction for an indebtedness of such distributee to the estate as existed against the distributee. *Id.*

3. The right of an executor or administrator to retain a legacy or distributive share from a debtor to the estate, and apply it to the indebtedness, exists without any statute. *Id.*

22 L. R. A.

4. The amount due from a distributee to the estate must be included in the assets in determining the amount of each share. *Id.*

EXPATRIATION. See also **ALIENS, 2.**

1. Expatriation must be effected by removal from the country. *Comitia v. Parker* (C. C. E. D. La.) 148

2. In the absence of any Act of Congress authorizing it, there can be no implied renunciation of citizenship by an American woman marrying an alien. *Id.*

FACTORS.

1. An agent's right to a lien for commissions and expenditures on goods consigned to him for sale is personal, and not transferable, and does not give his creditors any right in the property. *Barnes Safe & L. Co. v. Block Bros. Tobacco Co.* (W. Va.) 850

2. The title to goods consigned to an agent for sale, to be paid for when sold, remains in the principal until a sale to a bona fide purchaser, and prevents a sale of the goods on execution in favor of the agent's creditors. *Id.*

NOTES AND BRIEFS.

Factors; reservation of title in bailments for sale, as against creditors of bailor and bailee:—conditional sales of goods to be resold; consignment. 850

FALSE IMPRISONMENT.

Liability for an unlawful arrest and detention does not exist merely because the officer who made it did not have a warrant therefor in his possession, if such warrant had been issued and no hurt resulted to the accused because of the fact that the officer did not have the warrant. *Cabell v. Arnold* (Tex.) 87

FEDERAL COURTS. See **COURTS.**

FENCES.

The exceptionally small size of young cattle, such as calves and yearlings, on account of which they are able to pass through or under barbed-wire fence, will not excuse the owner of the fence for its insufficiency, where the statutes allow cattle to run at large, so as to give him a right of action for their trespass, although when the fence was built all cattle in the neighborhood were of a larger kind, against which the fence was sufficient. *Clarendon Land, I. & A. Co. v. McClelland* (Tex.) 105

NOTES AND BRIEFS.

Fences; sufficiency of:—in general; description of fence required; effect of contract. 105

FINDING. See **APPEAL AND ERROR, 9, 10.**

FIRE DEPARTMENT.

A fireman who goes into or upon a burning building for the purpose of extinguishing the fire acts under a license given by the law, and not by invitation of the owner so as to bring himself within the rule as to the owner's duty

to have the building safe for those whom he invites there. *Woodruff v. Bowen* (Ind.) 198

FIREMEN. See BUILDINGS, 2.

FISHERIES. See also CONSTITUTIONAL LAW, 16.

The penalty for selling or offering for sale, or having in possession, any trout which is not alive, during the close season, which is imposed by Mass. Stat. 1884, chap. 171, § 53, extends to trout artificially propagated on one's own premises, in view of § 26, which declares that such trout may be sold at all times for purposes of culture and maintenance, but not for food during close seasons. *Com. v. Gilbert* (Mass.) 439

FOOD. See also COMMERCE, 4.

NOTES AND BRIEFS.

Food; implied warranty on sale of, see SALE.

FORCIBLE ENTRY AND DETAINER. See JUDGMENT, 4.

FORGERY. See BILLS AND NOTES.

FRAUD. See also ESTOPPEL, 2.

1. Obtaining the property of an intoxicated person at an inadequate price, knowing of his incapacity to make a valid agreement in respect to it, constitutes an actionable fraud. *Baird v. Howard* (Ohio) 846

2. Representations that a horse is safe for a lady to drive, by which she is induced to drive the horse on trial, and is thrown out and injured by the plunging and kicking of the horse, which is in fact an ugly, vicious, and tricky animal, create a liability in the nature of a tort for breach of a warranty of the safety of the horse, although the person making the representations did not know that they were false. *Cameron v. Mount* (Wis.) 512

FREEDMAN'S SAVINGS AND TRUST COMPANY. See CORPORATIONS, 18, 14.

FREEDOM OF THE PRESS. See INFUNCTION, 7.

GARNISHMENT.

1. A foreign corporation may be charged as garnishee in all cases where an original action might be maintained against it for the recovery of the property or credit in respect to which the garnishment is served. *Neufelder v. German-American Ins. Co.* (Wash.) 287

2. A fund kept by a foreign insurance company in one state for the payment of losses in that and another state is subject to garnishment at the instance of creditors of an insured in the latter state to the amount of the debt of the company for a loss upon a policy issued in the latter state, although no portion of such fund has been specifically appropriated to such loss, under a statute providing that any credit or other personal property in the possession or under the control of any person, or debts owing the defendant, may be attached. *Id.*

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3. A garnishee paying into court the amount due the principal defendant in advance of an adjudication, as allowed by How. (Mich.) Ann. Stat. § 8087, which expressly excepts the sum of \$25 due to a householder for personal labor, does so at his peril, unless the principal defendant is estopped by circumstances from asserting his claim for this exemption, since the garnishee may always protect himself by his disclosure, by stating at least that he does not know whether the principal defendant is or is not a householder. *Crisp v. Wayne & E. R. Co.* (Mich.) 732

NOTES AND BRIEFS.

Garnishment; duty of garnishee to set up exemption of debtor. 732

Of debt due to nonresident. 287

GAS.

Allowing gas to escape into the open air and go to waste, because, it is not profitable to utilize it, from a well which has been lawfully drilled, without malice or negligence, in one's own premises, gives no legal ground of complaint to a neighboring owner on the ground that gas is thereby drained from the adjoining lands to the detriment of his wells; and the latter has no right to plug the well and prevent the waste of the gas, even at his own expense. *Hague v. Wheeler* (Pa.) 141

NOTES AND BRIEFS.

Gas; right of owner to allow waste 145

GIFT. See WILLS, 2.

GOVERNOR. See COURTS, 5; LEGISLATURE, 8.

HABEAS CORPUS. See also EVIDENCE, 20.

The burden of showing that a person is illegally detained, when held under a regular mittimus, is upon the prisoner, as the mittimus is sufficient, prima facie, to show legal detention. *State v. Jones* (N. C.) 678

NOTES AND BRIEFS.

Habeas corpus; presumption of innocence in habeas corpus proceedings. 678

HEALTH. See CONTRACTS, 8.

HIGHWAYS. See also DAMAGES, 7; DEDICATION; EMINENT DOMAIN, 12-16; INFUNCTION, 12, 18.

1. The laying out of a street over tide-lands is authorized only for the extension of existing streets, under Wash. Act March 24, 1890, giving a city the right "to project or extend" streets over such lands. *Seattle & M. R. Co. v. State* (Wash.) 217

2. The inconvenience of the public, or the sufficiency of the remainder of the street for public uses, is immaterial on the question of abating a purpresture in a street in proceedings by the public. *Smith v. McDowell* (Ill.) 393

3. An obstruction of a street for the length

of 85 feet and the width of 5 feet, by a stone wall enclosing an arway to a basement, is a purpresture which is a public nuisance *per se*, beyond the power of municipal authorities to license without express authority. *Smith v. McDowell* (Ill.) 898

4. The right of an abutting owner to use the part of the street of which he owns the fee does not extend to the construction of a private railroad therein, the use of which will pollute the air and depreciate the rental value of the abutting owner on the opposite side of the street. *Gustafson v. Hamm* (Minn.) 565

5. An abutting owner having an easement independently of his ownership of the fee in the street, to its full width in front of his lot for purposes of access, light, and air, which constitutes property, may maintain a private action to prevent the maintenance and operation of a purely private railroad on any part of the street in front of his lot so as to pollute the air and depreciate the rental value of his premises. *Id.*

6. A purely private railroad cannot be authorized upon or across public streets by a city council, under the provisions of Minn. Gen. Stat. 1878, chap. 34, § 47, and Minn. Sp. Laws 1889, chap. 37, which have reference only to such railroads as perform the duties of public or common carriers. *Id.*

7. A child in the highway for the purpose of play only is entitled to the protection of the law as against negligence in leaving a dangerous embankment which falls upon and injures the child. *Gibson v. Huntington* (W. Va.) 561

8. A municipal corporation is absolutely liable for injuries caused by its failure to keep in repair the streets, alleys, sidewalks, roads, and bridges. *Id.*

9. Trustees of a village in purchasing a ledge of rock and voting to locate a stone crusher there act officially, and are not personally liable to one whose horse was frightened by the stone crusher, where they did not participate as laborers, operatives, or superintendents in setting up and operating the crusher. *Bates v. Horner* (Vt.) 824

10. An ordinance attempting to vacate a street or portion thereof, for the sole purpose of allowing a private person to occupy a portion for an area and stairways in connection with the basement of a building, is *ultra vires* and void, where the only statutory authority is a general power to lay out, improve, and vacate streets. *Smith v. McDowell* (Ill.) 898

NOTES AND BRIEFS.

Highways; right to light and air from, see EASEMENTS.

Use of, by abutting owner for private railroad. 565

Right of child to protection against dangerous conditions of:—in general; statutes requiring simply safety for travelers; absence of statutory rules. 561

Personal liability of highway officers for negligence:—(1) nature of their office; (2) capacity in which liable; (3) duties required of them; (4) ministerial duties; (5) foundation of liability, (6) principles exempting from liability. 23 L. R. A.

ity; (a) general; (b) error of judgment; (c) matters of discretion; (d) necessity of funds; (e) order of the court; (7) necessity of notice; (a) to officers; (b) to land owners; (8) principles sustaining liability; (9) state decisions; (10) for acts of predecessors or successors; (11) for acts of employes; (12) adjoining towns; (13) canals; (14) criminal liability. 824

Rights of abutting owners as to obstruction or vacation. 894

HOMESTEAD.

The foreclosure of a mortgage on property cannot be contested by the wife of a subsequent owner who expressly assumed the payment thereof, on the ground that it is a family homestead, although it was obtained in exchange for a former homestead. *Sheldon v. Pruesner* (Kan.) 709

HUSBAND AND WIFE. See also ESTOPPEL, 1; NEGLIGENCE, 2.

1. Husband and wife do not take as tenants by entirety, but as joint tenants, under a conveyance to them "in joint tenancy." *Thornburg v. Wiggins* (Ind.) 42

2. A conveyance of land to a husband and wife in consummation of their joint purchase of it during coverture vests in them an estate by entireties. *Re Bramberry's Estate* (Pa.) 594

3. A mortgage taken in the joint names of husband and wife on the sale of land held as tenants by the entirety is presumed to be held by the same estate. *Id.*

NOTES AND BRIEFS.

Husband and wife; estoppel of wife, see ESTOPPEL.

Husband's negligence as bar to recovery for wife's personal injuries. 460

Tenancy by the entireties in personal property. 594

INDICTMENT.

An indictment charging profane swearing and cursing and taking the name of God in vain on the public streets, to the "evil example and to the common nuisance of the good citizens of the state," does not sufficiently aver the facts and circumstances necessary to make it a common nuisance, where it does not aver that it was heard by citizens, or state facts showing the offensive and annoying character of the utterances. *Com. v. Linn* (Pa.) 353

INFANTS. Right of, on Highways, see HIGHWAYS, 7, NOTES AND BRIEFS.

INJUNCTION. See also COURTS, 14.

1. A clear case of the inadequacy of the legal remedy must be shown in order to justify the interference of a court of chancery by injunction. *Carney v. Hadley* (Fla.) 233

2. While insolvency alone of the defendant may not be sufficient to authorize an injunction, yet it is an important element in many cases in determining whether or not a court of chancery should act in granting injunctions. *Id.*

8. An injunction may be granted against a threatened trespass, under an unconstitutional statute, to take lands for private purposes. *Welton v. Dickson* (Neb.) 496

4. In order to justify the granting of an injunction against an alleged trespass or threatened injury to trees standing on land, it must appear that the trees are of such peculiar value and importance to the estate as that the alleged injury to them will so affect the uses and purposes for which the estate was designed as to make the injury to them an irreparable loss to the owner. *Carney v. Hadley* (Fla.) 238

5. Whenever the complainant's title is disputed in cases of trespass, a court of equity will not interfere by injunction on the ground of a multiplicity of suits, until he has successfully established his title by trial at law. *Id.*

6. Before a court of chancery will interfere to prevent a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own pretension of right. *Id.*

7. The constitutional guaranty of the freedom of the press and of speech will not protect against an injunction one who publishes false and injurious statements against a competitor's business. *Shoemaker v. South Bend Spark-Arrester Co.* (Ind.) 332

8. An injunction may issue against false and malicious claims of title to a patent, with threats of infringing suits against the customers of a competitor,—at least where the defendant is insolvent. *Id.*

9. A vendor of village premises upon condition that no intoxicating liquors shall be sold thereon cannot maintain a suit to enjoin the sale of such liquor in violation of such condition, where he has subsequently sold adjoining premises without restriction, and such adjoining premises have been and are used for the sale of liquor, since such restrictions are sustained upon the theory that a person has the right in disposing of his property to prevent such a use by the grantee as may diminish the value of remaining land or impair its eligibility for other uses; and the fact that the omission of a restriction in the subsequent deed was a mistake will not affect the result. *Jenks v. Paulowski* (Mich.) 863

10. The fact that most of the premises in the locality are no longer kept for residences will not deprive a person who still resides there, and who has done or omitted nothing which would defeat the right, of the right to enforce a restriction in an agreement against business "injurious or offensive to the neighboring inhabitants." *Rowland v. Miller* (N. Y.) 182

11. An injunction will not lie in all cases to prevent the maintenance of a nuisance causing damage to private property, but the remedy may be by an action for damages. *Haggart v. Stehlin* (Ind.) 577

12. An injunction to prevent the continuance or creation of a nuisance by obstructing a highway may be granted at the suit of the proper officers. *Smith v. McDowell* (Ill.) 398

13. An injunction may be granted against the construction of a purely private railroad 22 L. R. A.

upon or across a public street, to the detriment of an abutting owner. *Gustafson v. Hamm* (Minn.) 565

Against official action.

14. The enforcement of city ordinances which attempt an unconstitutional interference with interstate commerce may be restrained by injunction from a federal court. *Georgia Packing Co. v. Macon* (C. C. S. D. Ga.) 775

15. The courts may enjoin the collection of an assessment upon abutting owners for the construction of elevated roadways which will not at all benefit the property assessed, as there is no foundation for the exercise of discretion of the assessing officers. *Oregon & C. R. Co. v. Portland* (Or.) 718

16. The proper mode of review of an order of court directing the sheriff to operate an elevator in the court-house for convenience of access to the court-room is by appeal, and not by injunction against the sheriff. *Vigo County Comrs. v. Stout* (Ind.) 898

17. A void order of court to make a practical reconstruction of the court-house is subject to collateral attack by way of injunction, although the order purports to be for repairs, and would have been valid if confined to necessary repairs only. *White County Comrs. v. Gwin* (Ind.) 402

NOTES AND BRIEFS.

Injunction; against collection of assessment. 718

Against trespass to cut timber:—conservatism of court as to such relief; lack of remedy at law; adequate remedy at law; multiplicity of suits; question of possession or title; preventing waste pending litigation; statutory provisions; allegation of irreparable injury; interference with contract rights. 233

To restrain collection of illegal taxes:—general doctrine against; foundation of jurisdiction; practical operation of principles; (a) recognized heads; (b) mere illegality, irregularity, etc.; (c) adequate remedy at law; (d) necessity of payment, etc., of tax due; relief granted; (a) multiplicity of suits; (b) irreparable injury; (c) inadequate legal remedy; (d) cloud upon title; special state doctrines; fraud; personal tax; estoppel; set-off. 699

INNOCENCE. Presumption of, see HABEAS CORPUS, NOTES AND BRIEFS.

INSOLVENCY. For Preferences by Insolvent Corporation, see CORPORATIONS, NOTES AND BRIEFS.

INSURANCE. See also CONSPIRACY; CONTRACTS, 10; EVIDENCE, 10; GARNISHMENT, 2.

1. A carrier's liability on a collateral contract to procure insurance on the property of shippers is not covered by a policy of insurance "to cover the liability of the insured as carriers and warehousemen." *Minneapolis, St. P. & S. Ste. M. R. Co. v. Home Ins. Co.* (Minn.) 390

2. A valid contract of insurance may be made by parol, when not forbidden by statute,

or a provision of the company's charter which has been brought to the knowledge of the other contracting party; and, as in other cases of parol contracts, the assent of the parties to the terms of the agreement may be shown by their acts and the attending circumstances, as well as by the words they have employed. *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio) 768

8. When nothing is said in the negotiations for insurance about special rates of insurance, or special conditions of the policy, it will be presumed that those which are usual and customary were intended. *Id.*

4. When the terms of an executed policy have been unconditionally accepted by the insured, and it has thereafter been treated as in force by the parties, its delivery will be regarded as complete, though it remain in the hands of the insurer's agent. *Id.*

5. An agent authorized to make contracts of fire insurance and issue policies may waive payment in cash of the premiums, and give time for their payment, unless there are restrictions upon his authority of which the insured has notice; and such waiver may be express or implied. *Id.*

6. Where, under an arrangement with the insured by which his insurance was to be kept up to a specified amount by renewals or new policies, it was the custom of the agent to charge the premiums as policies were issued or renewed, and have periodical settlements with the insured, when the premiums would be paid, a credit for a premium so charged, to the next period of settlement, may be implied. *Id.*

Insurable interest.

7. A college supported by a church has no insurable interest in the life of a member of that church, which will sustain a policy of insurance on his life in favor of the college, although the college paid the premiums, while the application was made by the person whose life was insured. *Trinity College v. Travelers' Ins. Co.* (N. C.) 291

8. A life insurance policy constitutes a wagering contract, in the absence of any ties of blood or marriage between the beneficiary and the person whose life is insured, or of some contractual relation between them by reason of which damage may result to the beneficiary from the death of the other party. *Id.*

9. A vendor in an existing contract of sale has not the "sole and unconditional ownership" of a building which is described as "his dwelling," within the meaning of an insurance policy. *Hamilton v. Dwelling-House Ins. Co.* (Mich.) 527

Health of insured.

10. The construction of the words "spitting of blood," by a medical examiner in filling out answers to an application for insurance, as it was his duty to do, to mean the spitting of blood from the lungs or bronchial tubes only, is conclusive on the insurance company. *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 825

11. An anæmic murmur of the heart, which indicates no structural defect but comes from mere debility or weakness, is not a "bodily or

mental infirmity" within the meaning of the provisions of a policy of life insurance. *Manufacturers' Acci. Indemnity Co. v. Dorgan* (C. C. App. 6th C.) 620

12. A fainting spell produced by indigestion or lack of proper food, which is a mere temporary disturbance or enfeeblement, is not a "disease and bodily infirmity" within the meaning of an insurance policy. *Id.*

Warranties.

13. The difference between a warranty and a representation in an application for insurance is that a warranty must be literally true without regard to its materiality to the risk, while a representation must be true only so far as it is material to the risk. *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 825

14. The rule that the breach of a warranty of the truth of an applicant's answer avoids an insurance policy, without reference to his good faith or the materiality of the answer, cannot be applied to avoid a policy for the falsity of an answer resulting from a mistake in judgment or an error or blunder of the company's agent, who was specially charged by the company with the preparation of the application, and who made the answers upon a full and truthful statement of the facts by the applicant. *Id.*

Estoppel or waiver.

15. An insurance company is estopped to question the truth of answers in an application, notwithstanding the application warrants the answers to be true, where they are made under a requirement of the company, by its own medical examiner, who deduces the answers from facts correctly stated to him by the applicant. *Id.*

16. Knowledge of an insurance agent that the insured had made a contract for the sale of the property estops the company from denying that he had the "sole and unconditional ownership" required by policy. *Hamilton v. Dwelling-House Ins. Co.* (Mich.) 527

17. The knowledge of an insurance agent that a warranty by the assured that "a continuous clear space of 150 feet shall hereafter be maintained" between the property insured and any woodworking or manufacturing establishment does not represent the existing state of facts and that there is no intent to change the situation, and that the insured cannot control a clear space for that distance, prevents a forfeiture of the policy for breach of the warranty, where the agent accepts the premium and issues the policy without taking any steps subsequently to rescind it though knowing of the breach of the warranty, and it appears that on account of the situation of the property, the manner of its use, and its proximity to water, he considered that the existing space was equivalent to that required. *Michigan Shingle Co. v. State Invest. & Ins. Co.* (Mich.) 319

18. A clause in a policy withholding from agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance," has no reference to the application which precedes the policy. *Mutual Ben. L. Ins. Co. v. Robison* (C. C. App. 8th C.) 825

19. Receiving and retaining notice of death without objection and call for further information, besides furnishing blanks for proofs of loss, waives the objection that the notice was not served in time. *Trippe v. Provident Fund Soc.* (N. Y.) 432
Time for notice.

20. The "ten days from the date of either injury or death," within which notice of the death of a person insured by an accident policy must be given, does not begin to run from the date of his death, occasioned by the fall of a building which he occupied, if the fact of his death is not known until the discovery of his body, but begins to run when the fact of death is known,—especially where the notice of death is required to contain full particulars of the accident and injury. *Id.*

Cause of death.

21. Drowning is the moving, sole, and proximate cause of death resulting from falling into water, within the meaning of an insurance policy, although the fall may have been due to disease. *Manufacturers Acci. Indemnity Co. v. Dorgan* (C. C. App. 6th C.) 620

22. Accidental death by drowning is caused indirectly by disease within the meaning of an exception to an insurance policy against death caused directly or indirectly by disease, if drowning ensues upon a fall into the water which is caused by disease. *Id.*

23. The words "voluntary exposure," "unnecessary danger," and "hazardous adventure," within the meaning of an insurance policy, do not include such exposure as is incident to the ordinary habits and customs of life, but refer to something beyond the ordinary,—such as wanton or gross carelessness. *Id.*

NOTES AND BRIEFS.

Insurance; sole ownership of property. 597
Effect of agent's knowledge to affect contract. 319

Validity of oral contract for:—in general; validity of such contract assumed; charter or statutory provisions; contract to insure; agreement to renew or extend policy; contract incomplete; superseded by written contract; English decisions; presumption as to agent's powers. 768

Interpretation of statements as to health of insured. 325

Cause of death of person drowned. 622

INTEREST.

1. A contract to pay a higher rate of interest after maturity than before is valid if not prohibited by statute. *Sheldon v. Pruessner* (Kan.) 709

2. A note or other instrument containing an express promise to pay money, without any time specified, is in law payable immediately, so that interest runs from its date, while a promise to pay upon demand requires at least a judicial demand to set interest running. *Horn v. Hansen* (Minn.) 617

INTERNAL IMPROVEMENTS. See CONSTITUTIONAL LAW, 4.

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INTOXICATING LIQUORS. See also INJUNCTION, 9.

1. Delivering an express package of whiskey marked O. O. D. to the express company addressed to a purchaser in another county, who by a postal card order had directed it to be thus sent, is a sale of the whiskey in the county where it was delivered to the carrier. *State v. Flanagan* (W. Va.) 480

2. A saloon constitutes an actionable nuisance to neighboring property owners whose property is largely depreciated in selling and rental value by reason of the proximity of the saloon, frequented by persons for the purpose of drinking intoxicating liquors therein, when it is established in a residence neighborhood that has been previously free from such business and which, aside from residences, includes little except churches, schools, a female college, and an orphan asylum, and in which the people are largely opposed to saloons. *Haggar v. Stehlin* (Ind.) 577

3. The lessor of a building for use as a saloon, which will constitute an actionable nuisance to neighboring property owners, is liable to them for the damage resulting from such use. *Id.*

4. A saloon-keeper's license for the sale of intoxicating liquors is no defense against liability to adjoining property owners as to whom his saloon may constitute an actionable nuisance. *Id.*

5. A statute providing for the licensing of liquor-sellers is not unconstitutional on the ground that it is to promote their business, or that it confers a privilege to do an unlawful act, since in the absence of any statute on the subject the business would be open to all. *Id.*

NOTES AND BRIEFS.

Intoxicating liquors; saloon as nuisance to adjoining property. 578

JOINT DEBTORS. See also CONTRACTS, 4.

A joint action against a street-railway company and a railroad company may be maintained by a passenger in a street car who was injured by a collision caused by the neglect of the railroad company to give notice of the approach of its locomotives, concurring with the negligence of the street-railway company in crossing the railroad track. *Matthews v. Delaware, L. & W. R. Co.* (N. J. Sup.) 261

JOINT TENANTS. See COTENANTS; HUSBAND AND WIFE, 1.

JUDGMENT. See also CONSTITUTIONAL LAW, 5.

1. Service in another state upon a foreign corporation after an order of publication has been made is insufficient, where there is no attachment, to give jurisdiction to render a personal judgment against the corporation, although it had no property within the state. *Tillinghast v. Boston & P. R. Lumber Co.* (S. C.) 49

2. A satisfied judgment in an action by a discharged employé working under a contract

for a year at a certain sum per week, payable weekly, against the employer, based on the contract, is a bar to a subsequent action thereon, although the recovery was for only one week's salary. *Olmstead v. Bach* (Md.) 74

3. A person summoned to show cause why a dormant judgment should not be revived against him may interpose the defense that it is void for lack of jurisdiction, when this appears on the face of the record. *Enebold v. Olsen* (Neb.) 578

4. A judgment in forcible entry and detainer is conclusive only as to the right of possession, and is not conclusive as to the lessee's right to recovery or recoupment for breach of covenant in the lease. *Keating v. Springer* (Ill.) 544

5. One only of two defendants charged as joint tortfeasors may be found liable for negligence, and the other exonerated by the verdict. *Matthews v. Delaware, L. & W. R. Co.* (N. J. Sup.) 261

JUDICIAL NOTICE. See EVIDENCE, 1-9.

JUDICIAL SALE. See also DEED, 4; ESTOPPEL, 8.

The return of a levy is not essential to the validity of a sheriff's deed to the purchaser at execution sale. *Lewis v. Watson* (Ala.) 297

NOTES AND BRIEFS.

Judicial sale; of property held by trustee. 454

JURY. See DENTISTS.

LANDLORD AND TENANT. See also ACTION OR SUIT, 5; EASEMENTS, 3-7; EQUIT; INTOXICATING LIQUORS, 8; SET-OFF AND COUNTERCLAIM.

1. A tenant of a portion of a building may recover back rent paid in advance in accordance with the lease, upon the total destruction of the building by fire. *Porter v. Tull* (Wash.) 618

2. A lessee may recover damages by action for breach of covenant by his landlord, even if this does not amount to an eviction or operate as a bar to the claim for rent. *Keating v. Springer* (Ill.) 544

3. A tenant must pay rent while he remains in possession, notwithstanding such interference with the enjoyment of the premises as would constitute an eviction for which he might abandon them. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; tenant's easement of light and air, see EASEMENTS.

Rights and liabilities of tenant on destruction of leased building;—right of possession of rooms; possession of building; continuance of rent for apartments and rooms; continuance of rent for building; rent ceasing by terms of lease; abatement of rent by surrender of premises; liability of tenant to rebuild; statutes. 618

LARCENY.

NOTES AND BRIEFS.

Larceny; as affecting liability on official bond. 449

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LAW OF PLACE. See CONFLICT OF LAWS.

LEGACIES. See EXECUTORS AND ADMINISTRATORS, 1-8; WILLS, 12.

LEGISLATURE. See also COURTS, 5, 9.

1. A resolution purporting to be passed by the house of representatives after the general assembly had been prorogued by the governor is of no effect. *Re Legislative Adjournment* (R. I.) 716

2. The provision in R. I. Const. art. 4, § 9, that neither house, without consent of the other, shall adjourn for more than two days, is subject to implied exceptions, such as that where one house has unlawfully unseated members, thereby depriving towns of their constitutional representation. In such case the other house may adjourn until the vacancies can be filled. *Id.*

3. The fact that the two houses have not yet joined in grand committee for counting and declaring votes does not prevent the governor, under R. I. Const. art. 7, § 6, from adjourning the general assembly in case of disagreement between the two houses. *Id.*

NOTES AND BRIEFS.

Legislature; power of governor as to adjournment of. 716

LEVY AND SEIZURE. See also FACTORS, 2.

1. A joint tenant's interest in property is subject to execution. *Thornburg v. Wiggins* (Ind.) 42

2. A return of a levy may properly be indorsed on an execution by a third person at the direction and in the presence of the sheriff. *Lewis v. Watson* (Ala.) 297

3. Books of account and trial balances are not tangible property which can be made subject to levy under attachment, since they are not so intimately connected with the demands charged therein that their seizure is equivalent to the seizure of such demands. *Rosenthal v. Muskegon Circuit Judge* (Mich.) 698

NOTES AND BRIEFS.

Levy; on books of account. 698

LIBEL AND SLANDER. See also CONTRACTS, 9; INJUNCTION, 7, 8.

1. A witness in an action is not liable for libel, unless it is shown affirmatively that her statements were not pertinent to the matter in progress, and were spoken maliciously and with a view to defame the one claiming to be injured thereby. *Cooper v. Phipps* (Or.) 836

2. Defamatory and libelous matter in a pleading is not necessarily privileged, but the protection of the party from liability depends on the good faith of the allegations. *Randall v. Hamilton* (La.) 649

NOTES AND BRIEFS.

Libel and slander; by defamatory words in pleading. 649

Privilege of witness as to defamatory testi-

mony;—in general; English cases; affidavits and depositions. 836

LICENSE. See also ATTORNEYS, 2; FIRE DEPARTMENT; HIGHWAYS, 3; INTOXICATING LIQUORS, 4; RAILROADS, 2, 3; TAXES, 2.

1. A deed of standing timber to be removed within ten years passes the title, and does not constitute a mere license to take off chattels within the time limited. *Moe v. Benedict* (Mich.) 641

2. A license fee of \$1,000 for the occupation of an emigrant agent, unaccompanied by any police regulation whatever, is unreasonable and cannot be upheld. *State v. Moore* (N. C.) 472

NOTES AND BRIEFS.

License; legality of occupation tax. 472

LIENS. See also FACTORS, 1.

A statute giving livery-stable keepers a lien for the keeping of animals placed in their charge, without the knowledge or consent of the mortgagee, does not make such lien superior to that of a prior duly recorded mortgage on the animals, even though the law day has passed and the animals are still in the mortgagor's possession. *Chapman v. Montgomery First Nat. Bank* (Ala.) 78

NOTES AND BRIEFS.

Liens; priority between chattel mortgage and lien for keeping animals. 78

LIGHT. See EASEMENTS, 2-7, NOTES AND BRIEFS.

LIMITATION OF ACTIONS.

The Statute of Limitations begins to run in favor of the drawer of a check, at the latest, after the lapse of a reasonable time for the presentment of the check. *Scroggin v. McClelland* (Neb.) 110

NOTES AND BRIEFS.

Limitation of actions; statutes applicable to bank checks; certified checks. 110

LIVERY STABLE. See LIENS.

MANDAMUS. See also COURTS, 9.

1. Mandamus will lie to compel a judge to set aside an order denying a motion to compel attorneys to surrender books and papers and copies made therefrom, obtained under an abuse of a writ of attachment, by its use as a search warrant for evidence. *Rosenthal v. Muskegon Circuit Judge* (Mich.) 693

2. Mandamus is the proper remedy to compel an electric-railroad company to place guard wires where they will prevent dangerous contact of its uninsulated wires with the insulated wires of a telephone company, as required by ordinance. *State, Wisconsin Teleph. Co. v. Janesville Street R. Co.* (Wis.) 759

3. Mandamus is peculiarly the proper remedy to compel a town council to call a new election, as required by statute, where a prior election is inoperative. *State v. South Kingstown* (R. I.) 65

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4. Mandamus to compel officers to proceed under prior laws in respect to elections, instead of following an unconstitutional statute, is not premature because no demand and refusal has been made or the time arrived when it is the duty of the officers to act. *State, Morris, v. Wrightson* (N. J. Sup.) 548

5. Citizens who are deprived of as full and effective an elective franchise as they are entitled to under the Constitution by an apportionment Act have a sufficient interest to prosecute a writ of mandamus to test the statute. *Id.*

NOTES AND BRIEFS.

Mandamus; to corporation. 759

MAP. See DEDICATION.

MARK. See WILLS, 1, 2.

MARKETS. See COMMERCE, 7.

MASTER AND SERVANT. See also ACTION OR SUIT, 2, 3; CARRIERS, 1; CONSTITUTIONAL LAW, 9, 12; CONTRACTS, 6; DAMAGES, 2; JUDGMENT, 2.

1. One who volunteers to assist the servants of another assumes all the ordinary risks incident to the situation, and cannot recover from the master for injuries caused by defects in the instrumentality used or by the mere negligence of the servants. *Boarts v. St. Paul, M. & M. R. Co.* (Minn.) 663

2. A mere volunteer, although he has placed himself in a position of danger through his own negligence, can recover of the master for injuries received by reason of the failure of servants to exercise reasonable care to prevent injury to him after discovering the danger. *Id.*

3. An injury to a brakeman caused by the improper loading of a flat car so that the end of the load projected does not render the railroad company liable to him, where the car itself was not defective, and the company had furnished a competent inspector to see that the cars were properly loaded. *Dewey v. Detroit, G. & H. M. R. Co.* (Mich.) 292

4. A railroad track owned, maintained, and repaired by a manufacturing company and used by a railroad company only under a license or invitation to deliver freight under a contract, is not a part of the railroad company's "ways," within the meaning of Mass. Stat. 1887, chap. 270, § 2, creating a liability for the death of an employé by reason of any defect in such ways. *Engel v. New York, P. & B. R. Co.* (Mass.) 283

5. An employé engaged in repairing an engine belonging to his employer, and the engineer, whose duty it is to prevent the starting of the engine while the repairer is at work, are fellow servants. *Dantelier v. De Bardeleben Coal & I. Co.* (Ala.) 861

6. Negligence in the exercise of superintendence entrusted to an employé, within the meaning of Ala. Code, § 2590, subs. 2, does not exist in the case of an engineer whose duty it is personally to operate the engine, although he usually has a helper, where, in the absence of the helper, by the negligence of the engineer

in starting the engine, or in failing to prevent a third person from starting it, a person engaged in repairing the engine is killed, since the primary duty of the engineer is not that of superintendence, but that of a laborer. *Dantzler v. De Bardeleben Coal & I. Co.* (Ala.) 361

7. A railroad company is not liable for the death of an engineer, which was due to a collision occasioned by his violation of the rules in running his train at excessive speed. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

8. A railroad company's failure to recover a switch key from a discharged employé is not of itself sufficient to make the company liable for his criminal act in maliciously misplacing a switch for the purpose of wrecking a train. *Id.*

NOTES AND BRIEFS.

Master and servant; liability of railroad company to employé for injuries received in line of duty from defective track owned by another. 283

Assumption by volunteer of the risks of service:— in general; liability to minor volunteer assisting by request of one in authority; persons with interest; persons not volunteers; servant volunteer. 663

MAXIMS.

1. Expressio unius est exclusio alterius. *State, Morris, v. Wrightson* (N. J. Sup.) 548

2. Qui facit per alium facit per se. *State, Lamar, v. Dillon* (Fla.) 124

3. Salus populi suprema lex est. *State v. Moore* (N. C.) 479

4. Sic utere tuo ut alienum non lædas. *Hague v. Wheeler* (Pa.) 141

MEAT. See **COMMERCE**, 7.

MILEAGE. See **CARRIERS**, 6.

MORTGAGE. See also **CONTRACTS**, 12; **COSTS**, 2; **HOMESTEAD**; **HUSBAND AND WIFE**, 8.

The fact that one of the debts secured by chattel mortgage was due at the time the mortgage was given does not nullify the defeasance clause so as to make the instrument absolute before demand and refusal to pay. *Brown v. Grand Rapids Parlor Furniture Co.* (C. C. App. 6th C.) 817

MUNICIPAL CORPORATIONS. See also **ELECTRICAL USES AND APPLIANCES**, 4; **HIGHWAYS**, 9; **INJUNCTION**, 14; **OFFICERS**, 5, 8; **PARLIAMENTARY LAW**, 1-3; **PROHIBITION**; **VOTERS AND ELECTIONS**, 4, 8.

1. A municipal corporation is liable for injuries caused by its negligence in the discharge of, or failure to discharge, such duties as are purely ministerial, and not governmental or discretionary. *Gibson v. Huntington* (W. Va.) 561

2. A municipal corporation is not liable for injuries caused by the negligence of its agents and officers in the discharge of, or omission to discharge, duties which are purely governmental or discretionary. *Id.*
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3. Power to remove a city counselor is not inherent in the common council of a city, where the appointment of the counselor for a definite term is given to the mayor absolutely, without providing for his removal. *Speed v. Detroit* (Mich.) 843

4. An office created by ordinance may be abolished by ordinance. *State, Rylands, v. Pinkerman* (Conn.) 653

5. A message of disapproval of the acts of the board of aldermen by the mayor has no effect when the charter provides for his approval and disapproval only of measures passed by both boards which constitute the common council. *Id.*

NOTES AND BRIEFS.

Municipal corporations; powers as to appointment and removal of officers. 654

NAME.

The name of a person in law consists of one given name and one surname. *Encowld v. Olsen* (Neb.) 573

NOTES AND BRIEFS.

Name; use of initials in. 573

NEGLIGENCE. See also **CARRIERS**, 7, 8; **CUSTOM**, 1; **ELECTRICAL USES AND APPLIANCES**, 8; **FIRE DEPARTMENT**; **MASTER AND SERVANT**, 8; **RAILROADS**, 4-7.

1. Negligence is the absence of care under the circumstances. *O'Toole v. Pittsburgh & L. E. R. Co.* (Pa.) 606

2. Contributory negligence of the husband will defeat an action by the husband and wife for a personal injury to the wife. *Pennsylvania R. Co. v. Goodenough* (N. J. Err. & App.) 460

NOTES AND BRIEFS.

See also **HUSBAND AND WIFE**.

Negligence; in respect to dangerous electric wire. 635

Imputing negligence of carrier to passenger. 608

As to licensee on premises. 199

NEGOTIABLE PAPER. See **BILLS AND NOTES**, **NOTES AND BRIEFS**.

NOTICE. See **BOARDS**, 1.

NUISANCES. See also **COVENANT**; **HIGHWAYS**, 2, 3; **INJUNCTION**, 10-12; **INTOXICATING LIQUORS**, 2, 4.

1. Profane language is not a common nuisance, unless it is heard by citizens and the manner and occasion of the utterances are offensive and annoying. *Com. v. Linn* (Pa.) 353

2. The right of a city to build a pumping station for waterworks on its own land, so near the premises of a private owner that buildings subsequently erected by him will be made untenable by the noise and vibration of the

pumping machinery, is not conferred, even if the legislature has power to confer it without compensation to him, by a general authority to locate necessary structures and machinery for the waterworks. *Morton v. New York* (N. Y.) 241

8. The legislative authority which will shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question. *Id.*

NOTES AND BRIEFS.

See also INTOXICATING LIQUORS.

Nuisance; legislative authority for. 241
By offensive business. 184

OCCUPATION TAX. See TAXES, 2.

OFFICERS. See also CONTRACTS, 8; MUNICIPAL CORPORATIONS, 8, 4.

1. The executive does not have any inherent power of appointment of officers. *People, Richardson, v. Henderson* (Wyo.) 751

2. Election commissioners to prepare for, hold, and declare the result of a municipal election, are not officers in any sense; and their appointment or designation by the legislature is not necessarily or essentially executive in its nature. *State, Lamar, v. Dillon* (Fla.) 124

3. Appointive as well as elective officers are within Wyo. Const. art. 6, § 16, providing that officers shall hold until their successors are qualified. *People, Richardson, v. Henderson* (Wyo.) 751

4. Upon the appointment of an officer to fill a vacancy "until the next meeting of the legislature," under a statute making no further provision as to the incumbency, the meeting of the legislature does not create another vacancy in the office within the meaning of Wyo. Const. art. 4, § 7, authorizing the governor to fill a vacancy when there is no other provision made therefor, since art. 6, § 16, provides that every officer shall hold "until his successor is qualified." *Id.*

5. A person appointed to fill a vacancy in a board of police commissioners is appointed only till the end of the term of his predecessor under a charter providing generally for appointment to fill a vacancy, but which provides for two-year terms and for the expiration of a part of them in each year, with other provisions as to a non-partisan board. *State, Rylands, v. Pinkerman* (Conn.) 653

6. A person is not a *de facto* police commissioner when he has not the reputation of being such, or his acts and authority are not generally recognized or acquiesced in or such as to lead men to suppose that he is such officer, especially where there is a rightful commissioner who is claiming the office. *Id.*

7. Misconduct of a person before appointment to office constitutes no ground for his removal. *Speed v. Detroit* (Mich.) 842

8. Power to remove a city counselor is not implied in Mich. Act 1893, § 8, providing that 22 L. R. A.

on expiration of the term of office "of the city counselor or the city attorney, or their resignation thereof or removal therefrom," such officer shall deliver papers and books to his successor,—especially since the city attorney is by law subject to removal. *Id.*

NOTES AND BRIEFS.

Officers; power of removal. 843
Power to fill vacancy. 751

OKLAHOMA. See COMMON LAW.

ORIGINAL PACKAGE. See COMMERCE, 8-5.

PARLIAMENTARY LAW. See also BOARDS.

1. The vote of an alderman, when once given and counted by the mayor, who has declared the result, can be rejected for interest only by action of the board, and does not make an appointment to office by such vote subject to collateral attack. *State, Rylands, v. Pinkerman* (Conn.) 653

2. The casting vote of mayor may be given on the choice of officers as well as on a measure of legislation. *Id.*

3. An alderman is not deprived of the right to vote against the confirmation of a person to succeed him in office of police commissioner by his interest in the result. *Id.*

4. Members of a board of police commissioners need not remain actually in their seats during the time in which a warrant of arrest is being served on absent members to procure a quorum. *Id.*

NOTES AND BRIEFS.

Parliamentary law; in municipal proceedings. 657

PARTITION. See also TIMBER.

NOTES AND BRIEFS.

Partition; to enforce rights in timber. 641

PARTNERSHIP. See also EVIDENCE, 50; TAXES, 8, 4.

The foundation of a partnership is a contract expressed or implied. It results from the act of the parties, not from the act of the law. *Gibbs's Estate* (Pa.) 276

NOTES AND BRIEFS.

Partnership; tax on, see TAXES.
What constitutes. 611

PARTY-WALL.

A wall standing partly on the premises of each of adjoining owners, the portions of which are owned by them in severalty, with an easement for the support of the building of one of them, may be removed by the other for the purpose of erecting a new and better wall, although some inconvenience is thereby occasioned to the other owner, provided a new one is built within a reasonable time and with the

least inconvenience to the latter, which shall furnish him the same right of support, and that he shall be indemnified for necessary expenses occasioned him in consequence of the removal of the wall. *Futrell v. Drovers & M. Nat. Bank* (Md.) 682

NOTES AND BRIEFS.

Party-wall; right to reconstruct, 682

PASS. See CARRIERS, 4.

PATENTS. See also COURTS, 12; INJUNCTION, 8.

NOTES AND BRIEFS.

Patents; for restraint of trade in patented articles, see CONTRACTS.

PAYMENT.

1. The extinguishment of the liability of an indorser of a check by failure to present it until after the bank has failed extinguishes his liability also on an indebtedness for payment of which the check was indorsed. *Kirkpatrick v. Puryear* (Tenn.) 785

2. The indorsement of the check of another to a creditor in settlement of notes and an account, accompanied by a surrender of the notes and a receipt in full of the account, will be regarded as payment, in the absence of any agreement to the contrary. *Id.*

PERSONAL PROPERTY.

NOTES AND BRIEFS.

Tenancy by entireties in, 594

PEW. See also ADVERSE POSSESSION, 1; RELIGIOUS SOCIETIES, NOTES AND BRIEFS.

1. The owner of a pew in a church is entitled to payment if the pew is destroyed by taking down the building or otherwise, when it is a matter of expediency merely, and is not made necessary by the ruinous condition of the building. *Aylward v. O'Brien* (Mass.) 206

2. An archbishop who has title to the soil on which a Roman Catholic Church stands has no greater rights in respect to the demolition of a pew therein owned by an individual than an organized religious corporation of any other denomination would have by reason of its ownership of the church. *Id.*

3. A conveyance of a pew prior to Mass. Stat. 1855, chap. 122, except in Boston, was required to be by deed, as the pew was real estate. *Id.*

4. The methods and usages of the Roman Catholic Church do not seem to touch the question of the rights of a pew holder who has a title to his pew. *Id.*

PHYSICIANS. See also CONTRACTS, 8; DENTISTS.

The treatment of a patient by a physician is to be tested by the general doctrines of his school, and not by those of other schools. *Force v. Gregory* (Conn.) 848
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NOTES AND BRIEFS.

Physicians; liability for lack of skill. 843

PLEADING. See also LIBEL AND SLANDER, 2.

1. The use of the term "willful," in charging a railroad company with liability for the wrongful and negligent act of a brakeman, where the latter is not charged with committing the act willfully, does not show that the act is beyond the scope of his employment. *Smith v. Louisville & N. R. Co.* (Ky.) 72

2. A breach of diligence shown by allegations and evidence of the defendant, although not referred to in the plaintiff's pleadings, may be urged by the plaintiff to defeat defendant's justification, but not as a basis of recovery. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

3. The objection of want of parties, when taken by plea or answer, should give the names of the necessary parties when this can be done, and especially where it is peculiarly within the knowledge of the defendants. *Cass v. Minot* (Mass.) 536

4. Failure to plead the invalidity of a contract on the ground of public policy will not prevent the courts from refusing to enforce it. *Sheldon v. Pruessner* (Kan.) 709

5. The allegation of an answer that plaintiff voluntarily swung himself off the train, from which he alleges he was kicked off, is not such an affirmative averment as requires a reply. *Smith v. Louisville & N. R. Co.* (Ky.) 72

POLICE.

A chief of police under that title is not required for a city so as to prevent abolition of that office and the devolution of its functions on a captain of police, by a statute referring to such an officer or by the city charter making a similar reference, where these manifestly refer to the functions of the office, and not to the name of the officer. *State, Rylands, v. Pinkerman* (Conn.) 653

POLICE COMMISSIONERS. See OFFICERS, 6.

PRESCRIPTION. See EASEMENTS, 1.

PRINCIPAL AND AGENT. See FACTORS, 1, 2.

PRINCIPAL AND SURETY. See also WILLS, 12.

The relation of cosureties jointly and severally liable for the default of their principal as to each other is such that each is principal for half the amount recoverable for such default, and a surety for the other half. *Re Bailey's Estate* (Pa.) 444

NOTES AND BRIEFS.

Rights of cosureties. 448

PRIVATE ROADS. See EMINENT DOMAIN, 1.

PROFANITY. See BLASPHEMY, NOTES AND BRIEFS; INDICTMENT, ETC.; NUISANCE, 1.

PROHIBITION.

A writ of prohibition lies to prevent a common council from proceeding to remove a city counselor without any lawful power to do so. *Speed v. Detroit* (Mich.) 845

PROSPECT.

NOTES AND BRIEFS.

Easement of, see EASEMENTS.

PROXIMATE CAUSE. See also BILLS AND NOTES, 2; ELECTRICAL USES AND APPLIANCES, 1.

NOTES AND BRIEFS.

Proximate cause; what constitutes. 635

PROXY. See SIGNATURE, NOTES AND BRIEFS.

PUBLICATION. See INJUNCTION, 7.

PUBLIC IMPROVEMENTS. See also CONSTITUTIONAL LAW, 10; INJUNCTION, 15.

NOTES AND BRIEFS.

Unconstitutionality of assessment. 713

PUBLIC LANDS.

The sale by a town-site claimant of his interest in a town lot before the title has passed from the United States is not against public policy. *McKennon v. Winn* (Okla.) 501

PUBLIC PROPERTY. See EMINENT DOMAIN, 2.

PURPRESTURE. See HIGHWAYS, 2, 3.

QUO WARRANTO. See APPEAL AND ERROR, 5.

RAILROAD COMMISSIONERS.

1. The power of railroad commissioners to make rates for telegraph lines includes the power to ascertain what corporation is in the control of such a line. *State, Railroad Commission, v. Western U. Teleg. Co.* (N. C.) 570

2. The authority of railroad commissioners in North Carolina to regulate telegraph rates does not include the power to direct offices to be opened for commercial business. *Id.*

NOTES AND BRIEFS.

Railroad commissioners; powers of. 570

RAILROADS. See also ATTORNEY GENERAL; CUSTOM, 1; DAMAGES, 5; EMINENT DOMAIN, 5-9; HIGHWAYS, 4-6; INJUNCTION, 13; SUNDAY, 3.

1. Railroad tracks constructed lengthwise of a public street cannot be made to constitute a part of the company's yard, so as to come within L. R. A.

in the provisions of a statute forbidding the crossing of a yard by the tracks of other companies. *Seattle & M. R. Co. v. State* (Wash.) 217

2. An implied invitation or license to the public to cross a railroad track at a certain place can arise only from such appearances or circumstances as would lead ordinarily prudent and intelligent persons to understand that the crossing was public. *Chenery v. Fitchburg R. Co.* (Mass.) 575

3. An invitation to the public to cross a railroad at a certain place, at which the company must therefore use reasonable care to protect the crossers, is not shown as a matter of law by the fact that people are accustomed to cross there without objection, although the fact of continuous crossing might be evidence to the jury of a license. *Id.*

4. A person who crawls under cars across a highway five times within an hour and a half, and is caught the sixth time and his leg crushed, is precluded by his own contributory negligence from recovering damages, even though the servants of the railroad company failed to ring the bell or sound the whistle before starting. *Bumpel v. Oregon Short Line & U. N. R. Co.* (Id.) 725

5. A traveler is not guilty of contributory negligence—as matter of law at least—in failing to anticipate and guard against the running of a train in a dark night without any headlight, so as to defeat a recovery for injuries in being struck by an engine running backward at a railroad crossing, although there was a failure to stop and listen before endeavoring to cross the track. *Van Auken v. Chicago & W. M. R. Co.* (Mich.) 83

6. The crossing of a highway and railroad at different elevations, one passing under the other, is not within the provisions of the statute as to the rate of speed of trains or as to ringing the bell or blowing the whistle at a highway crossing. *Jenson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 680

7. Failure to ring the bell or sound the whistle of a train on approaching a highway which passes under the railroad cannot be regarded as negligence which will make the railroad company liable for frightening a horse by the passing of the train, if the noise of the bell or whistle would under the circumstances have merely increased the noise of the train and tended to frighten the horse still more. *Id.*

NOTES AND BRIEFS.

Railroads; right to intersect each other. 218

Contributory negligence of pedestrian at crossing. 726

Contributory negligence at crossing. 33

Liability for failure of signal at crossing. 83

Liability of railroad company for accident caused by wrongful act of stranger. 306

Negligence in running train over highway crossing. 680

License or invitation to cross. 575

REAL PROPERTY.

1. Recording an instrument purporting to convey standing timber, in a book called "Mis-

cellaneous Records," will not prevent its being constructive notice to the world of the rights of the purchaser, if the record is properly indexed and there is nothing to prevent the register from providing such a book. *Mac v. Benedict* (Mich.) 641

2. The omission to mention the state where the lands are situated, in an instrument purporting to sell standing timber, will not destroy the effect of the record as notice, although the instrument is executed in another state, if it is properly acknowledged and recorded in the county where the lands are situated, and the record title there stands in the name of the grantor. *Id.*

3. The children of a man to whose "heirs" a fee is given after the expiration of life estates, one of which is given to him in case he outlives the first life tenant, will take as purchasers in case of his death before his estate vests, where by force of a statute a limitation to "heirs" of a living person is construed to refer to his children. *Starnes v. Hill* (N. C.) 598

4. The rule in *Shelley's Case* cannot operate so as to vest an indefeasible fee in a person to whom a life estate is given with an estate in fee to his heirs provided he outlives a prior life tenant. *Id.*

5. The rule in *Shelley's Case* has not been abolished in North Carolina by the statutory provision that any limitation to the heirs of a living person shall be construed to be the children of such person unless a contrary intention appears. *Id.*

6. A limitation to a person for life, and then to another, if he shall outlive the former, gives the latter a contingent remainder. *Id.*

RECORDS. See ABSTRACTS; ESTOPPEL, 2.

RELIGIOUS SOCIETIES. See also EVIDENCE, 18; PEW.

1. Acquiescence in and use of a constitution by a church society for more than fifty years settles the question of its validity. *Schlichter v. Keiter* (Pa.) 161

2. For the purpose of settling the title to church property, courts may inquire into and determine the validity of an attempt to amend the constitution and confession of faith of the society, so as to ascertain whether those adhering to the original or amended documents constitute the society. *Id.*

3. A provision of a church constitution that no rule shall be passed "to change or do away with the confession of faith as it now stands" does not prevent changes in the interest of clearness of expression or fullness of statement of the accepted doctrines of the church. *Id.*

4. An affirmative vote of more than two thirds of those voting in response to a proposition of the governing body of a church to change the constitution is effective under a constitution authorizing changes "on the request of two thirds of the whole society," although the whole number of votes cast is only a little over one third of the church membership. *Id.*

5. The adherents to the new constitution, 22 L. R. A.

and not the dissenters therefrom, constitute the church, where the governing body makes a proposition for a permissible change to the old constitution and confession of faith, which, after ample time for consideration and a suitable system for ascertaining preferences, is adopted by the required majority of those voting, and the change is then promulgated by the bishops under the direction of the governing body. *Schlichter v. Keiter* (Pa.) 161

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Religious societies; change in constitution of. 171

Rights of pew holders: (I.) the nature of their right and title; (a) English doctrine; (b) United States doctrine; (c) in Pennsylvania; (d) conditions attached; (II.) rights of the parish or society; (III.) rights of the pew owner; (a) compensation upon removal; (b) action for disturbance; (IV.) free church; (V.) attachment; (VI.) assessment and taxation; (VII.) relief under the English law. 206

REMAINDER. See REAL PROPERTY, 6.

REPUTATION. See EVIDENCE, 48.

RESCISSION. See ACTION OR SUIT, 1.

RESERVATION.

NOTES AND BRIEFS.

Of easement of light and air, see EASEMENTS.

RESUME.

Subjects discussed and points decided. 863

RIPARIAN RIGHTS. See WATERS.

SALE. See also INTOXICATING LIQUORS, 1.

1. The delivery of goods to a common carrier to be forwarded to a purchaser who has instructed them to be thus delivered is a delivery to him, and passes the title to him subject to the vendor's right of stoppage *in transitu*. *Ramsey & G. Mfg. Co. v. Kelsea* (N. J. Err. & App.) 415

2. No implied warranty of competency or fitness for breeding purposes is made by stock breeders on the sale of a bull, although a full price is paid and the sellers know that he is bought for breeding purposes, where there is no fraud or misrepresentation, and both parties are alike destitute of knowledge or the means of forming an intelligent judgment as to the fitness or capacity of the animal for that purpose. *McQuaid v. Ross* (Wis.) 187

NOTES AND BRIEFS.

See also FACTORS.

Sale; implied warranty of fitness of property bought for special purpose:—general principles; contract executed and executory; manufacturer; depreciation of article; latent defects; knowledge of purpose; effect of inspection; articles of food, etc.; provisions of the state codes and statutes; English doctrine. 187

Passing of title to property by delivery thereof to a carrier for transportation to consignee or vendee:—question of law or fact; (a)

between buyer and seller; delivery to designated carrier; effect of shipper's mistake or negligence; effect of fraud; the shipment, and not the loading, the important fact; (b) between consignor and consignee; consignment to satisfy debt; consignment for sale; shipment to one whose money paid for the goods; shipment by agent to principal; consignment without condition; (c) conduct indicating an intention to retain title; consigning to shipper's agent; agreement to deliver at designated place; bill of lading; making goods deliverable to consignor's order; bill of lading in name of consignee; draft against bill of lading; special contracts or courses of dealing; imposition of conditions; (d) sufficiency of change of possession as regards creditors; (e) place where sale is consummated; goods sent C. O. D.; (f) effect of receipt by carrier to satisfy Statute of Frauds; (g) right to maintain action; owner may sue; right of consignor; suit by consignee; admiralty suits. 415

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SECRETS.

NOTES AND BRIEFS.

For restraint of trade in secret process, see CONTRACTS.

SEDUCTION.

Seduction accomplished on promise of marriage conditioned on pregnancy resulting is not within a statute making seduction under promise of marriage a criminal offense. *State v. Adams* (Or.) 840

SET-OFF AND COUNTERCLAIM.

See also EXECUTORS AND ADMINISTRATORS, 1-8.

A tenant may recoup damages for interference with his possession by the landlord, in reduction of the recovery for rent, although he has remained in possession instead of abandoning, when he would have been entitled to abandon. *Keating v. Springer* (Ill.) 544

SHELLEY'S CASE. See REAL PROPERTY, 4, 5.

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Signature; by proxy. 802

By proxy:— (1) signature written by another; (a) to a deed or mortgage; (b) to notes, contracts, and bonds; (c) to writs and notices; (d) to wills; (2) guiding the hand of subscriber; (3) printed signature or stamp. 297

By mark:— wills; attesting by mark; deeds, notes, and contracts signed or attested by mark. 870

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STATUTE OF FRAUDS. See CONTRACTS, 1, NOTES AND BRIEFS.

STATUTES. See also APPEAL AND ERROR, 4; CORPORATIONS, 8.

1. The purpose of Fla. Const. art. 3, § 18, that a statute shall not take effect until sixty days from the final adjournment of the legislature at which it may be enacted, unless otherwise specially provided in the Act, was to enable the people to become acquainted with the provisions of the legislation, and not to require them to govern their actions by the same before it has become operative. *Sammis v. Bennett* (Fla.) 48

2. The requirement of a new election within ten days, in R. I. Pub. Stat. chap. 710, § 18, in case of the failure of an election, does not limit the power, but is intended to insure its timely exercise, and must be regarded, not as mandatory, but merely directory, where the time named has elapsed without an election. *State v. South Kingstown* (R. I.) 65

3. An express repeal of all Acts inconsistent therewith, contained in a statute amending a general law so as to create an exception for a particular town, does not repeal a prior special statute which in effect excepted another town from such general law. *Id.*

4. If the good and the bad features of a statute are not so essentially and inseparably connected in substance or so interdependent as that it cannot be said that the legislature would not have passed the one without enacting the other, it is the duty of the court to give effect to so much as is good. *State, Lamar, v. Dillon* (Fla.) 124

5. The rejection of an invalid feature of a municipal Act restricting a voter to some one of the candidates whose names are printed on the official ballot does not affect the valid portions of the Act. *Id.*

6. The fact that a territorial legislature had no power over tidelands does not change the effect of a territorial statute as to railroads along "any river, stream of water, watercourse, etc.," after the admission of the territory as a state. *Seattle & M. R. Co. v. State* (Wash.) 217

7. A statute allowing parol testimony to identify land insufficiently described in a contract is not retrospective. *Lowe v. Harris* (N. C.) 879

NOTES AND BRIEFS.

Statutes; for English statutes, see COMMON LAW

STREET RAILWAYS. See also CARRIERS, 4; JOINT DEBTORS.

1. Street cars propelled by electricity, and running along land burdened only with the easement of a public highway, cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety. *Newark Passenger R. Co. v. Bloch* (N. J. Err. & App.) 374

2. A person crossing a public highway in which a street railway runs must look out for

vehicles which might endanger him moving at lawful speed. *Newark Passenger R. Co. v. Bloch* (N. J. Err. & App.) 874

NOTES AND BRIEFS.

Street railways; liability for injury to pedestrian. 874

SUBSCRIPTION. See **CONTRACTS**, 4, **NOTES AND BRIEFS**.

SUMMONS. See **WRIT AND PROCESS**.

SUNDAY. See also **CONSTITUTIONAL LAW**, 8, 15.

1. A statute prohibiting labor on Sunday is not in conflict with the Constitution of the United States or of Maryland. *Judeford v. State* (Md.) 721

2. A constitutional guaranty of religious liberty is not violated by a statute prohibiting Sunday labor. *Id.*

3. Riding home from a railroad station in a peaceable and quiet manner on Sabbath evening is not such a violation of statute against labor, sport, games, etc., on that day as will defeat a right to recover for injuries received from a train at a railway crossing. *Van Auken v. Chicago & W. M. R. Co.* (Mich.) 38

NOTES AND BRIEFS.

Sunday; constitutionality of Sunday law. 696, 721

SURFACE WATERS.

NOTES AND BRIEFS.

Rights in respect to. 247

TAXES. See also **CONSTITUTIONAL LAW**, 6; **VOTERS AND ELECTIONS**, 6.

1. A constitutional provision requiring uniformity and equality of taxation is violated by a statute authorizing a state revenue agent to levy and collect back taxes when, in his opinion, the assessed value on which taxes have been collected was too little. *Adams v. Tonella* (Miss.) 846

2. If an occupation tax can be upheld in any case as an exercise of the taxing power, it must not violate a constitutional requirement of uniformity; and therefore a tax imposed by the legislature on the exercise of an occupation in some counties, but not in others, is unconstitutional. *State v. Moore* (N. C.) 472

3. Stock in trade of a partnership doing business in a city, which remains there until it is sold in course of business, is "permanently located" there for purposes of taxation, without regard to the residence of members of the firm, within the meaning of the exception in Md. Const. art. 8, § 51, making goods taxable at the residence of the owner, except when "permanently located" elsewhere. *Hopkins v. Baker* (Md.) 477

4. A stock in trade of a trading partnership is properly assessed to the firm, instead of to the individual members, where the law provides for the assessment of goods at a place 22 L. R. A.

where they are permanently located, without regard to the residence of the owners. *Id.*

5. A statute giving a state officer unlimited power and discretion to fix the valuation of property which he thinks has been assessed for too little, without any opportunity to the taxpayer to be heard except in defense of a suit to collect the taxes, is in violation of a state constitution which provides that property shall be assessed under general laws, by uniform rules, according to its true value, and which also provides for assessors as county officers. *Adams v. Tonella* (Miss.) 846

6. Property owned by a charitable institution is not exempt from taxation if not used by the institution, under Mont. Const. art. 12, § 2, exempting property "used exclusively for" certain specified purposes, including "institutions of public charity." *Montana Catholic Missions v. Lewis & O. County* (Mont.) 684

7. The intention to use property, by a charitable institution, is not equivalent to the use of it, within a provision as to exemption from taxation. *Id.*

8. The exercise of the power to mine its own coal by a manufacturing corporation, to supply itself in part with the raw material used by it, does not defeat the exemption of its capital stock from taxation, under Pa. Act 1889, but requires such exemption to be limited to that part of the capital which is used exclusively in manufacturing. *Com. v. Juniata Coke Co.* (Pa.) 233

9. The immunity from taxation of the capital stock of a corporation "exclusively engaged in manufacturing," under Pa. Act 1889, is not lost by its possession of the ancillary power of mining to supply its own raw material,—especially where it has never used, or sought to use, this power. *Com. v. Pottsville Iron & S. Co.* (Pa.) 236

NOTES AND BRIEFS.

Taxes; injunction against, see **INJUNCTION**.
Constitutionality of statute as to enforcement of. 346

On manufacturing business. 230, 232

Tax on partnership property; as regards place of taxation; set-off for debts; joint-stock association; name in which the assessment is made; dissolution. 477

Constitutional restriction of. 472

Exemption of charitable institutions. 684

TELEGRAPHS. See **COMMERCE**, 2; **CONFLICT OF LAWS**, 2; **DAMAGES**, 4; **RAILROAD COMMISSIONERS**.

TELEPHONES. See **ELECTRICAL USES AND APPLIANCES**, 1, 2.

TERRITORIES. See **STATUTES**, 6.

TICKET. See **CARRIERS**, 5, 6.

TIDELANDS. See **EMINENT DOMAIN**, 3; **HIGHWAYS**, 1.

TIMBER. See also **INJUNCTION**, 4; **LICENSE**, 1; **REAL PROPERTY**, 1, 2.

Purchasers of an undivided interest in timber from tenants in common of the land, al-

though not entitled to a partition of the timber, may in equity enforce a partition of the land, setting off the parcel on which the timber will belong to them, even if, by subsequent conveyances, the whole title to the land has been acquired by one person. *Mee v. Benedict* (Mich.) 641

NOTES AND BRIEFS.

Timber; injunction against trespass to cut, see INJUNCTION.

Rights of tenants in common. 641

TOWNS. See VOTERS AND ELECTIONS, 1.

TOWN SITE. See PUBLIC LANDS.

TRADEMARK.

1. The words "sarsaparilla and iron" cannot be claimed as a trademark for a medicinal compound or beverage including sarsaparilla and iron as ingredients, as against an alleged infringing compound of which the words are equally descriptive, even if the ingredients named are only a small part of the compound. *Schmidt v. Brieg* (Cal.) 790

2. A palpable imitation of a label for a medicinal compound called "Sarsaparilla and Iron," both having the word "sarsaparilla" at the top in large letters, and the word "iron" in the border of the lower half of the label, and both having parallel lines across the middle, with the names of the manufacturers between, and their monogram in the same position, and both having the words "a great blood purifier" and "cures all skin diseases," printed in the lower half of the label, while the only material difference in the design and appearance of the labels is in their color,—is sufficient to constitute an infringement, even if there is no valid trademark in any of the words copied. *Id.*

3. The use of labels, marks, and devices so closely resembling those used by one claiming a trademark as to deceive purchasers exercising ordinary care, constitutes an infringement of his rights, independently of the validity of the trademark in question. *Id.*

NOTES AND BRIEFS.

Trademark; infringement of. 790

TREES. See INJUNCTION, 4.

TRESPASS. See ANIMALS, 1; INJUNCTION, 3-5, NOTES AND BRIEFS.

TRIAL.

1. The constitutional right of trial by jury is not violated by a statute which provides for the determination by the court of the degree of crime, on a plea of guilty of murder. *State v. Almy* (N. H.) 744

2. Refusing questions leading in form after similar ones have been answered is proper. *Manufacturers' Acci. Indemnity Co. v. Dorman* (C. C. App. 6th C.) 620

3. The due care of a railroad company in protecting its switches from interference by malicious acts of third persons is a question for the jury. *East Tennessee, V. & G. R. Co. v. Kane* (Ga.) 815

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4. The sufficiency of the notice of death is a question of law, where it depends on the construction of an accident policy to determine whether the time of the notice runs from the date of death, or of the discovery of the fact of death. *Trippe v. Provident Fund Soc.* (N. Y.) 433

5. Charging that electricity requires the "utmost caution to control" is not erroneous in an action by one who, while passing along a sidewalk, was injured by contact with a telephone wire which was hanging near the walk and was heavily charged by an electric-light wire,—especially where, immediately afterwards, the jury are told to measure defendant's conduct by that of a "cautious and prudent man." *Ahern v. Oregon Teleph. & Telog. Co.* (Or.) 635

6. It is not error for the judge to express an opinion on the question whether a railway company had been guilty of negligence in respect to loaded cars left on a switch, which was left open so as to derail them if they got loose, where the circumstances call for words of caution from him, because of a collision due to the criminal act of a stranger, and the jury are told that it is for them to decide the whole matter. *Fredericks v. Northern O. R. Co.* (Pa.) 806

7. In case of substantial dispute as to the facts concerning negligence, a verdict cannot be directed. *Newark Passenger R. Co. v. Bloch* (N. J. Err. & App.) 874

8. It is not error to direct the jury as to an answer to a special interrogatory, where the evidence is all one way, and a party cannot complain of such direction because he wants to know whether the jury are making their findings of the facts in accordance with the evidence. *Van Auken v. Chicago & W. M. R. Co.* (Mich.) 83

NOTES AND BRIEFS.

Trial; waiver of jury trial by plea of guilty of murder. 745

TROVER.

A person who while intoxicated is induced to part with property at an inadequate price may treat the transaction as a conversion of property, if the possessor claims the property and denies the former's right thereto. *Bard v. Howard* (Ohio) 846

TRUST. See CHARITIES.

UNDERTAKERS. See COVENANT; EVIDENCE, 5.

VARIANCE. See EVIDENCE, 49.

VENUE. See ACTION OR SUIT, 4; COURTS, 8.

VIBRATION. See NUISANCES, 2.

VILLAGE. See HIGHWAYS, 9.

VOLUNTEER. See MASTER AND SERVANT, 1, 2, NOTES AND BRIEFS.

VOTERS AND ELECTIONS. See also MANDAMUS, 8-5; OFFICERS, 2; STATUTES, 2.

1. A statute providing for a new election within ten days in case of the failure of an election in a town divided into voting districts does not violate the Rhode Island Constitution providing for a reopening of the polls in case there is no election, as this applies only to towns which are not divided into districts. *State v. South Kingstown* (R. I.) 65

2. The right to vote is not an inherent or absolute right generally reserved in bills of rights, but its possession is dependent upon constitutional or statutory grant. *State, Lamar, v. Dillon* (Fla.) 124

3. Although the legislature cannot change or add to constitutional qualifications of electors in any way, where the Constitution does not confer the right to vote or prescribe the qualifications of voters, it is competent for the legislature, as the representative of the law-making power of the State, to do so. *Id.*

4. Elections for municipal officers are not within Fla. Const. art. 6, § 1, prescribing the qualifications of electors at all elections under it, but are subject to statutory regulation, and it is competent for the legislature to prescribe the qualifications of voters at the same. *Id.*

5. The legislature having the power under the Florida Constitution to make the payment of a capitation tax not exceeding \$1 a year a prerequisite for voting, the payment of delinquent capitation taxes may be required provided they do not amount to more than \$1 for each year. *Id.*

6. A statute giving a voter an "opportunity to qualify by registering and himself paying his own poll taxes for such years" does not deprive him of his right to pay his said poll taxes through an authorized agent. *Id.*

7. General provisions of the criminal law disqualifying persons convicted of certain crimes from voting at any election can and must be construed in harmony with Fla. Laws 1898, chap. 4801, making residents who were qualified to vote at the preceding general election the electors at a city election. *Id.*

8. The provisions of Fla. Const. art. 6, § 6, that in all elections by the people the vote shall be by ballot, applies to municipal elections. *Id.*

9. It is competent for the legislature to prescribe an official ballot and prohibit the use of any other; and it may also provide for printing the names of candidates regularly nominated by a convention or mass meeting, or who run as independents; but it cannot restrict the elector to voting for some one of the candidates whose names are printed upon the official ballot. The Constitution guarantees to him the right to vote for whom he pleases. *Id.*

10. The provisions of the Indiana statutes, that a ballot bearing a distinguishing mark or mutilation shall be void, and also that a stamp elsewhere than on a square prescribed by statute shall be treated as a distinguishing mark, 22 L. R. A.

are mandatory, and not merely directory, so that a corrupt intent in making such prohibited mark is not necessary to defeat the vote. *Sego v. Stoddard* (Ind.) 468

11. A stamp at or on a square opposite a blank space left for the name of a candidate is a distinguishing mark under the Indiana statute which prohibits any stamp excepting in the square enclosing the device or in the square opposite the name of a candidate. *Id.*

12. A hole in a ballot made in scratching out a stamp mark constitutes a distinguishing mark or mutilation within the prohibition of the Indiana statutes, although the ballot is otherwise properly stamped. *Id.*

13. A lead-pencil mark across the name of a candidate is a distinguishing mark which makes the ballot invalid under the Indiana statute which prohibits any distinguishing mark or mutilation. *Id.*

14. An election held under a statute with an invalid provision making the action of a ministerial board conclusive on a voter's right to cast his ballot will not, on this account alone, be set aside, in the absence of any showing that voters were deprived by the action of such board of any rights conferred by the statute. *State, Lamar, v. Dillon* (Fla.) 124

NOTES AND BRIEFS.

Voters and elections; legislative power to regulate municipal corporations. 127

WARRANT. See ARREST.

WARRANTY. See also FRAUD, 2; SALE, 2.

NOTES AND BRIEFS.

See also SALE.

Warranty; liability on, disconnected from contract. 512

WATERS. See also BRIDGES; EMINENT DOMAIN, 3; HIGHWAYS, 1; WHARFAGE.

1. The common-law rule regarding surface water as a common enemy which a land owner may, when necessary for the protection of his property, throw back on neighboring land to the damage of the owner thereof, exists in South Carolina, under S. C. Gen. Stat. § 2784, adopting the common law of England. *Edwards v. Charlotte, C. & A. R. Co.* (S. C.) 246

2. A sluiceway between the piers of a bridge, extended above and below between the filling by which flats have been reclaimed, through which the tide ebbs and flows, but which has no water in it at low tide, is not a watercourse which can be the basis of riparian rights. *Chamberlain v. Hemingway* (Conn.) 45

3. Permitting tidewater to flow for more than fifteen years through a sluiceway made, when flats were filled in, by leaving an opening above and below a bridge corresponding to that between its piers, does not create any adverse right in owners of adjoining uplands through which the sluiceway extends to the continuance of such flow, so as to prevent an owner from filling in the sluiceway on flats in front of his uplands. *Id.*

4. Accretions formed in front of the land of several owners belong to them all, and cannot be claimed by one with whose land the first point of contact was made. *Orandall v. Allen* (Mo.) 591

5. Accretions which begin to form upon land which was originally not riparian, but became such by the washing away of a portion of an intermediate tract, and which continue to form until they reach the latter tract and then fill out in front of it, replacing some of its washed-out portion, do not all belong to the land on which they begin to form, but that portion of them which forms beyond its original boundary line and along the washed-out portion of the adjoining land belongs to the latter. *Id.*

6. The policy to allow riparian owners on navigable rivers where the tide does not flow, to build wharves in aid of navigation, is shown in Oregon by the absence of legislation on that subject, in connection with legislation providing for the disposal of tidelands. *Lewis v. Portland* (Or.) 786

NOTES AND BRIEFS.

Waters; property rights of riparian owners as to wharves. 786

Ownership of accretions. 591

Liability of railroad company for obstruction of channel under railroad bridge. 868

WHARFAGE. See also WATERS.

Wharves built by riparian owners under the permission and license of the state are property which cannot be taken on a repeal of such permission, without due process of law and due compensation therefor. *Lewis v. Portland* (Or.) 786

NOTES AND BRIEFS.

Wharfage; property rights in. 786

WILLS. See also EVIDENCE, 19.

1. The name of the testator written at the beginning of a will is sufficiently near his mark at the end to make the mark a valid signature, within a statute requiring the name to be written near the mark, if the intention that the mark should represent the testator's name clearly appears. *Re Guilfoyle's Will* (Cal.) 870

2. A testator, knowing how, but being unable because of physical weakness, to write his name, is within the meaning of a statute permitting a mark "when the person cannot write." *Id.*

3. A will is sufficiently signed in the presence of the testatrix, although her name had been previously written thereto by another person, where the latter, in her presence and by her request, adds to her name words showing that it was written by him at her request. *Ex parte Leonard* (S. C.) 802

4. Express directions by a testatrix to sign her name to the will are sufficiently given by her answering "Yes" to one who inquires if he shall sign the will for her. *Id.*

5. One who signs the name of a testatrix at her request may be also one of the subscribing witnesses to the will. *Id.*

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6. Attesting witnesses to a will must be such as are competent at the date of attestation, and, if then competent, their subsequent incompetency, from whatever cause, will not prevent the probate of the will. *Re Holt's Will* (Minn.) 481

7. A married person is not to be deemed an incompetent attesting witness at the time of the execution of a will, simply because the husband or wife of such person is a beneficiary under the will, since the question of incompetency can arise, if at all, only on the subsequent probate of the will, upon his or her examination as a witness, and then only in the single contingency that such beneficiary becomes a contestant, and does not then consent to the examination of the witness. *Id.*

8. The statute making void a legacy to an attesting witness does not apply to the husband or wife of such witness. *Id.*

9. A gift by will of a chest and its contents does not operate as a devise of land, by reason of the fact that a deed of the land was in the chest. *Parrot v. Avery* (Mass.) 158

10. A devise of land to trustees, with power to collect the income for charitable purposes, giving them power to appoint their successors, and providing against failure of trustees indefinitely, passes the fee, if the devise is valid. *Johnson v. Johnson* (Tenn.) 179

11. A bequest of testator's set of books "and the proceeds of all collections he can make from accounts which were the results of my past oil and cotton business. . . . The accounts against or in favor of [certain of testator's relatives] as well as accounts of properties. Rents, stocks, bonds, and investments, to be treated as memorandums only, and not to be included in the above bequest,"—does not pass the accounts against the relatives. *Id.*

12. A legacy from a surety to his cosurety jointly and severally liable with him for the principal's default is subject to deduction for the proportionate share of the legatee of the amount the estate of the testator is compelled to pay upon such liability, although the legacy is assigned to a third person before any payment is made by the surety. *Re Bailey's Estate* (Pa.) 444

NOTES AND BRIEFS.

Will; competency of witness to. 481

Signature by mark; signing will; attesting will by mark. 870

WITNESSES. See also LIBEL AND SLANDER, 1; WILLS, 5-8, NOTES AND BRIEFS.

A rule of evidence under a state statute, as to privileged communications, must be regarded in a circuit court sitting in that state, under U. S. Rev. Stat. § 858, making the laws of the state the rules of decision as to competency of witnesses, except as affected by the color or interest of the witness, or in actions against executors and administrators or guardians. *Mutual Ben. L. Ins. Co. v. Robinson* (C. C. App. 8th C.) 825

WRIT AND PROCESS.

1. Ignorance of the given name of a person, excepting the initial thereof, is ignorance of

his name within the meaning of Neb. Code Civ. Proc. § 148, respecting the service of process upon a person whose name is unknown. *Enevold v. Olsen* (Neb.) 578

2. A summons against a person giving only the initial of his given name, and stating that his full name is unknown, must be personally served on him, and cannot be served by leaving it at his usual place of residence. *Id.*

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3. A proceeding for the dissolution of a corporation, in which the summons is improperly made returnable in term before the court, is properly remanded for the purpose of amending the summons so as to make it returnable before the clerk on a day certain. *Simmons v. Norfolk & B. Steamboat Co.* (N. C.) 677

WRIT OF ERROR. See **APPEAL AND ERROR, 2.**

